THE NEW ZEALAND
LAW JOURNAL
21 MARCH 1987

Humanitarian Law

On 27 February 1987 the New Zealand Red Cross held a seminar in Wellington on Current issues in Humanitarian Law. The principal guest speaker was Dr R Jaeckli, a Vice President of the International Committee of the Red Cross who was here in New Zealand from Geneva. The other two speakers were Dr R Morris of Auckland and Mr R Glover of the Faculty of Law at Canterbury University. The seminar was presided over by Professor K J Keith who is Chairman of the New Zealand Committee for the Dissemination of Humanitarian Law. The Seminar was opened by the Minister of Defence Mr F D O'Flynn QC. He confirmed the previous announcement that New Zealand would ratify the Protocols to the Geneva Conventions on Humanitarian Law, as had been recommended by the Human Rights Commission early in 1983.

Humanitarian Law

It is tragic that the topic of humanitarian law in armed conflict is as relevant today as it has always been. There is a greater need than ever before for rules of international law which may help to minimise the suffering caused by warfare.

As Mr Jean Pictet of the International Committee of the Red Cross has said, it is a sobering thought that in 3400 years of recorded history, this world has seen only 250 years of peace. And since 1945 alone there have been more than 400 armed conflicts around the world. Every day we are confronted with news reports, newspaper photographs and TV film of the horrors of armed conflict in the trouble spots around the world. And it is not so long ago that the international community was shocked by the mass exterminations of millions, the medical experiments, the torture, slave labour, mass deportations and other horrific abuses of human rights that occurred during the Second World War.

Since the beginning of history, all civilisations have been searching for ways to limit the horrors of war. Today, this great tradition of humanitarianism in war is embodied in a number of multilateral treaties, some of which have achieved almost universal acceptance by the nations of the world.

The latest of these treaties are the two Additional Protocols to the Geneva Conventions of Humanitarian Law. I am very pleased to confirm that New Zealand will be ratifying these Protocols.

Why should New Zealand support these Protocols? I would like to offer a few general thoughts on the value and significance of the Protocols.

First of all, the Protocols represent a very useful and timely codification of customary international law in several areas. In other words, they confirm as law practice which is already widely accepted by most nations as binding. A smaller, but vital, part represents new law.

Protocol I updates, supplements and refines the laws of war relating to international conflicts. A particularly important part of the Protocol is the provisions regulating the methods and means of warfare. This area is significant because modern technology has changed the nature of warfare.

The Protocol states in a unified and coherent way the basic rules which are to govern the selection and use of weapons and methods of warfare. Article 35 reafirms fundamental rules of customary international law that "the right of parties to the conflict to choose methods or means of warfare is not unlimited" and that "it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".

The biggest problem about this section of the Protocol is that it does not cover nuclear weapons. Any layman reading Article 35 would conclude that nuclear weapons are a "method of warfare" and that they would certainly be devastating in their effects on man and his environment. However, the nuclear powers – particularly the United States and the UK – had agreed to take part in the negotiations adopting the Protocols only on the understanding that the Protocols were not intended to prohibit the use of nuclear weapons. This was accepted at the time by the conference because it was clear that the choice was either having a Protocol not bearing on the use of nuclear weapons or having no Protocol at all. The prohibition of nuclear weapons was thus left to be pursued as a separate matter in other forums on strategic arms limitation.

The Protocols recognise that sophisticated modern military technology has ensured that the effects of war can no longer be confined to the actual participants in

the conflict. For example, aerial warfare and bomb attacks on large cities during the Second World War resulted in many tens of thousands of people being killed in a single raid. Most of these, of course, were civilians. So it is not surprising that whereas civilians had accounted for only five percent of casualties in the First World War, the number rose to fifty percent in the Second World War, sixty percent during the Korean and Vietnam wars and as much as ninety percent in some internal armed conflicts since 1945.

The Protocols therefore recognised the need for a comprehensive code to protect civilians. The basic principle goes back to a fundamental rule of customary international law that war should be directed only at the military forces of the enemy state, and not at the individuals who make up that state.

Accordingly, Protocol I requires parties to a conflict to distinguish between the civilian population and combatants and between civilian objects and military objectives and direct their operations only against military objectives. Attacks against civilians and indiscriminate attacks are prohibited. In cases of doubt whether a person is a civilian or a certain object is a military objective, they are considered to be civilian.

As well as a whole host of other provisions protecting civilians, the Protocol also contains certain precautionary measures which impose obligations on military forces. Those planning and carrying out attacks are to do everything feasible to ensure that civilians are protected and the treaty rules are obeyed.

The significant point of these rules is that they represent the first codification ever of the customary rules of proportionality. The correct balance must be struck between military necessity and humanitarian considerations.

The Protocols are also significant in that they broaden the categories of armed conflicts that are covered by humanitarian law.

Very few of the armed conflicts since 1945 have been wars of an international character exclusively between sovereign states – the traditional conflict situations that previous humanitarian law conventions envisaged.

New types of conflicts have emerged over the past 30 or so years – wars of national liberation, guerrilla wars, internationalised civil wars and so on.

A controversial provision in Protocol I is its treatment of wars of national liberation. Under the Geneva Conventions, such wars are considered to be non-international conflicts, since the territory of the colonies is looked upon as part of the territory of the mother country. By the 1960s, however, such conceptions were beginning to change.

Another achievement of the Protocols is the reasonably comprehensive code of rules in Protocol II which regulates civil wars. This code develops and supplements the fairly rudimentary provisions in Article 3 of the four Geneva Conventions.

I would mention briefly just a few more notable features of the Protocols. They are significant for the new material rules they contain, particularly those on the protection of the civilian population; on the wounded, sick and ship-wrecked; on prisoners of war, and so on. These provisions fill many of the gaps in the 1949 Conventions and improve them in important respects.

Protocol I is again very useful for the protection it grants to medical aircraft and vehicles, civilian medical units, Civil Defence organisations and so on. These provisions are intended to remedy the situation we found in Vietnam, for example, where helicopters carrying the wounded to hospitals had no immunity from attack, either in law or in practice.

Article 75 of Protocol I tries to ensure that states provide minimum humane treatment for all persons, including their own nationals.

These are general observations about just a few of the provisions in the two Protocols.

Like many humanitarian works the Protocols are not perfect. But they are a significant advance on existing humanitarian law in armed conflict. They set high standards of internationally acceptable conduct and, as such, they serve many purposes. They are a guide to states, a guide to individuals, a code of penal law and a checklist for the Red Cross movement. A number of western countries such as Switzerland, Austria, Italy and the Scandinavian states have already ratified the Protocols. Australia and Canada have also announced their intention to ratify shortly. It is my hope that New Zealand's ratification will encourage other governments to do the same, so that in the not too distant future the Protocols will become a law as universally accepted as the Geneva Conventions.

When the first Geneva Convention on humanitarian law was concluded in 1864, Gustave Moynier, one of the founders of the Red Cross, wrote:

> To take this path is to take a decisive step on a steep slope on which one cannot possibly stop; it cannot fail to culminate in an absolute condemnation of war . . . Future generations will witness the gradual disappearance of war. An infalliable logic wills it so.

More than a century on, I am afraid we have a long way to go. Breaches of humanitarian law are far too common these days. But perhaps if more people know and respect the rules, fewer breaches will occur. Humanitarian law must be part of an educational process that must be carried on across a number of fronts, so that it comes to be respected and obeyed by everyone – soldiers, politicans and ordinary citizens.

Finally, I would like to quote a short extract from the 1983 report of the Human Rights Commission which recommended New Zealand's ratification of Additional Protocols. Ratification, said the report, will be:

> A way of demonstrating New Zealand's recognition of and support for the Red Cross as a great international humanitarian organisation concerned with protecting and preserving as far as possible the essential needs and rights of individuals in terms of life, health, security and fair and humane treatment.

I endorse these sentiments wholeheartedly. And I would like to take this opportunity to place on record my high regard for the dedicated, enthusiastic and effective work of the New Zealand Red Cross Society and the New Zealand Committee for the Dissemination of Humanitarian Law.

F D O'Flynn QC
Minister of Defence

Case and Comment

De facto spouses property dispute: *Pasi v Kamana* [1986] BCL 1743

This is the first de facto spouses property dispute to come before the Court of Appeal since *Hayward v Giordani* [1983] NZLR 140. Unfortunately, the facts did not give their Honours an opportunity to develop the ideas which they had raised in that case. If anything, and this is perhaps to be expected in the light of other recent Commonwealth decisions, they seemed to retreat from those ideas.

Mrs Pasi and Mr Kamana lived together for about ten years. At the outset, she was aged twenty and he was in his mid thirties. For most of the relationship, they lived in rented accommodation but for the last three and a half years they lived in a house in Petone which was purchased, subject to a mortgage, with money he had obtained in settlement of a common law action.

Mrs Pasi made no contribution to the purchase of the house or to the payment of the mortgage instalments. She did no work to increase the value of the house. Her contributions to the relationship consisted of payment of some of her earnings for household purposes – but apparently no more than would have been necessary for her own maintenance – and the comfort, support and affection that may be expected of one spouse to another.

In the High Court, Jeffries J rejected Mrs Pasi's claim that she had an equitable interest in the house. His Honour held that there was no common intention or agreement, express or implied to purchase it in joint names or that Mrs Pasi should share in it. Nor was there any evidence of unjust enrichment. In the Court of Appeal, Mrs Pasi's appeal was dismissed. In reaching this decision, their Honours made some interesting comments on the circumstances in which trusts may be imposed in de facto spouse property disputes.

Cooke J who in *Hayward v Giordani* dealt with common intention and constructive trusts separately, brought the two together again:

> I respectfully doubt whether there is any significant difference between the deemed, imputed or inferred common intention spoken of by Lord Reid and Lord Diplock (and now by the English Court of Appeal in *Grant v Edwards*) and the unjust enrichment concept used by the Supreme Court of Canada. Unconscionability, constructive or equitable fraud, Lord Denning's "justice and good conscience" and "in all fairness": at bottom in this context these are probably different formulae for the same idea. As indicated in *Hayward v Giordani*, I think that we are all driving in the same direction. One way of putting the test is to ask whether a reasonable person in the shoes of the claimant would have understood that his or her efforts would naturally result in an interest in the property. If, but only if, the answer is Yes, the Court should decide on an appropriate interest – not necessarily a half – by way of constructive trust, as indicated in *Gissing v Gissing*.

McMullin J referred to a number of recent judgments which have considered the idea of a constructive trust being imposed to reflect the direct and indirect contributions of the parties to a property which they have when they cease to live together; including those of Fox L J and May L J in *Burns v Burns* [1984] 1 All ER 244 and Deane J in *Muschinski v Dodds* (1986) 60 ALJR 52, 65 and 66 which did not accept the development of this concept. However, His Honour did not discuss these cases. He commented only as follows:

> Expressions such as "the formless void of individual moral opinion" may be quaint but like many legal metaphors they do little to clarify. The unconscionable bargain in which Courts of equity will intervene is not capable of more precise definition. But it is well recognised. There is therefore little purpose in endeavouring to lay down the metes and bounds of the constructive trust any more than there is in pursuing the parameters of the unconscionable bargain except to say that it may arise in respect of some specific item of property.

Casey J, in a brief judgment, held that on the facts there was no common intention and no contribution sufficient to establish a constructive trust.

The present position in New Zealand seems to be that in de facto property disputes there are a number of factors which may indicate a trust. These include:

> – direct financial contributions by way of payments towards the purchase price or the mortgage;
>
> – indirect contributions by way of payments not earmarked for application towards the purchase price or mortgage but which enable the registered proprietor to make those payments;
>
> – work on the property which

enhances its value: considered relevant in *Hayward v Giordani* but not in *Burns v Burns* (note that housekeeping and other domestic contributions are now generally considered by the Courts to be irrelevant);

– evidence of an understanding between the parties that the property was jointly owned by them in equity; for example, in *Hayward v Giordani*, the invalid will and the views expressed by the parties that the property was jointly owned but that it was not necessary to put Mr Hayward's name on the title.

Two comments. First, as to the last factor, the problem with such evidence is that it may indicate, not a resulting or a constructive trust, but an express trust which would most likely be invalid under the Statute of Frauds (s 49A of the Property Law Act) or a testamentary trust which would be invalid under the Wills Act. And, if either the latter were intended, the trust could not be upheld as a resulting or a constructive trust. "If the settlement is intended to be effectuated by one [mode] the Court will not give effect to it by applying another [mode]": *Milroy v Lord* (1862) 4 De G F and J 264, per Turner L J.

Secondly, the distinction between unjust enrichment and common intention must still be relevant in determining the quantum of the shares. If there is unjust enrichment based on contributions to the property, the quantum should be ascertained by reference to the value of the contributions. But, if there is common intention that the property be jointly owned, the quantum should be ascertained by reference to the nature of the intention. It may be that the common intention was of a joint tenancy, in which case when one of the parties dies, the whole property passes to the survivor. However, as Equity prefers tenancies in common, it is more likely that the Court would hold that there is a tenancy in common in equal shares, as, for example, in *Hayward v Giordani.*

Andrew Alston
University of Canterbury

Insurance claims and the duty of good faith

In *National Insurance Co Ltd v Van Gameren* [1986] BCL 1697 the respondent held a policy insurance with the appellant company. Following an accident involving the respondent's motor car, the insurer repudiated liability on the basis that in submitting a claim the appellant had breached both the duty of good faith owed by him and an express provision of the insurance contract. An action on the policy succeeded in the District Court and Smellie J then heard the appeal brought by the insurer to the High Court.

The claim arose out of an accident which occurred late one evening when the insured was driving his car. In his claim form he attributed the accident to a tyre having blown out, and failed to disclose several facts: that he had been drinking prior to the accident, that at the time of the accident there was a passenger in the vehicle, and that he had been involved in two previous accidents when backing heavy vehicles owned by his employer during the course of his employment as a truck driver. It appears that all three of these points were the subject of specific questions in the claim form, which questions the insured either answered negatively or failed to answer at all. (It is regrettable that the judgment is not more explicit in this respect; unfortunately the confusion does not end there, for where the names of the parties appear at the head of the transcript the appellant is incorrectly designated respondent and vice versa, and in the second sentence of the judgment both parties are described as the respondent.) On being questioned by an assessor acting for the insurer the insured filled out a further statement in which he denied having consumed alcohol. The facts of his having indeed consumed alcohol (it was not found that the insured was intoxicated as a result) and that he was accompanied by a passenger emerged subsequently in a declaration made by the insured after being pressed further by the insurer.

Breach of contract

The contract insurance between the parties required the insured, in respect of claims, to supply the insurer with all information and documents in writing required by the insurer, and there followed a clause providing that the consequence of any claim affected by fraud on the part of the insured or any person acting on his behalf would be the forfeiture of all benefits under the policy. Clause 5 of the policy stated:

> The due observance and fulfillment of the terms exclusions conditions provisions memoranda and endorsements of this Policy in so far as they relate to anything to be done or complied with by the Insured and the truth of the statements and answers in the said proposal or in any claim form or in any statement in support of the claim shall be conditions precedent to any liability of the [Insurer] to make any payment under this Policy.

In addition, in completing the claim form the insured had signed a declaration that the particulars given were "true and correct in every respect", and acknowledged that "any untruth, misrepresentation or suppression" made by himself or on his behalf in support of the claim rendered the policy void.

At trial it was held that the insurer had failed to discharge its onus of proving fraud on the part of the insured and on appeal Smellie J declined to disturb this decision. But His Honour considered that cl 5 had been breached. This was the case where the insured had given incorrect answers but also where he had failed to answer at all, since this was a transgression of the first part of cl 5. On the bare words of the contract alone issue can hardly be taken with this finding. However, in *FAME Insurance Co Ltd v McFayden* [1961] NZLR 1070, where it was provided that the policy became void if "in any statement of declaration made in support of any claim there is any untruth or suppression by or on behalf of the Insured", Barrowclough CJ imported a requirement of "moral obliquity" on the part of the insured for the clause to operate. In that case the insured had omitted, in the Notice of Accident completed by him, to name two passengers as witnesses, and Barrowclough CJ accepted that this rendered the information given by the insured inaccurate and incorrect. However the learned Judge considered that the expressions "inaccuracy or incorrectness" and "untruth or suppression" were not synonymous, the latter generally involving moral obliquity, or being at least capable of that construction, opening the way for the application of the contra proferentem rule in favour of the insured. Since there was no positive evidence that in completing the form the insured had intended to deceive, it could not be said

that there had occurred "untruth or suppression".

Although in the present case Smellie J thought that the wording of cl 5 was materially different from that of the exclusion clause in *McFayden's* case, His Honour nonetheless felt constrained to establish an element of "moral obliquity". In this regard the judgment in *Sampson v Gold Star Insurance Co Ltd* [1980] 2 NZLR 742 was introduced. There the insured had stated in his claim form that the cause of the motor accident in question had been caused by the failure of his brakes, whereas in truth it was caused by the insured's neglect to observe a stop sign. It was found as a fact that the insured's intention in making the false statement was not to defraud the insurer but rather to assist the insurer in prosecuting a claim against the supplier of the vehicle. Barker J held that although s 11 Insurance Law Reform Act 1977 would otherwise have assisted the insured (for criticism on this point see Borrowdale "The Insurance Law Reform Acts in Practice" [1987] *NZLJ* 30 at 33-34; it is notable that in the present case s 11 was not pleaded), he had violated the common law duty of the utmost good faith owed by the insured and on that account lost his right to be indemnified by the insurer. Barker J said:

> (W)hatever his motive, [the insured] told a deliberate lie in his claim form and perpetuated the lie in oral and written form (at 746.)

In the present case, Smellie J commented that:

> implicit in what was said by Barker J was a finding of moral obliquity, which was founded on the fact of a deliberate lie being told.

With respect, this seems a little wide of the mark. First, the remarks of Barker J were made in respect of the common law duty of good faith, and not in the context of the construction of the contract, as in *McFayden.* Second, Barker J as good as disavowed any requirement of "moral obliquity" for he said:

> The learned Magistrate considered that, having regard to the wording of the two conditions, it is not necessary to establish a fraudulent motive, and *that once it had been established that the information sought by the insurer and provided by the insured was untruthful, that is sufficient.* The learned Magistrate's judgment reflects completely an accurate appreciation of the law prior to the passing of the [Insurance Law Reform Act of 1977]. (at 745; emphasis added.)

The second case cited by Smellie J in the present case is *Purcell v State Insurance Office* (1982) 2 ANZ Ins Cas 60-495. There one S, the father-in-law of the insured, crashed the insured's vehicle and falsely stated in answer to a question in the claim form required to be completed by the driver that he had not consumed intoxicating liquor within six hours of the accident. The insured in signing the claim form was unaware of this falsehood; the insurer sought to avoid liability by relying on Condition 3 of the policy which provided for the forfeiture of all benefit under the policy should "any false declaration or statement be made or used in support" of a claim. An action by the insured on the policy failed both in the District Court and on appeal to Prichard J in the High Court. Although the trial judge found "moral obliquity" to have been present in so far as the insured pressed his claim even after the falsehood came to his knowledge, Prichard J preferred to base his decision simply on the operation of Condition 3. Undeniably a false statement was made and was used in support of the claim, therefore Condition 3 applied to exclude the liability of the insurer. In the present case Smellie J commented:

> The making of the false statement was in my view sufficient to satisfy the requirement for moral obliquity although there was no express finding on the point.

With respect, this is a curious explanation of the judgment which was expressly based not on any consideration of moral obliquity but rather the simple wording of the policy. On the authority of *Sampson* and *Purcell* there is no need to find "moral obliquity" where the defect falls within the clear wording of the policy; the scope of the decision in *McFayden* could be regarded as limited to the construction of an ambiguous provision.

Having affirmed the requirement of moral obliquity (unnecessarily, it might be thought) Smellie J found that this was satisfied in the present case. It appears that merely the making of the false or incorrect statement gives rise to a strong inference of moral obliquity. Smellie J said:

> Nothing justified the insured in setting down answers contrary to the truth. Whatever his motives, and whether deliberately or otherwise, the insured concealed these matters from the insurer and therefore was in breach of his obligation.

If the threshold of moral obliquity is to be set so low, then there is a strong case for abandoning it altogether.

Breach of common law duty of good faith

In *Van Gameren* Smellie J held also that the insured had breached this duty, regardless of his motives, because the false statements "resulted from a conscious decision, which I find to be incompatible with the doctrine of *uberrima fides* which is at the heart of all insurance contracts". Consequently, an insured is subject, both at common law and in terms of the policy which contains clauses of the type here under discussion, to stringent and exacting requirements to ensure that the information given is accurate and complete. This contrasts oddly with the less onerous requirements which govern at the proposal stage by virtue of s 5 Insurance Law Reform Act 1977 which allows for avoidance of a non-life policy on the basis of mis-statements by the insured only if the mis-statement in question was substantially incorrect and material. (For a discussion see Borrowdale op cit 30 at 31.) The question which needs to be answered is whether the Courts should not interpret forfeiture clauses so as to import, not considerations of moral obliquity, but the same criteria as provided by s 5. Necessarily the common law duty of good faith must be likewise modified.

There is some support in *FAME Insurance Co Ltd v McFayden* (supra) for applying the duty of good faith less onerously at the claim stage. There Barrowclough CJ said (obiter) that he did not think that the common law duty of disclosure of material facts which rests upon the insured at the proposal stage applies in respect of statements made in support of a claim in terms of the policy once issued (at 1074). Presumably this would be the case only where no questions are framed in the claim form so as to cast upon the insured such a duty. The weight of recent authority is against any such distinction. In *Van Gameren* Smellie J thought it untenable, and in *Sampson's* case (supra) Barker J rejected the argument that the operation of the

common law duty of good faith had been modified by s 11 Insurance Law Reform Act 1977 (at 746). The indication is then that the anomaly of allowing an insurer to avoid liability for an insured's non-material mis-statement at the claim stage when the insurer could not have done so at the proposal stage remains.

Andrew Borrowdale
University of Canterbury

Valued policies in insurance law

Appearances deceive in respect of insurance policies as in all other things. In *Young v Commercial Union General Insurance Co Ltd* [1986] BCL 1618 the plaintiff insured had insured with the defendant insurer his household contents and personal effects under a domestic policy. A claim was submitted for items stolen from the insured's home during the currency of the policy; one of these was a silver tea set which was described as a "specified item" in the policy, the value being given as $22,125. The insurer denied any liability to indemnify the insured to the extent of this figure for the loss of the tea set, and tendered a much lower amount in settlement.

The case for the insured was that at least in respect of the specified article the policy was a valued policy and accordingly the insurer was obliged to pay the insured this amount irrespective of the indemnity value of the article insured. (Indemnity value generally refers to current market value; although there was a conflict of evidence as to the indemnity value of the tea set, Greig J finally accepted that it was approximately $6,000.) The sum of $22,125 was derived directly from a valuation obtained by the insured from a jeweller, and this valuation had been used for previous policies as well as the current policy. There were two issues in dispute: was the policy a valued policy, and, on the basis that it was not, what was the measure of the insured's loss?

Valued or unvalued policy?

Whether a policy is a valued policy or not is a matter of construction. As a matter of practice valued policies are regarded as unusual in non-marine classes of insurance although they are not unknown. The mere fact that there is specified a sum for which an article is stated to be insured is not conclusive, for this is quite consistent with the insurer undertaking liability up to a maximum amount.

In the present case the insurer undertook—

> on payment of the premium to insure [the insured] for accidental loss damage destruction or liability as expressed in this Policy and Schedule . . . occurring during the Period of Insurance.

Under the heading "Claims Settlement" the policy provided—

> The [Insurer] has the option to settle up to the sum insured by payment, reinstatement or repair and will base settlement on:
>
> .....
>
> 2. Indemnity value for furniture, furnishings and household appliances 10 years old or more; carpets, floor coverings, blinds and curtains 5 years old or more; and all other household contents and personal effects.

Greig J held that the policy was an unvalued indemnity policy. In so deciding His Honour relied principally upon the settlement clause in so far as it stated that as applied to the tea set the basis of settlement was to be the indemnity value. Somewhat subjectively Greig J thought also that the policy in question did not "look like a valued policy".

It might be argued that the wording of the settlement clause was not fatal to finding that the policy was an unvalued policy. The purpose of a valued policy is to avoid dispute as to the amount of the indemnity value payable in respect of the loss of a specified article; in effect the specified value is taken to be the indemnity value for the purposes of the insurance. There are good reasons why this interpretation may be preferred. The most obvious is that the insurer has been content to base the premium charged on the specified figure and it seems unfair that having done so it should be able, where the terms of the contract are at best unclear, to refute liability to pay the specified amount. A further reason is that there is ample scope in a case such as the present for the operation of the contra proferentem rule. Here the promise of the insurer was not to "indemnify" but to "insure". Thirdly, it is difficult to see what purpose specifying an amount in respect of a particular article can serve if it is not to fix the amount which the insurer agrees to pay if the article is lost, especially where the specified sum has been arrived at on the basis of an independent valuation. In the present case Greig J said:

> The insurer . . . is willing to offer cover for specified items for a specified sum. It requires some evidence that that is a justified sum.

Why the insurer should be so anxious that the sum is justified is difficult to understand. From the point of view of the insurer, it can hardly matter for what amount the specified sum is fixed if the policy is construed to be an unvalued one and the sum specified exceeds the indemnity value; in fact, the less relation the specified sum bears to the indemnity value the better, since the premium is calculated on the basis of the specified sum but the insurer can never be liable for more than the indemnity value. Of course the point can be made that the insured should not recover more than his actual loss; but then the onus rests on the insurer so to draft its policy that it is unambiguously an unvalued policy and does not give the appearance of being a valued policy.

There is however one important rider to this argument. Where the policy envisages settlement on an indemnity basis, then the valuation provided by the insured must be one as to the *indemnity* value of the property insured. Where the policy envisages settlement on an indemnity basis and the insured supplies a valuation as to indemnity value which the insurer accepts, then the policy is a valued indemnity policy and it should not be open to the insurer subsequently to dispute that the specified sum reflects the indemnity value. Unfortunately for the unwary insured, jewellers' valuations for insurance purposes vary markedly and often do not specify whether the valuation concerned relates to replacement value or indemnity value. Depending upon the facts this may or may not be significant, as appears below.

The approach of Greig J in the present case is not without support, although none was cited. In *Legal & General Insurance Australia Ltd v Eather* (1986) 4 ANZ Ins Cas 60-749 the Court of Appeal of the Supreme Court of New South Wales was required to decide the amount recoverable by the insured where jewellery insured under a multi-risks policy had been stolen from his motor car. The scope of cover provided under the policy was defined as:

> Accidental loss or damage not

> otherwise excluded, up to the limit of the sum insured on each item specified in the Schedule.

The value of the jewellery was specified to be some $27,000 which was the valuation obtained by the insured from experts for the purpose of the insurance. The evidence was that the probable market for such jewellery was that comprising second-hand dealers who would have been prepared to pay no more than half the specified amount, although the valuation was accurate in so far as it envisaged replacement by the insured. It was argued not that the policy was a valued policy, but that the jewellery was insured for its replacement, as opposed to indemnity, value.

The Court of Appeal accepted that the obligation of the insurer, in the absence of a specific settlement clause, was to indemnify (although there was disagreement as to the measure of indemnity; this is considered further below). Kirby P said that in the context of the policy:

> the obligation of the insurer was no more than the normal obligation which an insurer accepts, namely to provide an indemnity to the insured up to the value of the property lost as ascertained in the market normally available to such property. (at 74,507; see, too, McHugh JA at 74,512).

This is somewhat stronger authority than Young's case that a policy will ordinarily be treated as an unvalued indemnity policy only notwithstanding insurance based upon a specified sum, for in *Eather's* case the settlement clause was inconclusive, retaining to the insurer merely a general option to "settle any claim by payment, replacement, restoration or repair". Nor was Kirby P influenced by the fact of the premium having been calculated on the basis of the specified sum:

> [I]f the insured, misled by [the] valuation which assumed a replacement and not an indemnity approach, overvalued and paid an excess premium, that is unfortunate. But it cannot affect the proper construction of the policy, at least in the present proceedings as they were pleaded (at 74,508).

Measure of loss

It having been decided that the policy in *Young's* case was an unvalued one, there unfolds some justification for holding it to be a valued policy, viz wildly differing discrepancies in figures as to the value of the tea set given by expert witnesses called by each side. Greig J stated the basic principle that where there is not to be actual reinstatement or replacement, the insurer is bound to indemnify the insured for his actual loss by restoring him to his position before the loss occurred, so far as this is possible by payment of money. The amount payable is the market price to be paid by the willing purchaser to the willing seller, and the learned Judge accepted the evidence of the defendant insurer's witnesses that in the present case the market value of the tea set was no more than $6,000.

In the present case Greig J appeared to accept that there was no market for the tea set except that comprising second-hand dealers. In *Eather's* case Kirby P, dissenting on this point, held for the same reason that the indemnity to which the insured was entitled was the amount which a dealer would have paid for the jewellery. By virtue of a dealer's mark-up of 100% this amount was approximately half the replacement value, namely the amount which a private individual would pay to purchase the jewellery from a dealer. McHugh JA, with whom Glass JA concurred on this point, said:

> [I]n my opinion the relevant market was not what second-hand dealers would have paid for it but what an ordinary person would have bought or sold it for. It is clear that it would have cost an ordinary purchaser $26,960 to acquire the jewellery. This is the figure that a jeweller would have sold them for. I do not accept that the only market for this jewellery was through sale to second-hand dealers. It seems absurd to suppose that the insured, having paid the amount which he did for the jewellery and having bought it for investment purposes, would only have received half of that purchase price when he later sold it. Since purchasers were prepared to pay $26,960 for the jewellery, one is entitled to find that the insured would have sold his jewellery to this class of purchaser (at 74,512-74,513).

In effect this is to say that the insured's indemnity amounts virtually to the replacement cost (there may be some discount for wear and tear). Where this is the case, then it will not matter that the policy is not construed as a valued policy, for the insured will be entitled to recover the specified amount in any event as being the measure of his *indemnity.*

Andrew Borrowdale
University of Canterbury

Recent Admissions

Barclay, GJ	Christchurch	11 February 1987
Bibbey, CE	Christchurch	11 February 1987
Buchan, JAS	Christchurch	11 February 1987
Crocker, W	Christchurch	11 February 1987
Dunne-Smith R	Christchurch	11 February 1987
Forgeson, D	Christchurch	11 February 1987
Galbraith, PJ	Christchurch	11 February 1987
Grant, MA	Christchurch	11 February 1987
Hanton, GM	Christchurch	11 February 1987
Hillier, RD	Christchurch	11 February 1987
Hodkinson, IA	Christchurch	11 February 1987
Hutchins, AN	Christchurch	11 February 1987
Iosefa, LP	Christchurch	11 February 1987
Jones, GD	Christchurch	11 February 1987
Leggat, JE	Christchurch	11 February 1987
McCrostie, FC	Christchurch	11 February 1987
McEwan, KE	Christchurch	11 February 1987
MacLennan, MA	Christchurch	11 February 1987
McMurtrie, AM	Christchurch	11 February 1987
McNabb, D	Christchurch	11 February 1987
Manyam, JVA	Christchurch	11 February 1987
Meachen, PM	Christchurch	11 February 1987
O'Neill, SL	Christchurch	11 February 1987
Palmer, RGA	Christchurch	11 February 1987
Pather, SR	Christchurch	11 February 1987
Pattie, AG	Christchurch	11 February 1987
Rout, NR	Christchurch	11 February 1987
Ryan, EA	Auckland	5 February 1987
Ryan, MMC	Christchurch	11 February 1987
Sapolu, IS	Auckland	30 January 1987

Conference '87

Professor Irving Younger

One of the principal guest speakers at this year's triennial New Zealand Law Society Conference will be Professor Irving Younger from Minnesota. An address by Professor Younger was published in the 1984 New Zealand Law Journal *[1984] NZLJ 277. The next conference is to be held in Christchurch from 1 to 5 October 1987. The organising committee has provided the following information about Professor Younger.*

New Zealand lawyers will understand why Professor Irving Younger is regarded as one of the most dynamic and entertaining speakers in the legal field when he addresses them at the New Zealand Law Society's Triennial Conference in Christchurch this year.

Professor Younger has led a richly diverse life. As well as his noted Courtroom and lecturing skills, he has also worked as a sports writer for the *New York Daily Mirror* and as an advertising executive, marketing lingerie.

Born in New York city in 1932 and educated at government schools Irving Younger won a scholarship to the elite Bronx High School of Science. In 1953 he graduated Bachelor of Arts from Harvard and returned to New York to start work as a sports writer on *The Daily Mirror.*

After completing his national service and training as a light weapons infantryman, Professor Younger was discharged from the Army in 1955. He began working for an advertising company and became account executive for Peter Pan brassieres and girdles.

The government scheme for educating enlisted men induced Professor Younger to leave the advertising business and to complete the three year post-graduate Bachelor of Laws Degree at New York University School of Law. He graduated in 1958 with an average of first class honours in all of his subjects.

Professor Younger immediately sat the Bar examinations and became an associate at the large New York firm of Paul, Weiss, Riskind, Wharton & Garrison.

Two years later he was appointed Assistant United States Attorney for the Southern District of New York. For young lawyers in the United States, particularly in the large cities this was the only method of obtaining trial experience. Professor Younger later decided to set out on his own as a trial lawyer. His practice soon flourished, largely due to his success as a prosecutor. The bulk of his work consisted of criminal trial work with a side line of entertainment in media law. At the same time he was teaching evening classes in Evidence and Federal Jurisdiction at New York University Law Schools. His wife, Judith, soon joined him in practice but the pressure of his workload continued.

In 1969 he was appointed Associate Professor of Law at New York University. Two years later he became Professor of Law and in the meantime kept up his practice during the summer vacations.

He spent six years on the Bench in New York city then re-applied for his old teaching post at New York University Law School. He began teaching classes there in the early morning. In 1971 he took another teaching job at Columbia Law School where he took classes in the early evening.

In 1974 he was appointed to a specially endowed chair at Cornell Law School where he immersed himself heavily in lecturing activities and made a name for himself on the lucrative US lecture circuit.

He was lured back into private practice in 1981 by the prestigious Washington firm of Williams & Connelly. The firm needed to replace the services of Edward Williams one of the eminent trial lawyers of his generation.

Once again the tension and responsibility of high level litigation began to take its toll and in 1984 Professor Younger accepted an appointment to be Marvin J Sonosky Professor of Law at the University of Minnesota.

He remains at this post today and still takes cases on a locum basis through his association with Williams & Connelly. He remains a consultant to the *National Inquirer,* which specialises in the dark and steamy secrets of US celebrities.

Professor Younger's legal activities include acting as a legal commentator for the nationally syndicated television show "Break Away", serving as a consultant to the US Attorney General's Advocacy Institute and as chairman of the committee on the teaching of trial advocacy.

Professor Younger's unique perspective as a legal expert together with his exceptional talents as a lecturer and raconteur ensure that his lecturing skills are sought after in all parts of the common law world. □

Recent Admissions

Savage, JM	Auckland	16 January 1987
Simon, GJ	Auckland	21 January 1987
Steven, RG	Christchurch	11 February 1987
Tasker JA	Christchurch	11 February 1987
Thomas, BM	Christchurch	11 February 1987
Wheeler, PM	Christchurch	11 February 1987
Wild, KA	Christchurch	11 February 1987
Willett, NM	Christchurch	11 February 1987
Williams, BH	Christchurch	11 February 1987
Williamson, JN	Christchurch	11 February 1987
Williamson, NM	Christchurch	11 February 1987
Young, KS	Christchurch	11 February 1987

Summary Judgment and Specific Performance

By Andrew Beck, Senior Lecturer in Law, University of Otago

Rule 135 of the High Court has effectively introduced a novel process into New Zealand's judicial procedure — the remedy of summary judgment. Because of its importance as an expeditious method of dispute resolution, this procedure has already given rise to a number of decisions — all unreported — and, by virtue of its unique expression, to several interesting questions of law. This note is concerned with only one of these points: whether or not it is permissible to grant summary judgment on a claim for specific performance.

This issue has, at least tangentially, been the subject of two decisions in the High Court: *Billington v Kale* [1986] BCL 1331 and *Stephens v Gater* (Unrep HC Invercargill, 9 September 1986 CP12/86, Holland J). In both these cases the impression is given that it is difficult, if not impossible, for specific performance to be granted in summary judgment proceedings; this approach by the Courts requires some serious consideration.

The decisions thus far

In *Billington*, the defendants had agreed to purchase a farm for $290,000 but subsequently refused to complete; the plaintiffs having claimed specific performance and an inquiry as to damages, then applied for summary judgment. Jeffries J held that it was not an appropriate case for summary judgment because:

> These are substantial defences pleaded about which I do not intend to say more, but they are the proper subject of an ordinary action in a Court for the enforcement of a contract. (5-6)

What these "substantial defences" were is far from clear in the report. One of the points raised was the discretionary nature of specific performance; in this regard His Honour stated that:

> . . . [As] strong as the law is on the subject as contained in the [vendor/purchaser] cases, it cannot be raised to a definite rule of law where the court virtually loses its discretion . . . (5)

From this it would appear that the fact that the Court would have to exercise a discretion in the main action was a bar to the operation of summary judgment procedure. It was also mentioned that, in terms of the contract one of the defendants was required to enter a contract of service with the plaintiffs. The plaintiffs conceded from the bar that this would not be enforced but the defendants objected to this treatment of the matter; although there is no objection to a plaintiff obtaining summary judgment for portion only of his claim (see Rule 136; *Helicopter Equipment Ltd v Marine Insurance Co Ltd* [1986] BCL 856, 884) the Court in fact made no pronouncement on this issue.

The other matter which was briefly considered by the Court was whether Rule 135 permitted the Court to entertain claims for specific performance at all. The reason for this is that summary judgment procedure is not available in proceedings to which Part IV of The Rules applies. These include proceedings where the relief claimed is wholly within the equitable jurisdiction of the Court (Rule 447) and proceedings

> . . . by any vendor or purchaser of real or leasehold estate, or the assignee of either, for relief in respect of —
> (i) Any requisitions or objections; or
> (ii) Any claim for compensation; or
> (iii) Any other question arising out of or connnected with the contract (not being a question affecting the existence or validity of the contract). (Rule 449(c)).

His Honour made no final decision on this question, merely remarking that it might be necessary for the whole matter to be re-examined as Part IV appeared to be primarily concerned with matters dealt with in the Courts of Chancery. (6-7)

Stephens v *Gater* also involved a sale of residential property which the purchaser refused to complete; the plaintiff accordingly sought an order of specific performance and damages as well as an inquiry as to damages in the alternative. As far as the summary judgment application was concerned, however, the plaintiff restricted his claim to one for specific performance. The defendant argued that summary judgment was inappropriate on the basis of either Rule 447 or Rule 449(c).

Holland J summarily dismissed the first of these arguments, holding that

> . . . these proceedings sought relief also by way of damages and I am satisfied that the proceedings are not proceedings in which the relief claimed is wholly within the equitable jurisdiction of the Court. (3)

The alternative defence posed a greater problem: although His Honour was clearly reluctant to find that all claims by vendors or purchasers of real estate were governed by Part IV of the Rules, this was prima facie the meaning of Rule 449(c). He avoided reaching a final decision on this matter because he was not satisfied that the defendant had no defence to the plaintiff's claim. He expressed himself thus:

> Not only am I not satisfied that a court might hold damages to be an adequate

> remedy, I am not satisfied that specific performance must inevitably be the appropriate remedy. The defendant may not be able to carry out the agreement. (4)

With due respect to the learned Judge, this does not appear to be an adequate answer to a claim for summary judgment. It is not enough to say that a Court *might* find damages to be adequate; there must be some grounds to justify such a finding and none was mentioned. It is certainly not enough to say that a defendant *may* be unable to perform; he must show that he *will* be unable to do so if he is to succeed on this basis.

Holland J was quick to point out that he was not saying that summary judgment could *never* be granted in a claim for specific performance (4) and referred to the case of *Verrall v Great Yarmouth Borough Council* [1981] QB 202. However, in view of the fact that his decision to refuse summary judgment rested, apparently, on the discretionary nature of the remedy, it is difficult to imagine any circumstances in which the order could be granted; it is always possible to say that the Court hearing the main action *might* find damages to be adequate. That is really just another way of saying that the Court has a discretion. It seems that there are two problems to be dealt with here: a substantive one and a jurisdictional one.

The substantive issue

Part of the difficulty in these cases has been caused by the Courts' attitude to claims for specific performance in general, which tends towards the traditional approach of English law, rather than the more modern approach which has evolved in recent years. This latter view was endorsed by Bisson J in the recent case of *Brett Wotton Properties Ltd v Cameron* [1986] BCL 1285 where His Honour quoted with approval from *Chitty on Contracts* (25 ed at 979):

> The question is not simply whether damages are an "adequate" remedy, but whether specific performance will "do more perfect and complete justice than an award of damages".

Verrall's case is also instructive in this regard. In that case the plaintiffs had hired a hall from the defendants for the purpose of holding a political meeting by the National Front. Before the meeting took place, the Council changed from being Conservative-controlled to Labour-controlled and permission to use the hall was revoked. The National Front could not find any other suitable accommodation and accordingly sought specific performance of the contract.

The defendant contended that it was an arguable case and that summary judgment ought therefore to be refused. Both Lord Denning MR and Roskill LJ had no difficulty whatsoever in disposing of this point:

> In many cases now, when all the issues are clear and the point of substance can be decided as well now as hereafter, we have repeatedly decided matters under the Order 14 procedure. (215D, per Lord Denning MR)

and

> Merely to order a trial so that the matters can be re-argued in open Court is to encourage the law's delays which in this Court we are always trying to prevent. (218H, per Roskill LJ)

What is notable here is concern of the Court to prevent fruitless delay and the recognition that once the issues are clear, there is no reason why the Court in a summary judgment application should not exercise the discretion to grant specific performance. If the defendant's only claim is that specific performance *might* not be appropriate, that would seem to be an ideal case for considering the matter immediately.

Two cases in Australian Courts also support the proposition that there is no objection to specific performance claims being the subject of summary judgment applications.

In *Australian Can Co Pty Ltd v Levin & Co Pty Ltd* [1947] VLR 332 (FC), summary judgment was granted for specific performance of an agreement for the sale of land and in *Ritter v North Side Enterprises Pty Ltd* (1975) 132 CLR 301, although conditional leave to defend was granted, the Court found no objection to the claim by a vendor for specific performance of a contract for the sale of land being the subject of a summary judgment application. It would therefore seem that the New Zealand Courts have created an unnecessary obstacle in their treatment of the subject.

In neither of the cases discussed above was any indication given as to a substantive defence which it was open for the defendants to argue. The Courts were content simply to "remain unsatisfied" that there was no defence. While this may well have been an accurate assessment of the situation as presented, it is submitted that sound reasons are essential to back up the conclusion. Both judgments start off by giving the impression that the Judge felt the case to be unsuitable for summary judgment. If future plaintiffs are to be able to make use of the procedure, however, something more than feelings must be laid down in the decisions. This vital new procedure should not be allowed to be sucked into a mire of oral and unreasoned judgments.

The jurisdictional issue

The jurisdictional question is a somewhat trickier one. Assuming that the legislature did not intend to exclude claims for specific performance from the ambit of summary judgment, it must be asked why the exceptions have been phrased in this particular way.

As far as Rule 447 is concerned, this is no problem in practice because virtually every claim for specific performance is coupled with a claim for damages, at least in the alternative. This was recognised by Holland J in *Stephens* and is unlikely to arise again for serious consideration by the Courts.

Rule 449(c) is, unhappily, a more imponderable device. While it is true that it is limited to sales of land, this is the area in which most claims for specific performance arise as well. As the Rule stands, it would seem that not only are specific performance claims included, but so are claims for damages, relief by virtue of mistake, the determination of implied terms and everything else not affecting the existence or validity of the contract. McGechan on *Procedure* points out that this rather anomalous situation is probably the result of a legislative oversight and suggests that a narrow construction of the word "question" might be appropriate. (449.04) Holland J thought that perhaps the eiusdem generis rule should be applied (*Stephens* 4) but did not explain how this would operate. It would appear, however, that neither of these approaches is able to produce entirely satisfactory results.

As McGechan has pointed out, there is no reason why the types of cases listed above should have to be governed by the special procedure created in Part IV of the Rules. It is clear that the Courts are unhappy with an interpretation necessitating such action and there is no evidence that ordinary matters like this are in practice being commenced

otherwise than by statement of claim — no objection to this was raised in either *Billington* or *Stephens*. However, as has been shown above, this sensible approach does require a strained interpretation of the rule.

It is submitted that the only answer to this problem is a legislative one. The difficulty does not lie with Rule 135, which is framed in an empowering rather than limiting way, but with the ambit of Part IV, which is clearly too wide. As far as Rule 447 is concerned, it is suggested that only the specific instances listed should remain and the general portion (relief wholly with the Court's equitable jurisdiction) be deleted. If it is desirable that Part IV proceedings should be used in any particular case not covered by the specific instances mentioned, this can be achieved by order of Court in terms of Rule 449(d).

Rule 449(b) and (c) both require redrafting in order to exclude ordinary types of action which ought to be commenced by statement of claim. In particular, it would seem that Rule 449(c)(iii) could be omitted without any deleterious side effects and this would solve the problem of summary judgment for specific performance.

Conclusion

As it stands, the question as to whether summary judgment can be granted on a claim for specific performance is fraught with difficulties, both jurisdictional and substantive. It is submitted that urgent legislative intervention is necessary to cure the former and that decisive judicial action is the remedy for the latter. The achievement of both is necessary for the sound development of the summary judgment procedure. □

Consent orders and finality

The appeal is yet another example of the unhappy results flowing from the failure to which I ventured to draw attention in *Sandford v Sandford* [1986] 1 FLR 412 to take sufficient care in the drafting of consent orders in matrimonial proceedings to define with precision exactly what the parties were intending to do in relation to the disposal of the petitioner's claims for ancillary relief so as to avoid any future misunderstanding as to whether those claims, or any of them, were or were not to be kept alive. The hardship and injustice that such failure inevitably causes, particularly in cases where one or both parties are legally aided and the only substantial family asset consists of the matrimonial home, are so glaring in the instant case that I feel impelled once again to stress in the most emphatic terms that it is in all cases the imperative professional duty of those invested with the task of advising the parties to these unfortunate disputes to consider with due care the impact which any terms that they agree on behalf of their clients has and is intended to have upon any outstanding application for ancillary relief and to ensure that such appropriate provision is inserted in any consent order made as will leave no room for any future doubt or misunderstanding or saddle the parties with the wasteful burden of wholly unnecessary costs. It is, of course, also the duty of any court called upon to make such a consent order to consider for itself, before the order is drawn up and entered, the jurisdiction which it is being called upon to exercise and to make clear what claims for ancillary relief are being finally disposed of. I would, however, like to emphasise that the primary duty in this regard must lie upon those concerned with the negotiation and drafting of the terms of the order and that any failure to fulfil such duty occurring hereafter cannot be excused simply by reference to some inadvertent lack of vigilance on the part of the court or its officers in passing the order in a form which the parties have approved.

Lord Oliver of Aylmerton
Dinch v Dinch (House of Lords 19 February, 1987)

Correspondence

Sir

Union membership (New Zealand style)

I refer to the article by Martin Vranken published in your December 1986 issue.

Perhaps I should first point out that I am a Local Body Officer, was successful in my application to the Exemption Tribunal and received life exemption. That was a rather hollow victory for me because I had only a year to go before retiring at the age of 65 years in April 1987. And that, after a life time of hatred of unions and the way they operate.

Mr Vranken thinks we should follow the old unions' line that those exempted from membership should still pay the equivalent of union fees to some fund. In other words he wants to perpetuate the quaint New Zealand idea that we must pay a licence fee to work. To suggest payment into a union Welfare Fund presumably relies on "principle", but what principle suggests I should support the "welfare" of a group which wants to coerce me but will not come to my aid or consider my welfare if I should need either of them!

I note that he, conveniently perhaps, ignores the fact that New Zealand's union membership system is in contempt of the United Nations' Charter and the International Labour Organisation's tenets for freedom.

The United Kingdom's closed shop system is well known to me. 75% of the working population do not have to worry about union membership because the unions have never been permitted to obtain a stranglehold on the majority of the work places and offices (thank heavens). The Communists in our midst can never be elected to Parliament so they do the next best thing — get power in the Trade Unions and wreak havoc that way to try and destroy democracy.

I ask your readers to stop and think for a moment. Just let your mind wander over the names of those union bosses running our unions. The thought is ghastly. So many of them give you a feeling of horror. The old cloth cap them or us attitude is all they are capable of. They are not interested in the country's economy nor of the views of and financial problems they create for their members.

Arnold S Long

Parents, maintenance, and access

By P R H Webb, MA, LLB (Camb), LLD (Auckland), Professor of Law, University of Auckland

This article considers what relationship, if any, exists in law between rights of access and liability to pay maintenance, and in particular whether the deprivation of one entitles the aggrieved parent not to pay the other. The conclusion drawn is that while particular facts will determine many cases, the questions of maintenance and of access should generally be seen as distinct. In some cases while access is avoided contrary to a Court order, some adjustment of maintenance may be made, as also in cases where bitterness has been engendered by the custodial parent. When this article was in publishing production, the decision in Shrimski v Shrimski *(1985) 3 NZFLR 707 became available, and consequently this has been dealt with in an Addendum at the end of the article.*

Introduction

It appears to be sadly becoming an often-litigated topic as to how far a non-custodial parent may properly take the stance that he or she is entitled to cease to pay "private" maintenance (or to have the liability to pay it adjusted) because of denial of access on the part of the custodial parent. It is hoped in this article to give some indication of the trend of judicial thinking in this context.

It will be noticed from the cases about to be discussed that in none of them was the custodial parent actually seeking child maintenance for the first time against the parent complaining of lack of access; that is, none of them happen to be clear cases of initial applications under what is now s 74(a) of the Family Proceedings Act 1980 by the access-denying parent against the access-seeking parent pursuant to the principles of maintenance set out in ss 72 and 73 of that Act. The cases are all, basically and essentially, concerned either with (a) disobedience proceedings under the former Domestic Proceedings Act 1968 — because the parent who had been denied access had failed to pay the maintenance previously ordered in favour of the custodial parent, or (b) with applications by one of the parents — usually, but not necessarily, the one complaining of access denied — to have the child maintenance adjusted — by way of variation, cancellation outright, or remission or suspension of arrears, as the case might be. Such "adjustments" are governed by what is now s 99 of the 1980 Act. While subss (1) and (2) of that section require the Court to have regard to ss 72 and 73, subs (6), (which is confined to remission and suspension of arrears due under a maintenance order or registered maintenance agreement) does not.

"The Court has a discretionary power to prevent injustices in the exercise of its discretion under s 99(6) . . . The discretion under s 99(6) is unfettered:" per Chilwell J in *Johnson v Johnson* (1982) 1 NZFLR 212, 223.

The approach in disobedience proceedings under the former Domestic Proceedings Act 1968

The making of maintenance orders under s 35 of the former Domestic Proceedings Act 1968 depended upon the reasonableness of their being made. Compare now the approach under the present legislation: see *Carmine v SSC* (1981) 1 NZFLR 1; *Blake v Rhodes* (1983) 2 NZFLR 117, esp at 120-125, per Judge Inglis, QC.

In *Stone v Maintenance Officer*, [1979] NZ Recent Law 175, the husband had been convicted, under s 107(1) of the 1968 Act, for default in paying maintenance in respect of two children. Custody had previously been entrusted to the wife and the husband had been granted access, the Court's order contemplating the children's continued presence in New Zealand. The wife later left — with the children — for Australia without notice to the husband. Arrears of maintenance accrued, but the application of the husband to have them cancelled could not be served — because he had no address for the wife. Subsequently, the wife wrote from Western Australia concerning the possibility of adoption of the children by her and her second husband. The Magistrate took the question of access to the children to be a separate one from that of their maintenance and observed that the children were still dependent. He convicted the husband, holding him to have no "reasonable cause" for the default. The husband appealed and the conviction was quashed by the Supreme Court.

The view there taken was that this was a case where the wife desired to enforce one order but was, on the evidence, in breach of another. While it was true that maintenance and access were distinct matters, they did have a common link in that both were for the benefit of the children. In the present case, their father had no possible means of ascertaining whether moneys payable to their mother for their benefit were being applied for that purpose at all — or, indeed, whether the children were even with their mother. The Court was, however, quick to point out that, although the children's father had made out his plea, it must not be thought that a

failure by the mother to afford access as ordered was, per se, "reasonable cause" for non-payment of maintenance by the father. Accordingly, the actual validity of the original maintenance order, and the prima facie obligations under it, would not appear to have been detracted from.

Proceedings for adjustment of maintenance order or maintenance agreement under the former Domestic Proceedings Act 1968 or the Family Proceedings Act 1980

This article proceeds on the basis of the following propositions:

(a) A child's parents are liable to maintain him or her up to the age of 16: see s 72(1)(a) of the 1980 Act. As to extension of that liability beyond 16, see subs (1)(b) and (c). The liability has been said to be joint: *Harrison v Steele* (1982) FLN 71 (2d). The making of an order is at the Court's discretion: see *Blake v Rhodes* (1983) 2 NZFLR 117 and *Mead v Harrison* [1985] NZ Recent Law 18.

(b) Section 66 of the 1980 Act, one of the sections to which s 99(1) and (2) of that Act refer back, states that, in considering the liability of one party to a marriage to maintain the other party to the marriage (whether during the marriage or after its dissolution), and the amount of maintenance, the Court may have regard to (a) conduct of the party seeking to be maintained that amounts to a device to prolong that party's need to meet reasonable needs; or (b) misconduct of the party seeking to be maintained that is of such a nature and degree that it would be repugnant to justice to require the other party to pay maintenance. It is clear from its terms that this provision relates only to the maintenance of spouses and former spouses. There is no express equivalent to it among the sections of the Act devoted to child maintenance. Prima facie, therefore, it must follow that it is not appropriate to allow any misconduct on the part of a custodial parent in denying the non-custodial parent access to a relevant child to affect the non-custodial parent's liability to maintain that child (or, indeed, the quantum of maintenance to be awarded in respect of the child). Thus one may readily appreciate that, as a general rule, the type of case here under review must be approached on the footing that liability for child maintenance is not dependent upon the availability of access.

(c) The Court is likely to frown upon those who have resorted to "self-help": see, eg, *Seabrook v Seabrook* [1971] NZLR 947 (CA); *J v J* [1971] NZLR 1020; *Johnson v Johnson* (1982) 1 NZFLR 212, 223; *Cordery v Cordery* [1983] NZ Recent Law 50; *Johnston v Johnston* (1984) 3 NZFLR 311, but cf *Kuipers v Kuipers* [1984] NZ Recent Law 49.

(d) The Court does not take kindly to those who deliberately refuse to pay maintenance and is likely to deny remission of arrears: *Leav v McCauley* [1984] NZ Recent Law 113.

(e) The Court does not favour those who take no step to seek a reduction or suspension of their maintenance obligations, eg, if unemployed: see *Hamer v Colthorpe* [1983] NZ Recent Law 92, but cf *Nuttal v Nuttal* [1985] NZ Recent Law 320; *Plant v Jarvis*, Family Court, Hastings; 2 August 1985, (No FP 020/200/79); Judge B D Inglis, QC.

(f) The Court does not sympathise with those who delay taking enforcement proceedings inexcusably: see, generally, *Moat v Moat* [1984] NZ Recent Law 343; *Cleghorn v Cleghorn*, Family Court, Lower Hutt; 19 August 1985, (No FP 361/77); Judge B D Inglis, QC.

In *Denby v Croucher* [1979] NZ Recent Law 141 the parties had been married but their marriage had been dissolved. By a deed, entered into after the decree absolute, the parties had finally settled, inter alia, the issues of the children's custody, access and maintenance. The husband had since faithfully discharged his maintenance obligations under the deed. The wife was now seeking an adjustment upwards of the children's maintenance as provided for under the deed. She had, however, denied her husband access to the children despite the terms of the deed and of the access orders that had been made by the Supreme Court. It was accordingly argued for the husband, no authority being cited, that a deliberate failure to allow access was a factor to be taken into account in deciding whether the agreement was to be varied by increasing the children's maintenance. Chilwell J, having adverted to the *Stone* case, said that, in the absence of authority and of considered argument from counsel, he prefered not to deal with this issue.

Nevertheless, he expressed the obiter view that, in a case like the present, where a maintenance agreement was entered into as part of an overall settlement after divorce, which settlement included access rights and where the mother had, as here, ignored her obligations under the deed and had flouted Supreme Court orders requiring her to allow access and where the father had faithfully observed all his obligations, those factors were relevant in deciding whether the agreement ought to be varied.

In the very briefly reported decision of Judge McAloon in *Boxall v Boxall* [1981] 1 FLN [37], a father was seeking, inter alia, the outright cancellation of all maintenance arrears in respect of his two younger children. They had, it seems, refused to see him, or to discuss the matter of access with counsel or the psychologist. On the other hand, however, there had evidently been no attempt on the part of their mother to hinder access. In these circumstances, it was held that the father was not entitled to refuse to pay maintenance in respect of them.

Comfortable circumstances of stepfather

By way of contrast, in *Fletcher v Fletcher* [1981] FLN [47] the parties had separated in 1977, Court orders had been made with regard to the maintenance of their three children and as to access, and the mother had, shortly afterwards, left for Australia and had remarried there. She took the children with her. Their circumstances there were very comfortable. The father then proceeded to seek the outright cancellation of the children's maintenance on the grounds of his inability to obtain access to the children owing to his former wife's conduct and of her present

comfortable circumstances. The District Court declined to vary or to cancel the order. On appeal to the High Court, Speight J held that, in a case where there was evidence that the children might be disadvantaged by lack of funds from their father, it was doubtful whether mere inability to see them would be taken into account. In the special circumstances of the present case however, taking into account the children's need to maintain contact with their father, the action of the former wife in depriving them of that contact, and the comfortable circumstances being provided by their well-to-do stepfather, the father's money would be better applied to the purpose of saving up for visits.

By way of contrast again, from the very brief report of *Smith v Smith* [1982] FLN [54], it appears that a father was seeking enforcement of his rights of access and the cancellation of a maintenance order, the matter having already been previously dismissed. The father evidently considered that refusal of access entitled him not to pay maintenance for his children. Judge Finnigan held that it was not a ground for refusal to pay child maintenance that access was not permitted.

It may be interpolated here that a certain degree of sympathy was shown by the Court to a father-objector in the "LPC Scheme" case of *McLaren v SSC* [1983] NZ Recent Law 166. One of his grounds for objection was that he was being denied access to his children. He asked that this factor be considered pursuant to s 27P(b)(iv) of the Social Security Act 1964. It emerged that he and the mother had been living in Australia when they separated and that the mother, without any reference to the father at all, had removed the children to New Zealand. Judge McAloon considered that the children had a right to access and held that the father's need to save the fare to exercise access was a "need" that could be considered under s 73(3)(b) of the Family Proceedings Act 1980 and was accordingly relevant under s 27P(b)(iv) of the 1964 Act.

An important statement, albeit obiter, was made by Judge Inglis, QC, in *Hamer v Colthorpe* [1983] NZ Recent Law 92. He stated that there might be cases where a decision to remit arrears in respect of children's maintenance might be justified by the unwarranted exclusion of the liable parent from access to the children. This was on the basis, he explained, that a parent who, by depriving the other parent of access, elected to assume de facto sole guardianship might properly be regarded as having assumed the sole responsibility for their maintenance (this seems to be the first occasion upon which a Court was so explicit).

That it is by no means easy to establish the kind of case suggested by Judge Inglis, QC, is readily to be seen from the decision of Judge Mahony in *Gilmer v Gilmer* [1984] NZ Recent Law 99. The Court was there invited by a husband to remit child maintenance arrears on the specific ground that access had been denied him. His Honour noted that there had been cases where Courts had refused to enforce child maintenance orders where the custodial parent had prevented the other party from exercising access. He referred particularly to the unreported decision of Judge Inglis, QC, in *Dawick v Dawick*, Family Court, Napier, 23 May 1983, (No FP 041/206/77); Judge B D Inglis, QC, as being a recent case where the Court had declined to assist a wife who, effectively and over a period, had prevented the children's father from seeing them. Judge Mahony was of the opinion that the Family Proceedings Act 1980 referred to the liability of parents to maintain their children and went on to determine the way in which that liability was to be quantified.

In his view, the rights vested in children to be maintained by their parents and for access by a non-custodial parent were distinct and created separate and distinct obligations which were not normally interrelated. It was only in exceptional circumstances that a maintenance obligation ought not to be enforced against a refusal to allow access to be exercised and that occurred where the party with custody (and therefore control) persistently said in effect: "I refuse to allow a relationship to be developed and maintained between this child and the child's non-custodial parent but at the same time I insist that that parent contribute to the support of that child in my custody and control." In his Honour's view, the breach of one order by one parent did not, in itself, excuse the breach of the other order by the other parent. Thus the breach of an access order did not, in itself, relieve the other from his obligation to pay maintenance for the child. Conversely, where a non-custodial parent fell into arrears in payment of maintenance, the custodial parent was not thereby relieved of an obligation to allow access. His Honour did not see the present case as one where the refusal of access had been of such a kind and degree as to effectively shut out the father from the life of the child.

The case is undoubtedly a strong one, for the wife is reported as having used deliberate deceit to take the child to Australia for a year on one occasion and as having taken the child there for a similar period, on a second occasion, without informing the husband. These circumstances were, even so, not considered by the Court as possessing that element of aggravation and persistence which would justify a remission of all arrears in respect of the child during theose periods. At the same time, however, the husband was to be given some consideration for the contribution he had made to the return air fare of the child at the end of the second period. $300 of the $1,500 owed in respect of the child was therefore remitted.

Consideration for husband

A certain degree of consideration was also shown to the husband in *Payne v Payne* (1984) 3 NZFLR 305. He lived in New Zealand and was now applying under s 142(1) of the Family Proceedings Act 1980, for the variation or discharge of a maintenance order in respect of two children. That order had been made in Queanbeyan, New South Wales. The husband had appeared in person and was not represented. The order was later registered in New Zealand. In the same proceedings it was ordered that the husband should have reasonable access. (Section 142(1) allows the Family Court to make orders under s 99 in regard to a registered order such as the present one, and, for that purpose, the registered order is treated as if it were a New Zealand order: see s 142(3)). The parties' marriage had run into difficulties early in 1980. They then lived in New Zealand in rented

accommodation. In March 1980, the wife left for Australia, where she had relatives, taking the children. After a week or so, she telephoned the husband saying she would not be returning and that, in her view, the marriage was finished. Some time before 1982, she formed a new relationship, which was still subsisting. In 1982, the husband visited the children in Australia. In 1983, the wife visited New Zealand and the husband saw the children had been taken to Australia by his wife and kept there without his consent, as a result of which, he alleged, he had been unable to exercise any effective right of guardianship.

Judge Inglis, QC, conceded that the husband had been prevented from playing any effective role as a parent, but drew attention to the point that the evidence did not suggest that the wife's initial move to Australia was motivated by a desire to cut the husband off from the children, or that she had put any obstacle in the way of his seeing the children or communicating with them. The situation was not unlike that which commonly arose when there was a separation and the parents, for reasons of their own, decided to live in different parts of the country. In the present case, the father seemed to have accepted that the mother should have custody and therefore, by force of circumstances, the major input into their upbringing. In the absence of any proceedings to determine where the children should live, it did not seem possible to suggest that their mother was necessarily unreasonable in choosing Queanbeyan as her, and thus the children's base! The father had not himself formed any new ties; he was a free agent and there was the possibility at least that he could himself have moved to Australia to be nearer his children.

His Honour declined to see the case as resembling the *Dawick* case. The present case was not one of access denied but of access being difficult because of the distance involved. The *Dawick* case was not to be interpreted as indicating that liability for maintenance depended on availability of access or that maintenance might be withheld as a punishment for denial of access. It could not be right to relieve the father here of his obligation to contribute to the children's support (1984) 3 NZFLR at 307-308.

On the other hand, since he had a duty to participate in their upbringing, the travel costs should be taken into account in assessing the extent of his obligation to provide maintenance as such. It was not unreasonable for him to wish to remain in New Zealand (at 308). On the facts as a whole, the father was entitled to a degree of temporary relief until such time as he could resume payment in full under the order. The case is clearly one where there was no usurpation of her position as co-guardian by the mother, and it illustrates not only the need to sift the facts with extreme skill in cases of this type but also the inescapable point that the achieving of access can prove to be both difficult, though not utterly impossible, and expensive for a non-custodial parent.

Engendering of bitterness

In very striking contrast is the quite different position apparent in *DY v DY* (1985) 3 NZFLR 446. Judge Ryan was asked by the husband to enforce an access order made in 1982 in respect of his children, now aged about 12, 10 and eight, and to cancel outright the maintenance orders, made later in 1982, in respect of them. The wife, in her turn, invited the Court to vary the maintenance orders upwards. The children had been living with her since the husband left in 1979. They had seen their father only spasmodically up until May 1984 and, since then, had not really seen him at all. The present hearing constituted the culmination of five and a half years of litigation between these parents. The wife had refused to co-operate with the counsellor, according to his report: see at 447 cf the equally sorry case of *B v B* [1971] 3 All ER 682 (CA). It was found that the absence of access had occurred primarily because of the mother's bitter attitude towards the father and because she had entirely captured the souls of the children — to the extent, indeed, that they now harboured the same views towards their father as she did and were united in their resistance towards him, at 447. The Judge described his interview (ibid) with the children as "one of the most distressing interviews that I have ever conducted with children, although over the years I have seen quite literally hundreds of children in that situation."

In these circumstances, the Court cancelled the maintenance orders "given the total and complete denial of access brought about solely by [the mother's] attitude towards her husband", at 448. It seems clear (ibid) that the Court took the view that a "variation" of maintenance was governed by s 99 of the 1980 Act, which referred back to ss 62-66 and ss 72-73 and that, under s 72, the Court was charged with having regard to all relevant circumstances affecting the welfare of the child. Access was held to be "regrettably a dead letter". No good purpose would be served by counselling or further attempts at access and the Court accordingly discharged the access order entirely. (See, too, *Carmine v SSC*, (1981) 1 NZFLR 1; *Priston v SSC* (1981) 1 NZLFR 7; *Jones v Jones* [1983] NZ Recent Law 329.)

In *Nilsen v Sands* [1985] NZ Recent Law 401 the mother of a boy born in 1976 sought the cancellation of a maintenance order which had been made against her in respect of the child in 1979. The parties had separated and, because the mother was in full-time work, it was accepted that the father should have the main charge of the child during the week and that the mother would have access to him during the weekends. Access difficulties soon developed, eventually to the point where the mother "gave up altogether". There had been discussions in 1982 about the mother's right to see the child. The father told the mother that he had told the boy that he did not have a mother and otherwise made it clear to the mother that she was no longer regarded as any part of the child's life. The father did not defend the present application by the mother, who now had a child of her own to care for and had no income. Judge Inglis, QC, was prepared to place this state of affairs "squarely in the category of exceptional class of case where the parent who has de facto custody of the child has assumed exclusively the role of de facto guardian and has deliberately set out to exclude the other parent from rights of guardianship". He accordingly held that the sole responsibility to maintain the boy now rested exclusively on the father

as a result of his own choice and that the 1979 order should be cancelled and all arrears remitted. Family Court, Wellington; 13 September 1985, (No FP 085/240/79); Judge B D Inglis, QC.

New family

In *Kearns v Kearns* there was a greater element of subtlety about the situation than was present in the cases discussed above. The applicant father was seeking a review of the maintenance he was paying in respect of his two children pursuant to a consent order made in 1981. He alleged that he could not afford to pay because he had remarried and had a new family, but, essentially, his case was that he had been effectively deprived of any control or influence over their upbringing because of the way in which their mother, his former wife, had arranged matters. They had separated in 1979, the children then being five and two years of age, and the mother had been entrusted with their custody under a separation agreement. In the opinion of Judge Inglis, QC, this meant that, in terms of the Guardianship Act 1968, s 3, she had been entrusted with their day-to-day care and the provision of their principal home. After the separation, the mother moved, with the children, from the former matrimonial home in Palmerston North to Wellington so as to be near her parents and, later, to Tauranga, where her parents had since moved. Early in 1984, she moved, with the children, near Brisbane. The father was not consulted about these various moves, hearing, indeed, of the last one only at second hand and shortly before it took place. On the other hand, he had never taken any actual steps to prevent these moves with the children – which were, obviously, going to create difficulties over access and sharing in their general upbringing as far as he was concerned.

Evidently the mother took legal advice, from someone other than her present counsel or his firm, before the move to Australia and was informed that there was no need to obtain the father's consent or to consult him. As the Court indicated, this was wrong having regard to *W v W*, (1984) 2 NZFLR 335, and the *Seabrook* case, [1971] NZLR 947, and the mother should have consulted the father.

The Court conceded that the mother had, in fact, assumed a degree of control over these children's lives which had gone beyond anything that could have been justified by the agreement that she should have custody. At the same time, however, it was found to be established that, over the years, a situation had developed which could have led the mother to believe that the father had no great interest in the children's welfare or progress and that he was content to leave the responsibility for their upbringing in her hands. Indeed, the mother had said that the father had seen the children only sporadically since the separation and that she had wished he would see more of them but that he had not appeared to be interested. As against this, the father had protested that, at least during the early stages, he had made consistent efforts to see his children, that he had been put off by the mother's excuses and that he had formed the impression that she generally preferred him not to see the children and was evading his attempts at access. There had been a failure by the mother to get into touch with the father directly after one of the children had been hurt in a road accident.

The Court found the mother to be more "forceful" than the father, who was thought to have been inclined to avoid confrontation and to have become discouraged too early and too easily from obtaining as much access as he wanted. Had he pressed more firmly, he would, in the Court's view, have got it. It was considered likely that the mother had misinterpreted his desire to avoid confrontation as lack of interest, and possible that she had been too ready to believe that he was not interested. She might, furthermore, have found some encouragement for that belief in the constant maintenance difficulties, the present being the fifth occasion on which maintenance issues had come before the Courts. Just as the mother had had an obligation to consult her co-guardian about important matters affecting the children, so did the father have an obligation, if he wished to maintain his effectiveness as co-guardian, to adopt a less passive stance. Thus, if the mother, in reaching her decision to move to Australia, had led herself to believe that the father did not want to play any part in determining the children's future, his own passive approach must have tended to confirm that belief.

The Court thus declined to regard the case as one where the mother had deliberately set out to exclude the other parent from the children's lives in a way that could properly be regarded as the assumption also of sole financial responsibility for the children's support. In the rare type of case where the Court had thought it proper to relieve the non-custodial parent from any liability for child maintenance, there had always been, it was observed, a history of strenuous efforts by the non-custodial parent to assert his or her role as co-guardian and a determined opposition to that by the parent having custody. The Court referred to the *Dawick, Payne and DY* cases; referred to above. It was observed that the case under review had none of the exceptional features present in the *Payne* case which had there obliged the Court to take particular notice of the financial commitments entered into in good faith by the husband after the parties' separation. (He had bought a house since the making of the maintenance order in an honest, though mistaken, belief that there were proper grounds for stopping his maintenance payments. The Court held that he should not be forced to sell the house.)

In the present case, the mother had – sincerely – said she did not oppose access – easier said, in the Court's view, than done because the children could only come to New Zealand if their grandparents subsidised their visits.

Counsel for the father further argued that the children's welfare needed to be emphasised in the sense that, to insist on their father's meeting an obligation that would not only cause him financial strain but also strain his second marriage, was not likely to enhance his attitude to the children of his first marriage. The Court conceded that it must remain sensitive to the human feelings involved in an exercise such as the present, but adverted to the point that the mother had herself demonstrated a degree of sensitivity by – quite rightly in the Court's eyes – not asking for increased maintenance for the children. It was accepted that

the welfare of the children must be considered in all its aspects and that it was important not to put an impediment in the way of their future relationship with their father. It was accepted, too, that the factors to be taken into account went beyond those set out in s 72 of the Family Proceedings Act 1980 (see *DY v DY*, (1985) 3 NZFLR 446; *Woolley v Carmichael* (1984) 2 NZFLR 426, at 429, per Tompkins J).

Nevertheless, the reality was that the father here had an income sufficient to provide for the relevant children, a reasonable standard of living for his second family, and a reasonable fund to enable him to have access to the relevant children if he wished to do so. There was no reason to believe that money provided by him to their mother would not be used for their benefit. If she ensured that their father was kept regularly informed of their progress and encouraged them to develop a feeling for him, he could have no basis for saying that he was supporting children who were being cut out of his life. (See also *Re B (Infants)* [1971] Recent Law 242; *Re F* [1973] 3 All ER 483). The father's application was accordingly declined, but all arrears which had accumulated down to the date of His Honour's judgment would be suspended while the father regularly and faithfully paid current maintenance.

Move to Australia

Finally, there must be mentioned, by way of further contrast, *Comrie v Therkleson*, Family Court, Napier, 5 October 1985; (No FP 041/181A/85), Judge B D Inglis, QC. The applicant father sought a variation of a maintenance order, originally made in 1976 and varied in 1979, whereunder he was obliged to maintain his three children. Their mother, his former wife, had remarried and she and her second husband were in a very good financial position. The mother had departed, with the children, for Australia on 14 February 1985, the father first hearing of this decision on the evening of the previous day, when the children were nearing the end of a long stay with his own mother. They had been collected by their mother on the morning of 14 February and their father had neither seen nor heard from them since. It was his belief that the mother and her second husband had sold their home and taken their furniture with them. The father's inquiries as to the whereabouts of the mother and the children proved fruitless. He ceased his maintenance payments, informed the Department of Social Welfare accordingly and began to put money aside as a fund for the children if and when he learned where they were. See *Kuipers v Kuipers*, [1984] NZ Recent Law 49; *Fletcher v Fletcher* [1984] FLN [47].

Judge Inglis, QC, referred to the *Dawick* and *Payne* cases, pointed out that, while maintenance could not properly be withheld as a punishment for denial of access, the mother here had not been entitled to take the children out of the country without the father's express consent as parent and guardian, and held that her actions in so doing must, in the present circumstances, be regarded as an acceptance by her of sole responsibility for the children's maintenance. Even so, it was observed, the father still had his legal rights as a parent — if able to enforce them. The mother was not entitled in law to direct the children's lives simply because she was now solely responsible for maintaining them. The maintenance order was accordingly suspended, as from 14 February 1985, until further order. Since he had been put to the expense of a Court appearance to have his obligations adjusted, the father was awarded $150 costs — there having been no explanation, in the nature of things, from the mother for the course adopted by her and it being difficult to think of any which could be regarded as satisfactory.

Conclusion

Cases of the kind under review must necessarily depend upon their own particular facts, but the following general principles do seem to emerge. Such cases should be approached on the prime bases that a non-custodial parent's obligation to maintain and the custodial parent's obligation to afford access are to be treated as distinct issues and that the Court will not tolerate withholding maintenance as a punishment for withholding access. Some form of adjustment to the maintenance obligation may, however, be justified by the deliberate flouting of Court orders as to access by the custodial parent where the non-custodial parent has faithfully observed his or her maintenance obligations.[2]

It will always be a relevant question in these cases whether the custodial parent can be said to have hindered access, or put obstacles in the way of access to, or of communication with, the relevant children. It will be necessary to bear in mind that access cannot be said to have been hindered if all that can really be complained of by the non-custodial parent is merely that the access periods were not working out as well as he or she was hoping and were, in that sense, a failure, or that the distances involved — whether within New Zealand itself or between New Zealand and another country — were merely serving to make access to the relevant children difficult, impracticable or expensive.

What the Court may, according to the circumstances, be looking for is a deliberate failure by the custodial parent to consult the non-custodial parent over a removal of the relevant children to a distant residence, as evidenced by some element of kidnapping, snatching or spiriting them out of the jurisdiction. At the same time, it is necessary for Court and practitioner alike to be able to distinguish those instances where the non-custodial parent is only attempting unjustifiably to say that he or she cannot afford access or has simply not pressed his or her claim to access with that degree of assiduity, determination and promptness which is reasonable in the circumstances (or, for that matter, has not pressed at all).

A seemingly different class of case arises where a custodial parent is found to have instilled into the relevant children such feelings of bitterness and animosity towards the non-custodial parent with the result that access to them by the latter was bound to be a failure if it took place at all. Nevertheless, a situation of this kind may similarly entitle the Court to find that there has been that necessary degree of "cutting off" conduct on the part of the custodial parent to enable it to hold that the custodial parent has deliberately transmuted his or her role as custodian and co-guardian to that of sole guardian and sole provider of maintenance. In the event of an application for

maintenance being made for the first time made by such a parent, it would seem to be open to the Court either to refuse to exercise its discretion to make an order or to decline to make one, regard being had to the relevant child's welfare (s 72(2)). Such a deliberate exclusion may also be found to have occurred where the custodial parent has told the child that he or she has no other parent and has informed the non-custodial parent that he or she is no longer regarded as any part of the child's life. Possibly this discussion reveals that it is preferable to think of access in terms of the welfare of the relevant child rather in terms of the "right" of the non-custodial parent or of the relevant child. □

Addendum

Since the above article was written and was in the course of publication, there has come to hand the recent decision of Sinclair J in *Shrimski v Shrimski* (1985) 3 NZFLR 707 which requires the writer to add a brief, but cautionary, note on the interrelation beteween the parental duty to maintain children and the parental "right" to have access to them. In the *Shrimski* case, the wife had separated from her husband and had left, with their girl and boy, for Melbourne, where her own parents lived (at 708). Whether there was any prior consultation with the husband, or an approach to any Court in New Zealand in terms of *W v W* (1984) 2 NZFLR 335 (CA), is not clear. One very much suspects that there was neither. The Family Court there granted her custody of both children. Access in respect of the boy was granted to the husband. The husband later endeavoured, in New Zealand, to obtain access orders in respect of the girl, but was frustrated by the wife's attitude. Finally, the wife brought maintenance proceedings – in the Auckland Family Court – in respect of both children. The matter of maintenance appears to have been compromised in Australia in the circumstances described at 708-709. They are not relevant to the present discussion. The present case is thus concerned, in effect, with an initial application in New Zealand for the children's maintenance and not with an adjustment of the husband's pre-existing liability under a New Zealand maintenance order or maintenance agreement. Nor is it concerned with the enforcement of any New Zealand order or agreement.

The Family Court Judge considered that the wife had unilaterally moved the children from New Zealand to Australia and had put the possibility of access almost out of the husband's reach, see at 709, per Sinclair J. He also referred to the wife's having taken on for herself the rights and duties of parenthood to the effective exclusion of the husband to a degree where he should not be asked to make further monetary contribution. He accordingly held that the wife's conduct had disentitled her to an order for the children's maintenance. In the exercise of his supposed discretion under s 76(1) of the Family Proceedings Act 1980, he declined to make any order.

Sinclair J agreed that the Family Court Judge had been justified in being critical of the wife's conduct, but he nevertheless allowed the wife's appeal and remitted the case to the Family Court, see at 712-713, per Sinclair J.

The first problem that Sinclair J had to solve in this context was: did s 76(1) mean that the Court's ability to make a maintenance order in respect of a child was a discretionary one? This was, for instance, the view taken by Judge Inglis QC, in *Mead v Harrison and Gifford* [1985] NZ Recent Law 18, and in *Blake v Rhodes* (1983) 2 NZFLR 117, at 124, a case concerned with a stepfather requiring consideration of s 76(2). See also the decisions of that Judge to the same effect in *H v C* (1985) 3 NZFLR 749 and *Fleming v Fleming*, Family Court, Christchurch; 2 December 1985, (No FP 009/528/77). Or alternatively, is the provision a machinery one simply conferring on the Court a discretion to choose which form of order it may make, as put forward in *Butterworths Family Law Service*, at p 5031, n 24?

His Honour came down firmly in favour of the latter view (1985) 3 NZFLR at 711-712. His Honour thought that s 72(1) of the 1980 Act made it clear that each parent of a child is liable for the maintenance of the child until the child attains the age of 16 or one of the other remaining provisions of s 72(1) applies. The dominant consideration under s 72(2) was, in his view, at 710, 712, the child's welfare. Hence the Court was mandatorily required to have regard to the matters referred to therein. It has to ascertain the type and degree of maintenance needed, and then go on to consider the matters set out in s 72(3). His Honour emphatically did not wish to visit the sins of the parent at fault upon the innocent child; see at 712.

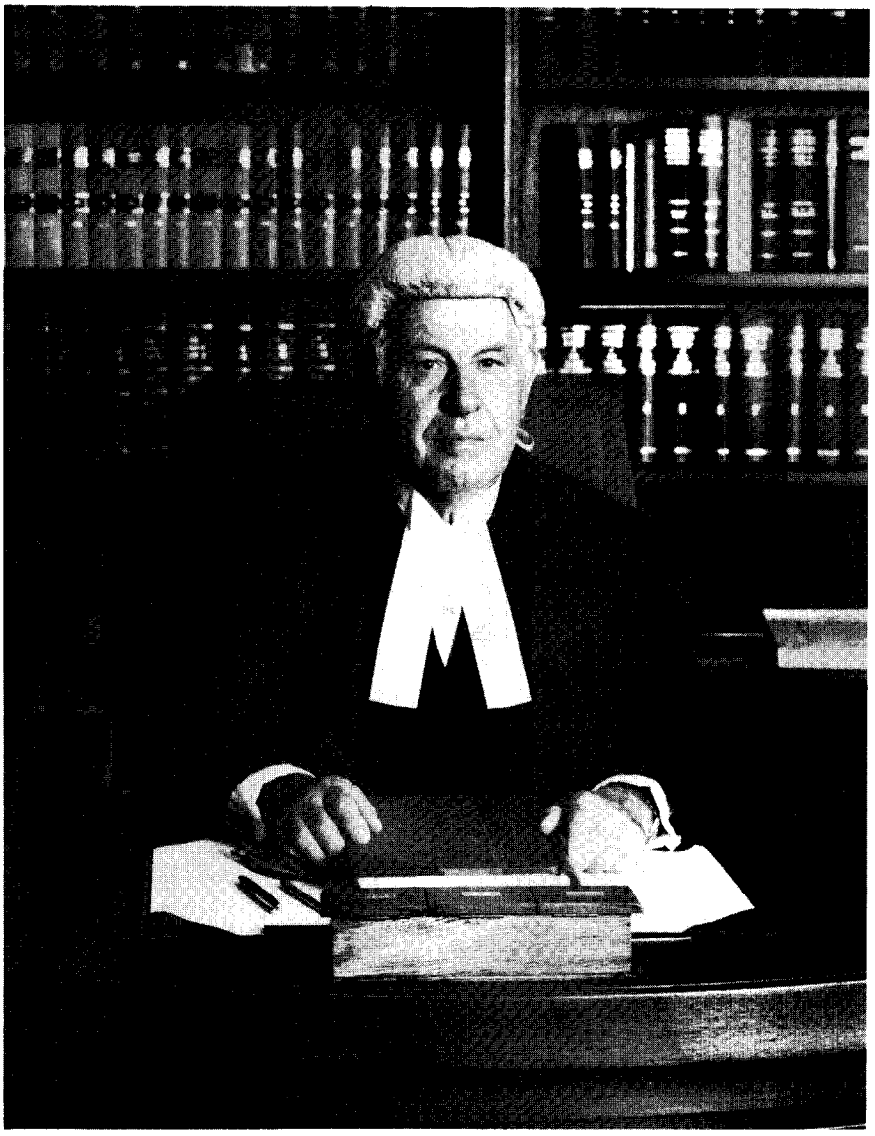
The express reference in s 72(2) to all relevant circumstances affecting the welfare of the child implicitly rules out the use of other circumstances, as stated at 711, approving the statement to that effect in *Butterworths Family Law Service* at p 5031, n 24. That meant, in his opinion, that the wife's conduct had no bearing on the children's entitlement to maintenance or on the liability of either parent in respect of the maintenance of either child, at 712. The case was accordingly remitted to the Family Court for reconsideration in the light of His Honour's judgment.

It is clear from the report that, during the hearing of the appeal, reference had been made to certain decisions where the Courts had refused to enforce an order for payment of maintenance for children where the custodial parent had prevented the other party from exercising access, (Ibid). What those cases were, however, and whether any of them were those discussed by the writer in the above-mentioned article is not apparent from the report. Whilst it is obvious that both the Family Court and the High Court considered the wife's behaviour as deserving of criticism, it is not clear beyond peradventure whether either Court went so far as to regard the wife as having actually and deliberately transformed her role as custodial parent and co-guardian to that of sole guardian and sole provider of maintenance for the two children. One very much suspects that the Family Court did go to that length, (see at 709).

Given that the Family Court has no discretion "to excuse the parent from paying the amount which the Court has found ought to be paid by that parent" see at 712, and that the dominant consideration is the child's welfare, it has to follow that all the cases decided under the 1980

continued on p 91

Judicial appointment:
Mr Justice Bisson



Mr Justice Bisson

At the end of 1986 the Attorney-General announced that Mr Justice Bisson had been appointed a permanent member of the Court of Appeal. The notice of appointment was dated 17 December 1986 and was gazetted on 15 January 1987.

Mr Justice Bisson has been a Judge of the High Court since 1978. He has been stationed at Hamilton.

The Judge was born in Napier in 1918. He is a graduate of Victoria University of Wellington. During the war he saw service in the Navy. He was mentioned in despatches at the time of the landings in Normandy when he was serving in HMS *Warspite*. He finished his war service with the rank of Lieutenant Commander.

On completing his University education shortly before joining the Navy, he worked for a time as personal clerk to Mr Humphrey O'Leary KC, who later became Chief Justice. After the war he joined the Napier firm of Bisson Moss Bisson and Robertshawe. In 1961 he was appointed Crown Solicitor in Napier.

His Honour served as a Judge of the Courts Martial Appeal Court from 1976. He was active in Law Society affairs. He held the office of President of the Hawkes Bay Law Society and was a Vice-President of the New Zealand Law Society. The Judge has been active in the International Commission of Jurists on whose behalf he visited and reported on the Philippines. He was chairman of the New Zealand Section of the ICJ from 1972 to 1976 and has continued to take an interest in ICJ affairs. □

---

continued from p 90

Act mentioned in the article must now be approached in a new questioning spirit.

Thus, the suggestion made in *Hamer v Colthorpe* [1983] NZ Report Law 92, that there might be cases where a decision to remit arrears of children's maintenance might be justified by the unwarranted exclusion of the liable parent from access may warrant reconsideration. It must be remembered though, that s 99(6) of the 1980 Act does not require the Court to have regard to ss 72 and 73. *DY v DY* (1985) 3 NZFLR 446 would seem to be sustainable only if it can be said that it was no longer in the interests of the children's welfare for their father to continue to maintain them.

The reasoning in *Nilsen v Sands* [1985] NZ Recent Law 401 cannot stand with that in the present case; its result could be justified only if it was no longer in the boy's welfare that his mother should continue to maintain him. Similarly, *Comrie v Therkleson*, Family Court Napier 5 October 1985, (No F 041/181A/85); a decision of Judge Inglis, in *Dawick v Dawick*, Family Court, Napier, 23 May 1983, (No FP 041/206/77); also appears to require a careful reconsideration. □

---

1 At 307, attention being drawn to *W v W* (1984) 2 NZFLR 335 (CA); see also *P (LM) v P (GE)* [1970] 3 All ER 659 (CA); *Nash v Nash* [1973] 2 All ER 704 (CA); *Williamson v Williamson* noted by Atkin in [1978] NZLJ 134; *Wastney v Wastney* (1983) 3 FLN 46 (2d).

2 ie as stated under s 99(1) or (2) of the 1980 Act, referring back to ss 72 and 73, or under s 99(6) in the case of remission of arrears. In the former situation, the test to be applied in determining whether an adjustment should be made would seem to be the child's welfare (s 72(2) or whether there is an injustice calling for the Court's intervention. And see *Jones v Jones* [1983] NZ Recent Law 329.

Merger and Takeover Criteria:

Competition and the Commerce Act

By John Collinge, Chairman, Commerce Commission.

This article is a slightly edited version of an address given to a Conference in Auckland on 3 July 1986. The author points out that the merger and takeover provisions of the Commerce Act seek to encourage competition by regulation of such proposals which might be used for restrictive commercial purposes.

1 Introduction

Broadly speaking, the Commerce Act 1986 [the Act] can be described as one which endeavours by way of regulation to encourage the creation of conditions which allow competition. I am taking this opportunity to further develop the discussion of a competition policy in relation to mergers and takeovers under the Act. What I hope to do is to examine the merger and takeover provisions of the Act – and how they seek to encourage competition by regulation of merger and takeover proposals. This is a matter of importance at this time in view of the attempts of the Commission and Parliament to establish a modern and consistent body of merger and takeover law which is well understood. We need also to establish criteria which are satisfactory in a New Zealand environment. The current climate of opinion, world wide, appears to be that mergers and takeovers are an essential commercial mechanism to reallocate resources, to provide incentives to management and to be the vehicle by which the rewards for initiative can be obtained. There is thus a sympathetic climate but, nevertheless, there may be circumstances in which merger and takeovers operate to the detriment of the public by foreclosing competition. In New Zealand this problem is magnified because of the smallness of the domestic markets.

2 The statutory criteria

Under s 66(6) of the 1986 Act, the Commission is, in respect of a merger or takeover proposal within the Act, required to make a determination in writing either giving a clearance or an authorisation or declining to give either a clearance or authorisation. Section 66(7) in relation to clearances, provides:

> *The Commission shall give a clearance* under subs (6) of this section *unless it is satisfied that the merger or takeover proposal,* if implemented, *would result,* or would be likely to result, *in any person* [whether or not that person is a participant in or otherwise a party to the merger or takeover proposal] *acquiring a dominant position in a market or strengthening a dominant position in a market.*

"Dominant position" is defined in s 3(8) to mean:

> For the purposes of ss 36, 66 and 67 of this Act, *a dominant position in a market is one in which a person* as a supplier or an acquirer of goods or services either alone or together with any interconnected body corporate *is in a position to exercise a dominant influence over the producton, acquisition, supply, or price of goods or services in that market . . . .*

It further provides that for the purposes of determining whether a person is in a position to exercise a dominant influence over the production, acquisition, supply or price of goods or services in a market, regard shall be had to:

> (a) The share of the market, the technical knowledge, the access to materials or capital of that person together with any interconnected body corporate.
> (b) The extent to which that person is constrained by the conduct of competitors or potential competitors in that market;
> (c) The extent to which that person is constrained by the conduct of suppliers or acquirers of goods and services in that market.

Section 66(8), relating to authorisations, is not the subject of this paper but is added for perspective in relation to the test in s 66(7). It provides:

> *The Commission shall grant an authorisation* under subs (6) of

this section *if it is satisfied that the* merger or takeover *proposal*, if implemented, *would result or would be likely to result, in a benefit to the public which would outweigh any detriment to the public which would result or would be likely to result from any person* (whether or not that person is a participant in or otherwise a party to the merger or takeover proposal) *acquiring a dominant position in a market or strengthening a dominant position in a market.*

The emphasis is mine in order to highlight the essence of the provisions.

3 General objectives of the Act

The Commission is charged with a statutory duty under the Commerce Act 1986 to promote workable or effective competition in markets within New Zealand. This policy is based on the belief that the public interest is, in general, best served by competition and that this promotes efficiency in the use and distribution of resources, that this fosters growth through technological developments and that it facilitates an environment in which firms discover the kinds of goods and services which the community wants and how they can be supplied in the cheapest way. The Act is a visible expression of a wider competition policy which involves frontier de-regulation [eg import licensing and tariffs] and deregulation of specific industries [eg licensing schemes]. With public policies moving away from the regulation of markets, it is particularly important that entrepreneurial opportunities are not restricted by private or voluntary regulations, ie by the participants themselves seeking to regulate the market in the place of government. One such danger, as I have said, is the monopolising of markets by the acquisition of existing participants.

4 The Commission's approach

When assessing mergers and takeovers a usual sequence is for the Commission to look at the effect of the proposal upon competition in any market affected by the proposal. If it has not, eg if it is a simple transfer of ownership or a restructuring without aggregation, then the Commission need proceed no further. If it has, then the Commission examines whether competitors exist among the participants remaining in the market and whether they are likely to provide a sufficient discipline to the merged concern. If not, then the Commission examines the likely strength of the merged concern and the height of barriers to entry to see whether new entrants would be able to provide such competition ie whether the market is contestable, which is in essence the same judgment which a businessman makes in deciding whether to start a new business. If the market is not contestable by new entrants, the Commission examines whether, notwithstanding, imports provide or are likely to provide a sufficient discipline upon the market dominance of the merged concern. It is only if, as a result of such analysis, there is not or is not likely to be sufficient competition — actual or potential — from existing competitors, potential entrants or imports — that the Commission will decline consent to a merger or a takeover. Even if it did so find, the proposal may still be approved if the public benefit flowing from it outweighs any detriment likely to flow from the foreclosure of competition. There are thus a number of criteria and a methodology which must be satisfied before a proposal is disallowed. I hope that the reasons for this broad approach will be more apparent when we examine the specific criteria.

5 The rationale of the test of dominant position

Competition is thus the primary policy to be fostered by the Commission under the Act. However it is important to remember that it is not the only policy and may be affected by other competing policies in appropriate circumstances, eg the encouragement of exports. Some degree of merger control is a necessary part of any competition policy because one of the inhibtors to competition is high concentration within industries. The rationale of the test of "dominant position" applied to mergers and takeovers in s 66(7) was explained by the Commission in *Proposal by News Ltd: Decision No 164* (9 May 1986) 6 NZAR 47, as a situation in which the Act supposed that there was an absence of workable or effective competition in the market. Thus, the same question can be addresed in two ways. In any market, "is there a dominant position"? Or "is there an absence of effective competition"?

6 Test is one of market power

The nature of a dominant position was also discussed in the Commission's decision in *News/Ltd.* It is clear that it relates not to the size of the organisation but to its market power. Thus, the Commission indicated in that case:

> A "dominant position" must be judged, upon the proposal being implemented, by the power of any such person to exercise a dominant position in a market as a result of the acquisition.

The principal hallmarks of market power are the ability to raise prices or to exclude competitors in any market.

> A person can be considered to have a dominant influence in a market when that person is able to make significant business decisions, particularly those relating to price and supply, without regard to the competitors, suppliers or customers of that person.

It follows that the question of dominant position must be looked at in the context of the market under consideration. In any particular proposal, a dominant positon is to be judged by the power, as a result of the acquisition, of any person particularly to exclude competition or to raise prices at will.

7 Meaning of dominance

In *News/Ltd* the Commission also considered the meaning given to the term "dominant position" in the Australian case of *TPC v Ansett*, (1978), 32 FLR 305 and considered that the same meaning, ie "having a commanding influence on", should also be adopted as the appropriate test of degree in the New Zealand context. The Commission put it this way:

> In the *Ansett* case, "dominant position" was construed as meaning something less than

control, namely, as "having a commanding influence on". Section 3(8) itself uses the phrase "dominant influence over". "Dominant" is defined in the *Shorter Oxford Dictionary* as "occupying a commanding position". Accordingly, it seems clear that the term should be similarly construed in New Zealand, ie "as having a commanding influence on".

That I believe is a strong test and will require a persuasive case to satisfy. Having said that, it should be mentioned that it is not necessary either that there be a use of such market power, merely that the acquirer be in a "position" to exercise such power.

8 Relevant factors

There is, however, no fixed list of matters to be examined when attempting to ascertain whether a person has a dominant position in a market, but merely a number of factors which may assist in coming to a decision. These factors are not an exhaustive list but are merely an expansion of the factors listed in s 3(8) to which the Commission shall have regard. As the Commission said in *News/Ltd*:

> The *Ansett* case further indicates that in making a judgment as to whether this standard is met, there are no set factors – only those which may assist the determination. Section 3(8) lays down matters to which the Commission is to have regard in this respect but we do not think that these are exclusive of the matters to be taken into account. Had that been the position then (adopting the reasoning of Dalglish J in *Associated Booksellers* [1962] NZLR 1057, 1062) one might have expected the legislature to say that the Commission should have regard to these matters only.

As to the nature of the factors to be considered, it is to be noted that s 3(8) requires the Commission [as it has in the past] to have regard to factors affecting both the *structure* of the market (s 3(8)(a)) and the *behaviour* of concerns engaged in the market and of suppliers and acquirer in such market (s 3(8)(b) and (c)). Thus, the judgment of dominance to be made is neither structuralist nor entirely behaviouralist. Both approaches must be considered.

9 Matters to be considered

Bearing these comments in mind the Commission endeavoured in *News/Ltd* to assist future consideration of the matter, by providing an expanded list of matters relevant to a consideration of dominance [or conversely, a lack of effective competion]:

(i) The *structure* of the market which requires a consideration of:
- (a) The share of the market of the merged new concern.
- (b) The degree of market concentration.
- (c) The size distribution of all concerns in the market.
- (d) The extent to which the products in question are characterised by product differentiation and sales promotion, ie whether there are reasonably close substitutes.
- (e) Access to technical knowledge, materials and capital.
- (f) The financial stability of the merged concern in relation to other operators in the market.
- (g) The nature of any formal, stable and fundamental contracts, arrangements or understandings between concerns in the market.
- (h) The extent of corporate integration (eg interlocking shareholdings and cross directorships) among concerns in the market.
- (i) The extent of vertical integration.

(ii) The extent of restraints imposed by the *conduct* of competitors or potential competitors or by others affected which requires a consideration of:
- (a) The extent to which competition exists or has existed and is likely to continue.
- (b) The extent to which the concern is constrained by the conduct of competitors.
- (c) The capacity of the concern to determine prices in or to exclude entryto the market without being inhibited in that determination or action by suppliers and acquirers.
- (d) The height of barriers to entry in that market and the ability of potential competitors to enter the market and to sustain a position in the market.

This may be a more comprehensive and explanatory list of factors than the five factors laid down by the Commission in *Visionhire/Sanyo* (1984) 4 NZAR 288, but the definition of effective competition in that case remains valid. No limitation is placed upon the Commission as to the weight to be allocated to either approach or to any particular factor.

10 Acquisition and strengthening of a dominant position

Other matters to which the Commission turned its mind in the *News/Ltd* decision are as follows:

(a) The test requires a person to "acquire or strengthen" a dominant position in a market. It does not apply where the proposal results in no aggregation of market shares. Thus the mere change of ownership – without any market aggregation, ie where the market position of a company is not affected – would not be caught.

(b) The acquisition or strengthening of a dominant position may be, in terms of the Act, in relation to "any person (whether or not that person is a participant in or otherwise a party to the merger or takeover proposal)". It could thus include, not only the participants to the proposal, but also the parent of the acquiring company or a third party which, as a result of a proposal, acquires a dominant position.

11 Other Relevant Considerations
Matters decided by the Commission under the old Act, are also likely to be relevant under the 1986 Act. The main issues are summarised below:

(a) A dominant position must be considered in the context of a "market". Particularly important in the analysis is the definition of the market, and the tests and practices previously laid down by the Commission in cases such as *Edmonds/Tucker*, (1984) 4 NZAR 354, at 360; *Re Proposal by Air New Zealand* [1985] BCL 829, 1250 are still wholly applicable.
(b) Interlocked concerns (by shareholding or directors) may or may not be independent sellers for the purpose of examining the number of competitors in a market. Again, the tests laid down in cases *Re Proposal by Wattie Industries Ltd* (1985) 5 NZAR 218 and *Goodman/Mt Cook* [1985] BCL 828 are still apposite.
(c) The height of barriers to entry are still central to the issue of dominant position [or effective competition]. Are they so high as to prevent potential competitors from appearing or is the market contestable?
(d) Horizontal, vertical and conglomerate/concentric aggregation should be viewed using different criteria – the dissenting opinion in *Re Proposal by Air New Zealand* [1985] BCL 829 outlines the differences of approach between the three. Horizontal aggregation, ie between competitors in the same market, has concerned the Commission most.
(e) Inter-brand competition between brands owned by the same company is not competition in the sense in which the term is used in the Commerce Act – it is quite likely to be illusory and, in any event, limited when the controlling company calls "enough" – see for example *Re Proposal by Wattie Industries Ltd* (1985) 5 NZAR 218.
(f) The failing company doctrine laid down by the Commission in *Re Proposal by J Wattie Canneries Ltd* (1984) 4 NZAR 354 is still applicable – if a company is genuinely likely to go out of business, its merger with another will not affect competition.

These principles have been canvassed in an earlier paper so that I need not repeat them here.

12 Establishing actual and potential competition
In this area, we sail into relatively uncharted waters and issues which have not been considered in any depth. If I give an indication of how they may be decided, I am to be taken as doing no more than that. Some conclusions, however, are:

(a) The dominant position test requires a judgment as to a state of competition at a given time. I believe that this is the time of the likely implementation of the transaction.
(b) As to what might happen in the future, this is to be judged upon the basis of present facts and what is reasonably foreseeable in relation thereto. Crystal ball gazing is not permissable.
(c) Present behaviour may assist in an assessment of whether potential competition is likely to exist, eg how are existing concerns likely to react to a new entrant? However, the lawfulness of future behaviour of the dominant concern is now dealt with in s 36 – use of dominant position to exclude competitors.

What is clear, however, is that in judging both competition and potential competition regard must be had to the test laid down by Chief Justice Davison, in *Re Proposal by Air New Zealand* [1985] BCL 829 – What is the "probable" [and not "possible"] effect of the proposal upon competition? The High Court has also, in *New Zealand Steel Ltd v Commerce Commission* (10 June confirmed that potential competition should be considered as well as actual competition and, with respect, has correctly approached an assessment of this by adopting a practical approach based on market realities.

13 Import competition
An issue now coming into more prominence, with frontier de-regulation, is the extent to which imports may impose a discipline on the NZ market sufficient to protect the domestic consumer. The difficulty is often, if imports have not occurred in the past, how to assess whether their potential is such to provide adequate protection? This depends upon a number of things. Is the product one which is likely to be imported? Those which are voluminous relative to value such as large water cylinders are clearly not good prospects (see the *Rheem/Zip* case, unreported decision of the Commission dated 3 July 1986), transport costs, the availability of transport and the costs of setting up local distribution are others (see the *Cement Price Control Inquiry*, Report to Minister of Trade and Industry by the Commerce Commission). Further, the economic feasibility of imports has to be judged against a background of change eg licences, tariffs and exchange rates. Frontier barriers (declining at present but not extinct) may clearly limit the ability to import (see also *Rheem/Zip*). There is also the acceptability of the product on the local market (see *Dairy Board/Ambreed*, unreported decision of the Commission dated 8 May 1986, No 163, in relation to imported semen). All of these factors may require to be assessed. An important power is that the Commission may recommend to Government relaxation of imports or reductions in duty in any area where it considers that, frontier barriers exluded, imports would provide an adequate discipline upon local concerns. Of course, in considering such a request, the Government must necessarily balance the value of protecting a local industry against the value of competition in the domestic market.

14 Dominance the only test for refusing consent
Another matter which is new under

the 1986 Act is that the Commission can now refuse consent to a proposal only upon competition grounds. Formerly, under s 80 of the 1975 Act, it had a shopping list of matters it could consider, including employment and the "catch all" matters affecting the welfare of the public of NZ. For example, in *Re Proposal by Brierley Investments Ltd* (1985) 5 NZAR 108, reversed by the High Court, *Brierley Investments Ltd v Commerce Commission* (1986) 6 NZAR 25, the Commission exercised this power, in favour of non-aggregation of ownership of the press, to decline its consent to Brierley taking *actual* control of ownership of a substantial section of the newspaper media. In other cases, conditions were imposed to alleviate relocation and employment difficulties. The Act now makes it quite clear that factors other than competition can only be the vehicle (through the public benefit provisions) for saving a merger and cannot be used to condemn it. The idea of this change is that the Commission should concentrate on competition issues. The new position is understandable, if there are other policies in place [or a conscious decision not to put policies in place] to cover such matters.

15 The detrimental effects of competition

The Commission cannot, in its assessment of whether a dominant position exists, consider the detrimental effects (if any) of competition. When the Commission consented in very short order to the *Ansett/Newmans/Brierley* (unreported decision of the Commission dated 25 June 1986) proposal for a main trunk airline, it considered the matter to be very straightforward. It had already been determined in previous cases that main trunk and provincial air services were a distinct market, and it could hardly be questioned that Air NZ was the dominant operator on main trunk and provincial routes. The advent of a new fledgling company to operate three 737s on main trunk routes could hardly be said to create or strengthen dominance in that market. Yet the allegations came thick and fast. Air traffic controllers would strike because of extra work load; employment would be lost in maintenance units of Air NZ; provincial routes operated by Air NZ would be cancelled; Air NZ services would be uneconomic because Newmans was a major buyer of air services; there would be ruinous competition which would adversely affect the consumer; Air NZ did not have reciprocal privileges in Australia, etc.

None of these matters affect the position of Ansett/Brierley/Newmans in a market within NZ. If established, they are detrimental effects flowing from the competition which might be offered by the new concern. There may be beneficial effects as well, of course, in terms of improved price, service, etc. In providing that the Commission can only assess whether a concern has a dominant position (and not whether it has, on balance, beneficial or detrimental effects), the Act assumes that competition in the domestic market is on balance beneficial. It is only where dominance is acquired or strengthened that public benefit can be adduced to save the merger and in this case, any detrimental effects of competition may possibly be addressed in striking the balance.

16 Onus of proof

One of the more vexed questions when dealing with the question of dominant position, is the onus of proof. Section 66(7) is oddly worded. The Commission shall give a clearance "unless it is satisfied" that a dominant position exists. This contrasts with the earlier wording in the Bill that the Commission shall *not* give a clearance unless it is so satisfied. Two views have arisen from these words — one that the onus of proof is on the applicant and the other that it is not. I believe, tentatively, that the likely position is that there is an evidential burden upon the applicant to adduce the necessary facts upon which a decision can be made. After all, it is the applicant who is likely to be in possession of the facts and must discharge that onus. If not, then the applicant risks refusal of the application.

However, at the end of the day, if the considerations which the Commission must take into account in assessing dominant position are so evenly divided, it appears that the Commission will not have been satisfied as to dominance and must allow the proposal, that is to say, the legal burden is upon the Commission. In an evenly balanced situation, it appears that the benefit of the doubt is in favour of the proposal. This, in passing, may be one of the differences between the old and the new Act — the old appears not to place the legal onus on one side or the other. The new Act appears to proceed on the basis that mergers are normal and usually beneficial transactions and are to be prohibited only if the Commission is satisfied that a dominant position exists.

17 Conditions and undertakings

One thing which is clear under the new Act is that the Commission is not empowered to impose conditions in granting a consent — nor can it accept undertakings on the basis that they have the same effect as conditions. Conditions were previously most notably used to prevent restrictive practices in the market in question or to prevent cross subsidisation or discrimination in favour of the merged concern against competitors. This was particularly useful in an environment where trade practices (and particularly the practice of monopolisation) were not appearing to receive adequate coverage. With the conscious advent of a provision especially designed to prevent abuse of dominant position (s 36), the need for such conditions became less important. The danger was that the imposition of conditions could be a means of trade practices control — agree to the abandonment of the practices or we won't agree to your merger. This could mean that practices were not always reviewed on their merits. Further, there were uncertainties as to when a condition could be imposed. Under the old Act it appeared that a condition could be imposed only where a finding was made that it would render the proposal no longer contrary to the public interest.

For reasons such as these, the power to impose conditions was deleted from the new Act and, at the same time, all the conditions imposed under the old Act were rendered invalid, s 110(4). This approach assumes that the trade

practices and abuse of dominant position provisions of the new Act will be effective. The existence of trade practices in a market is one factor which, worldwide, is taken into account in assessing barriers to entry. It is as yet uncertain whether the Commission will refuse consent to a merger because of the trade practices of the participant or whether it will simply act against the practices under the other parts of the Act.

18 Partial clearances

It is the area of partial clearances which raises particular difficulties. In relation to a proposal which affects a number of markets, if there is dominance in relation to one market only, should the whole proposal fall or part only? It seems clearly untenable for the whole transaction to be deemed bad because there is concern over say one product market. It is likewise difficult to accept that a proposal should be disallowed because the Commission is unable to allow the proposal subject to the divestment of certain brands. Overseas, the tendency has been for the Commission's equivalents to allow mergers subject to the divestment of certain brands (eg of edible oil – Trade Practices Commission (Australia) in *Fielder/Gillespie/Davies,* see Reports of Australian Trade Practices Commission; of whisky – Monopolies Commission (UK) in *Guinness/DCL*, see Reports of UK Monopolies Commission). It is true that a proposal may be withdrawn and an amended proposal substituted if the parties so wish. If they do, their right of appeal for the part dropped is lost. If they file a new proposal in addition to the other, they raise costs and incur time losses. If they elect to proceed with the original proposal, they cannot implement the unexceptional parts until the decision on the whole proposal has been dealt with. The Commission has renewed its efforts to have the legislation changed to specifically allow partial clearances and will be examining the Act closely for assistance in allowing it to do so.

19 Other government regulations

There is often some confusion as to the Commission's role in relation to other legislation. I believe that is relatively easily answered. This, in the case of the Overseas Investment Regulations, if overseas involvement is allowed pursuant thereto, the Commission considers an application by an overseas person in exactly the same way it would for the New Zealand concern – see *Proposal by News Ltd* (1986) 6 NZAR 47. The OIC's function is in relation to the right of an overseas person to carry on business here. The Commission's function is to encourage competition – whether from overseas or otherwise. Secondly, if regulations govern the industry – and these are becoming fewer – then those regulations outline paramount public policy in that industry so far as the Commission is concerned. If regulations purport to regulate competition in the industry in question by licensing for example, then the Commission must take as read the restriction and reasons for the legislature deeming it necessary to restrict competition therein. The Commission's role is to encourage competition generally but there may be circumstances in which the Government of the day has seen fit to take this matter to itself and to limit competition in some way.

20 Conclusion

The Commission has, over the last two years, been endeavouring to establish a modern merger standard. This approach has been endorsed by the principles relating to mergers and takeovers laid down in the Commerce Act 1986 which give support for and precision to some of the principles adopted earlier by the Commission. That is not to say that there are not further questions which will need to be addressed. What I am endeavouring to do in this lecture is to articulate the likely interpretations to be given to the new criteria in the hope that it may assist the understanding of the Act. It is also an endeavour to explain that the issues involved will be dealt with consistently and according to law and not by *ad hoc* decision-making. I hope that, whatever your view of the judgments made under this Act, the principles and matters which need to be addressed are becoming clearer. □

Juries

So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

— **Blackstone** (1723-1780)

Legal aspects of factoring of book debts

By Andrew Hames, an Auckland practitioner

The recent sale of the debts owing to a Government Department would have been a surprise to many people. As a commercial transaction however it is not all that unusual. In this article Andrew Hames considers some legal issues concerning assignment of book debts. As a matter of professional propriety the author discloses an interest in that his firm McElroy Milne are solicitors to a factoring services company, Factors W.A. (New Zealand) Ltd.

Factoring book debts (ie selling the debtors ledger for cash) is increasingly common in New Zealand as an adjunct to the ordinary course of business. This reflects Australian experience.

The major attraction of factoring is said to be the additional trading flexibility which can result for businesses (especially small businesses) from cashing-up their debtors ledger. This additional flexibility would usually take the form of an improved negotiating position in the purchase of raw materials or inventory.

Restrictions on an entity's power to "borrow" might not affect the ability to raise finance by factoring.

At the time of writing, at least three companies[1] providing exclusively factoring services have been established in Auckland. Others offer factoring as part of a wider finance operation.

Typically a debt factoring facility agreement sets the framework for later sales of blocks of book debts. Care must be taken in relation to the following aspects (the entity which sells its book debts is referred to as the "vendor"):

The agreement will stipulate the type of book debts which may be offered to or sold to the factoring company. The perusing solicitor must ensure that his or her client's book debts are within this definition. Generally, only debts arising from wholly executed contracts can be assigned (ie amounts owing as progress payments are not eligible for assignment). Amounts owing under credit contracts and hire purchase agreements are commonly excluded.

Book debts are choses in action and, as such, may be purchased by way of legal assignment or equitable assignment. Legal assignment in accordance with section 130 Property Law Act 1952 constitutes an effective assignment of the book debts but may involve the vendor in reimbursement to the factoring company of unnecessary stamp duty on the formal assignments. The agreement may provide for equitable assignment with a right on the part of the factoring company to execute and stamp legal assignments (as attorney) at the cost of the vendor. For the technical rules relating to assignment of choses in action, readers are referred to the specialist texts on the subject.

The vendor may have the option of factoring when it wishes or alternatively it may be required to factor all eligible debts.

Some agreements specify an aggregate value of invoices that must be factored in a given period, or impose a minimum factoring fee to the same effect.

The effective factoring fee cannot be measured in isolation. Consideration must be given to any additional interest charges and any repurchase, cash retention and other relevant provisions.

A prior period of notice may be necessary for termination of the agreement by the vendor. This period assumes particular importance in those agreements which require the vendor to factor all eligible debts.

The assignment of a book debt does not generally terminate the vendor's responsibility. The factoring will normally be "with recourse" (ie the vendor is required to reimburse the purchaser for an uncollected debt at the end of a specified period) possibly coupled with provision for the payment of interest on any uncollected debts. After the vendor has reimbursed the factoring company for uncollected debts such debts should either be reassigned to the vendor or the proceeds of such debts received to the benefit of the vendor.

Although expressed as a sale and purchase of property, factoring transactions "with recourse" may be viewed by a Court as "shams". The "real" transaction may be perceived to be a loan on the security of book debts. Questions of registrability of such security would then arise. For this reason the factoring company may be concerned to register charges under the Companies Act 1955 in

respect of company vendors. This can be accomplished by a separate charging clause, in the facility agreement or a separate document, registered in accordance with s 102(f) of the Act. A corresponding course in respect of individual vendors is not available under the Chattels Transfer Act 1924, because "instruments" registered under that Act would need to identify the particular book debts. This leaves the legal position in respect of individual vendors problematical. Of course, blocks of assignments of book debts by an individual can be registered in succession but this may be an unwieldy alternative in the small-business setting.

The timing of payment for the book debts needs to be checked. Part of the payment for the book debts may be retained by the vendor as a security deposit account until cash received from previously factored debts triggers release of the retention.

The assignment of book debts and/or the charge over book debts sought by a factoring company will generally necessitate the consent of prior debentureholders. Either an acknowledgement by such debentureholders to the effect that the factoring company has priority in respect of book debts, or a release of the prior charge so far as book debts are concerned, would normally be required.

Possible liability for goods and services tax should be considered. If the facility agreement provides for additional services (ie other than purchasing book debts) then questions of apportionment arise under the Goods and Services Tax Act 1985. The purchase of book debts simpliciter is exempt as a "financial service" in terms of the Act.

The typical agreement will also contain standard provisions appropriate to other kinds of financing facility agreements, including warranties as to the financial condition of the vendor, events of default entitling termination of the agreement, force majeure, set-off and provision for costs.

The facility agreement will be a "credit contract" in terms of the Credit Contracts Act 1981. Typically it will be a "revolving credit contract". As such there are certain disclosure requirements analogous to those applicable to bank overdrafts. □

1 Factors W.A. (New Zealand) Ltd, New Zealand Factors Ltd, and Pacific Factors Ltd.

Books

Banking Law in New Zealand

By Mark Russell
Published by the Law Book Company Ltd. 286 pp ($27.50.)

Reviewed by Johanna Vroegop

The publication of the first book on banking law in New Zealand for 15 years (the second edition of *Banking Law and Practice in New Zealand* by Bright was published in 1969) is an event which is both noteworthy and welcome. The fact that it has taken place now, after a considerable length of time, is no doubt a reflection of the expansion in banking and finance which has taken place during the last few years, an expansion which shows every sign of continuing at least some time into the future, and also of the changes in banking which are taking place at the same time.

Mark Russell's book is designed to meet the needs of both lawyers and non-lawyers, particularly bankers. As the author makes clear in the preface, it is not intended to be an exhaustive text on banking law, such as the standard English work, Paget's *Law of Banking*, but to be a concise account of all the areas of law which are encountered in banking. A large number of topics are covered. As well as the subjects which may be considered central to banking, such as bills of exchange, cheques, fund transfers, the banker/customer relationship and bankcards, the author has also covered aspects of the law which are relevant to bank lending and securities, including guarantees, to the Credit Contracts Act, company borrowing and securities, stocks and shares, life insurance policies, securities over chattels, land and other forms of security. Also covered are investment advice, safe custody, garnishee proceedings, and Mareva injunctions. In addition, there is a section on international banking, which covers documentary letters of credit, contract bonds and guarantees, the bank's role in transactions involving overseas bills of exchange, offshore loans and exchange control.

Banking Law in New Zealand thus provides a useful overview of a large number of topics which are of interest to bankers and to those acting for them. The difficulty of encompassing such a wide range of subject matter within a book of less than 300 pages must have been substantial and the author's task was not an easy one. By and large, he has succeeded in what he has set out to do. However, the work does suffer from a certain unevenness in treatment, with some topics being dealt with in depth, others not explained fully enough and some barely touched upon, a defect which is perhaps inevitable in a work which tries to cover a large amount of law. While it is no doubt useful to some readers to have such a wide range of subjects covered in one book, from the point of view of a lawyer, it is suggested that the work would have been of more value if the topics which are central to banking, such as the banker/customer relationship, cheques, bills of exchange, bankcards, funds transfer and international banking had been dealt with in greater depth, and the other topics, which are in any case adequately covered elsewhere, omitted. In spite of that, as the only up to date book on banking law in New Zealand it will still be a useful addition to the lawyer's library. □

Books

Mastering Law Studies and Law Exam Techniques

By Richard Krever, LLB (Osgoode, York), LLM (Harvard)

ISBN 0 409 49156 X. 1986. Butterworths, Australia. 173 pp. Price, $A18.00.

Reviewed by P R H Webb

The author of this work is a lecturer in the Faculty of Law at Monash University. He states in his Preface that, early in his teaching career, he realised that many of his students were failing to achieve their full potential, and that their problem was not that they were unwilling to work but rather that they did not understand exactly what they were expected to learn. To explain what they should learn from his course, the author outlined the type of questions that could be expected in his own examination papers and explained the hallmarks of superior answers to questions. With that understanding, the author claims — and, doubtless, very justly claims — his students were enabled to reorganise their studying habits and direct their efforts towards effective examination answers. Because, it seems, he was unable to find adequate Australian materials on examination techniques, the author assigned overseas materials for students seeking to improve their performance. While those materials proved helpful, it became obvious to the author and his colleagues that it was Australian materials that were needed. The present work grew out of their efforts to fill that gap. It is designed not only for law students but also for students of related disciplines, such as business or commerce, where law courses form part of the syllabus.

Chapter 1 (pp 1-4) indicates the purpose of the book. The following four chapters (pp 5-51) are concerned to outline those important matters that would be covered early in the piece by Legal System/Legal Writing lectures and tutors — eg, what the law examinations seek to evaluate, the role of lawyers, the legal process, the doctrine of precedent ("An Introduction to Law Studies and Law Exams: Understanding the Dialectic of Law", as Chapter 2 is intituled). Chapter 3 continues the theme, being devoted to the topics of "Reading and Briefing Cases". It encourages the reader to determine the context of decisions he or she is required to read; it informs how to distinguish the ratio decidendi from obiter dicta, what to record in the brief that is made of a case and how best to utilise that brief when it has been made.

Chapter 4 conveys many soundly-based studying hints. The student is enjoined to go to classes, since they "can provide an excellent return for a minimal investment", to read the materials before hand, not to be afraid to ask questions when confused, to review notes made in class "right after class or the same evening", and to consolidate them into "review" notes and to prepare an "overview" of those review notes. The pros and cons of study groups are explored and the practice of going over old examination papers either alone or in a group is recommended. A couple of helpful pages on what should be done by the student who has failed concludes this chapter.

Chapter 5 provides useful hints on avoiding pitfalls that are commonly found in answers to examination questions. The student is instructed to prepare an outline, to organise the answer sensibly, to allocate the time so as to maximise marks, to argue the problem properly, etc. A number of "don'ts" are listed by way of a warning — eg, not to repeat the question asked; not to repeat the words of the relevant section of a statute, as no marks are given for doing so; not to use superfluous introductions; not to ignore spelling and grammar, and so on.

Chapter 6 (pp 52-167) consists of ten testing and ingenious sample examination questions, together with answers to each of them. These questions cover a wide variety of topics: Legal Process, Contract, Property Law, Tort, Criminal Law, Company Law, Constitutional Law, Evidence, Revenue Law and Commercial Law. Monash University colleagues of the author provided six of these. The tort and contract problem came from Melbourne University colleagues; the company law one was provided by Professor Ford, formerly Professor of Law at that University. The Revenue Law exercise was contributed by Associate-Professor Vann of the Sydney Law Faculty. The problems are of varying length, intended to occupy the student for anything ranging from two hours, reading time included, to 45 minutes in all. Each sample question is followed by an "average answer" and by an "above average answer" (through not a "model answer"). A critical comment by each examiner follows, showing, inter alia, why one examinee obtained a higher score than the other.

The work concludes with a Postscript (p 170) and an Appendix (pp 171-173). This latter is, in essence, a select bibliography of publications useful for law examination preparation. Needless to say, it contains the current edition of Glanville Williams's *Learning the Law*, for which, as the author, his contributors and this reviewer would surely all agree, there is no substitute.

There can be no doubt that this handy guide will be of considerable value to the Australian student who is about to begin, or has recently begun, the study of law, whether he or she is taught through the medium of straight lectures or that of a case and materials book. The author and his team of contributors are to be heartily commended on their initiatives, for the work is the fruit of an obviously successful partnership.

There is no real reason why the New Zealand student should be put off by the fact that the sample questions and answers come from another common law jurisdiction. However the answers might happen to differ, the methodology displayed remains the same for both countries.

The publishers are to be congratulated on the pleasing appearance of the publication. It is softback, but hard-wearing; the binding is silver and the lettering black. It may justly be said that all that glisters is not gold.

To jocularly make a final point: on p 39 the reader was properly and duly advised: "To effectively discuss an issue, arguments and counter-arguments must be matched and carefully balanced to ensure all facets of the debate are canvassed." On p 50, the student is counselled: "Avoid split infinitives and switching tenses." Indeed, "*quis custodiet custodes ipsos?*"! □

Mortgages and Securities (3 ed)

By E A Francis and K J Thomas

Sydney: Butterworths Pty Ltd 1986 lxiii and 493 and (index) 16 pp. $A68, ISBN 0 409 49169 1.

Reviewed by D F Dugdale.

One of the consequences of Australian economic growth has been an increase in the extent to which solicitors across the Tasman have found themselves having to be concerned with the laws of states other than their own. The present volume is the third edition of a work first published in 1963 to fill what Sydney solicitor E A Francis discerned to be a need for a comprehensive statement of the mortgage law in force in all the Australian states, a sort of Australian usurer's vade-mecum. It is a book designed to provide answers to the day to day problems of conveyancers. How do you mortgage home and other types of unit held through shares in a unit company? What special provisions should be included in a mortgage of an interest under the Strata Titles Act? How do you mortgage patent rights? There is homely advice as to the information to be sought from a loan applicant. There is a form of undertaking by a loan applicant to pay a proposed lender's costs.

It would, I suppose, be possible to be supercilious about the academic shortcomings of this book which is not the one to consult if you are looking for profound discussions of matters of principle. But the book's whole point is that it is written by and for practitioners. Its utility as a tool of trade can only be vouched for by those who have relied on it, but to the outside observer it would seem to fulfil its intended function admirably. Well done, Mr Francis. Mr Thomas, bravo!

It is less clear that the book would be of use to the New Zealand conveyancer, who does not have quite the same pressing need to know that in certain circumstances a Victorian stock mortgage may include vehicles usually drawn by horses or bullocks or that the definition of stock in the South Australian Stock Mortgages and Wool Liens Act 1924-1983 includes camels, mules and donkeys. (The definition of stock in our own Chattels Transfer Act 1924 includes ostriches.) But for the researcher the very down-to-earth practicality of this book means that Australian cases are able to be located far more swiftly and readily than in more ponderous tomes. You are looking for authority on hanky-panky in the conduct of mortgagee's sales, or on the validity of an escalation clause? It can be quickly found in these pages.

Those ostriches call to mind the pressing need in our own jurisdiction for a reform of the law as to chattels securities. An ideal securities law is one that protects the interests of the mortgagee on the one hand while adequately alerting those who might otherwise unwittingly believe themselves to be acquiring an interest in the mortgaged property free of encumbrance on the other.

The most efficient system is one that utilises a register of title. Mortgages of registered ships, mortgages of interests in land under the Torrens system and mortgages of life policy are obvious examples. It is not beyond the wit of man to devise a comparable arrangement for motor vehicles (and it is in respect of these that most difficulties arise), and at the time of writing the Prime Minister (no less) has just promised introduction of a bill presumably along these lines (there is Victorian legislation to build on) during the current session.

A second possibility is a register of instruments (or copies of or particulars of instruments) creating charges. This is the basis of our Chattels Transfer Act and Companies Act provisions, but it needs to be remembered that historically the policy sought to be achieved by these statutes or their ancestors was not to warn those minded to acquire an interest in the property in question but rather to publicise the debtor's financial position to all those who might be inclined to extend the debtor credit.

A modernised registration of instruments system is the basis of North American reforms of the law as to secured interests in personal property. These provisions obviously provide a possible model for New Zealand. Their disadvantages are first the difficulties inherent in any nominal index and secondly the fact that such a system is expensive and cumbersome. If the only risk of non-registration is that recovery of the goods from an innocent disponee is barred many retailers and finance companies will prefer to avoid the hassle of registration. On the other hand such a system is very reassuring to the secured creditor, and it must not be overlooked that one objective of reform is to fulfil the economic necessity of providing a method of securing advances over personal property in which potential lenders can have confidence.

The third method, which provides us with an alternative possibility to either type of registration system, is simply to tinker with the *nemo dat* rule in favour of either secured creditor or innocent third party. Our law as to customary hire purchase agreements (now more than half a century old) is an example of such a tinkering (by creating an exception to the Sale of Goods Act 1908 s 27(2)) in favour of dealers and finance companies. More recent examples, notably in the United Kingdom and South Australia, have been in favour of consumers. The secured creditor it is argued, can always protect his position, perhaps by insurance or perhaps by the finance houses banding together to create their own register. This approach tends not to be popular with motor vehicle dealers and those concerned with consumer financing but its possibilities should be carefully considered before any sort of registration system is plumped for.

The only real justification for the existence of the Law Commission is that it should be able to handle such projects as a reform of the law as to securities over personal property which were really too big for the part-time law reform committees of blessed memory to tackle successfully. There is as yet no sign of the Commission grasping this particular nettle; but one lives in hope. □

Literal Compulsion and Fundamental Rights

By Philip Joseph, Senior Lecturer in Law, University of Canterbury.

The term literal compulsion *is taken by the author from the recent judgment of Cooke P in* Keenan v Attorney-General *[1986] BCL 1501 and is used by analogy with torture as referring to compulsion by the exercise of physical violence to compel someone to do something.* Keenan's *case involved the power of the police to fingerprint a person in lawful custody. The judgment contained a reference to* Taylor v NZ Poultry Board *[1984] NZLR 394 which was discussed by J L Caldwell in an article "Judicial Sovereignty — A New View" at [1984] NZLJ 357. The issue raised in this present article is whether a comment by Cooke P in* Keenan's *case was again implying that not even Parliament could validly make the duty to answer questions enforceable by literal compulsion.*

A The dictum to *Keenan*

There may now be a sixth reference by Cooke P to fundamental common law rights which Parliament could not override (see J L Caldwell, "Judicial Sovereignty — A New View" [1984] NZLJ 357). The issue in *Keenan v Attorney-General* [1986] BCL 1501 concerned the power of the police to obtain fingerprints from persons in lawful custody on a charge of having committed an offence. Section 57(1) of the Police Act 1958 authorises the police to:

> take or cause to be taken all such particulars as may be deemed necessary for the identification of that person, including his photograph, fingerprints, and footprints, and may use or cause to be used such reasonable force as may be necessary to secure these particulars.

It was argued for the appellant that the taking of his fingerprints was unlawful because a significant purpose of the police was to obtain fingerprint evidence to strengthen their case, whereas, it was argued, the power to obtain fingerprints under s 57 could only be exercised to establish the identity of the accused in respect of the offence for which he had been arrested.

In the result, the Court of Appeal unanimously upheld the decision of Hardie Boys J below that the police could lawfully insist on taking fingerprints as further evidence supporting the charge. The Court of Appeal affirmed the ruling in *Moulton v Police* [1980] 1 NZLR 443 (CA), at 445, that s 57 was intended to authorise the taking of particulars for any "legitimate police purposes" (cf *Duffield v Police* (n 2) [1971] NZLR 710).

In reviewing the case law under s 57, Cooke P observed that a suggested duty to answer questions asked by a police officer ". . . takes the matter into a different field". Compare with *Moulton v Police* [1980] 1 NZLR 443, wherein the Court of Appeal held that s 57 of the Police Act 1958 properly empowered the police to demand name and date and place of birth of a person in lawful custody, failure or refusal to answer sanctioned by penalties; (discussed infra, text). Cooke P in *Keenan's* case stated:

> A duty to answer questions by a police or other officer is usually only imposed by express enactment *and is never in this country enforceable by literal physical compulsion.* The subject is discussed in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398-406. (Emphasis added)

Was Cooke P simply observing the absence of statutory enactment in New Zealand authorising literal physical compulsion? Or was His Honour in truth implying that not even Parliament could validly make the duty to answer questions enforceable by literal compulsion?

In *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA), Cooke J collated his several dicta on common law rights. There, His Honour said:

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them. The subject has been touched on in *Fraser v State Services Commission* [1984] 1 NZLR 116, 121; *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *L v M* [1979] 2 NZLR 519, 527.

The common law rights specifically referred to by Cooke J were the right of Courts to conclusively determine whether actions in the Courts are barred (*L v M*); the right of access of citizens to the Courts for determination of their rights (*New Zealand Drivers Association* case); the right of Parliament and not the Executive under delegation from Parliament to control the economy (*Brader's* case); the right of an office-holder to natural justice (*Fraser's* case); and

the right to be free from literal compulsion by torture (*Taylor's* case). Prior to *Taylor v New Zealand Poultry Board* in 1984, the dicta were cautiously expressed as "reservations" (*New Zealand Drivers Association* case) or through such terminologies as "it is arguable" (*Fraser's* case) and "there is even room for doubt" (*L v M*), whether Parliament could abrogate certain common law rights. Many in the profession were reluctant to accept the dicta for what they said, preferring any interpretation which might avoid their constitutional implication. But the most benevolent construction could not relieve them of their polemic intent following *Taylor v New Zealand Poultry Board.*

It could be argued that Cooke P's recent dictum in *Keenan* ("[a] duty to answer questions by a police or other officer . . . is never in this country enforceable by literal physical compulsion"), viewed in isolation, was simply an observation that Parliament does not, as a matter of course, indulge the police or officials with powers of literal physical compulsion. But this argument becomes less plausible when His Honour's statement is placed with his other dicta. In his most definitive statement in *Taylor v New Zealand Poultry Board*, supra, Cooke P prefaced his dictum on fundamental common law rights thus:

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament.

The reference to torture, be it noted, was by way of illustration of literal physical compulsion: torture is but one form, albeit an obvious and extreme form, of literal compulsion. Presumably therefore His Honour's dictum in *Taylor v New Zealand Poultry Board* would apply equally to lesser forms of literal compulsion, which invites the inference that Cooke P in *Keenan* was again referring to a class of fundamental common law rights which His Honour would uphold as against the authority of Parliament itself.

The dictum in *Keenan* may therefore be significant. His Honour's earlier dicta were delivered in 1979 and 1981-1984. There was much anticipation amongst the profession since the unequivocal pronouncement in *Taylor v New Zealand Poultry Board*, and more than two years have elapsed without further reference to fundamental common law rights. Perhaps Cooke P was prepared to let the notion of common law supremacy quietly lapse in the wake of the Bill of Rights movement. Certainly one must have serious misgivings about the judicial eclecticism inherent in any doctrine of common law supremacy: precisely which common law rights posit values so fundamental as to constitutionally limit Parliament's freedom of action? Not all, for instance, would regard the right of an office-holder to natural justice to be "fundamental" (see *Fraser v State Services Commission* [1984] 1 NZLR 116, p 121 per Cooke J referring to a dictum of Lord Hailsham in *Chief Constable of North Wales Police v Evans* [1982] 2 All ER 141, p 144), or at least more "fundamental" than many other rights consonant with the welfare and protection of the individual. In this respect, the notion of common law supremacy lacks the overriding coherence of a Bill of Rights. The political decision having been made to entrench particular rights, the Courts' function is then confined to making qualitative judgments about them.

Sir Robin has declared his support for a New Zealand Bill of Rights. (See Bill of Rights Seminar held under the auspices of the New Zealand Section of the International Commission of Jurists, Wellington 1985, pp 57-58. See also Sir Robin's 1984 *F S Oethridge Memorial Address*, "Practicalities of a Bill of Rights". For earlier reservations, see 1982 *F W Guest Memorial Lecture*, "The Courts and Public Controversy" (1983) 5 Otago LR 357, p 358.) Yet opposition from several quarters to the draft Bill currently before the Select Committee may place the successful adoption of a Bill of Rights in doubt. (The draft Bill of Rights was tabled in Parliament on 3 April 1985. See the Government's White Paper, *A Bill of Rights for New Zealand*, presented to the House by leave of the Minister of Justice.)

Whether *Keenan* will mark a resurgence of Cooke P's earlier views, then, awaits to be seen.

Cooke P's dictum in *Keenan* raises two further general issues.

B Scope of literal physical compulsion

First, what will constitute literal physical compulsion? Torture, violence or use or threat of coercive force speak for themselves. A more difficult question is whether "physical compulsion" necessarily implies violence or overt force or threat of force. In *Miranda v Arizona* 384 US 436 (1966) the majority of the Warren Court recognised that "the modern practice of in-custody interrogation was psychologically rather than physically oriented" (see C B Cato, *The Privilege Against Self-Incrimination and Reform of the Law and Practice of Police Interrogation*, Legal Research Foundation (Inc) Seminar, University of Auckland, 1985, pp 21-27). The majority of members expressed concern about the techniques of interview typically employed by police in the United States to subject an accused to psychological pressure to obtain admissions. One American study records at least 16 inherently coercive interview techniques commonly practised. (F E Inbau and J Reid, *Criminal Interrogation and Confessions* (2nd ed, Williams and Wilkins, Baltimore, 1967); these techniques are listed by Cato, ibid, pp 24-25).

The psychological pressure capable of being exerted in custodial interrogation was recognised by the Court of Appeal in *R v Wilson* [1981] 1 NZLR 316. *Wilson* is one of the comparatively few cases in New Zealand where a statement has been excluded on the ground that it has been obtained through "the exercise of violence or force or other form of compulsion". Under s 20 of the Evidence Act 1908 such statements are automatically excluded whether or not the compulsion was likely to cause untruth (cf *R v Hartley* [1978] 2 NZLR 199 (CA), where the Court as a matter of discretion excluded statements obtained by prolonged cross-examination in breach of the Judges' Rules). The appellant in *Wilson* (a Maori youth) had been interrogated in police custody from 2.45 pm until 8.11 pm when he confessed. The interview involved skilled use of friendly and then

robust methods to appeal to his conscience, despite repeated indications that he wished to remain silent. The suspect was also interrogated by a Maori constable who appealed to Maori religion and mythology to attempt to influence the appellant to confess. The Court of Appeal ruled that the confession should not have been admitted. Cooke J delivering the judgment of the Court observed (ibid, p 324) that:

> it is fundamental in the New Zealand system of justice that confessions obtained by overbearing the will of a person in custody by tactics amounting to compulsion will not be received in evidence.

On the facts, His Honour held that:

> . . . the prolonged interrogation in the confinement of a small room has to be treated, in all the circumstances, as unfair and oppressive. *While not involving violence, the oppression had a physical character putting it in the category of . . . compulsion.*

This may suggest that the notion of physical compulsion embraces more than torture, violence and other overt forms of coercive force. If indeed it is appropriate to talk of "physical" compulsion where the duration, methods and circumstances of an interrogation subject an accused to oppressive psychological pressure, then Cooke P's dicta in *Taylor v New Zealand Poultry Board* and *Keenan* are of more than merely academic interest. The prospect of a statute authorising custodial interrogation is not as fanciful as a statute permitting literal compulsion by torture or violence. While it would take a vivid imagination to contemplate state-sanctioned torture or violence, Cooke P in *Keenan* proffered that "a right to interrogate against their will persons in custody would be very unusual in New Zealand".

C The Bill of Rights

The second issue concerns Art 16(b) of the draft Bill of Rights. This guarantees the *Miranda* rights to an arrested person "to refrain from making any statement and to be informed of that right". In *Moulton*, supra, the Court of Appeal held that under s 57 of the Police Act 1958 a person in lawful custody on a charge of having committed an offence commits a summary offence (punishable under s 57(2) by up to one month's imprisonment or a fine of up to $40) by failing to comply with a demand by the police for name and date and place of birth. The Court held that the power to use reasonable force under s 57(1) was limited to the physical particulars expressly set out (namely, the accused's photograph, fingerprints, palm-prints and footprints), and could not be used to record particulars elicited by question and answer.

The Court of Appeal in *Keenan* expressed no opinion on the correctness of that decision. However, assuming *Moulton* to be correctly decided, the duty found to exist would be in breach of Art 16(b) of the draft Bill. The critical question then would be whether the duty to answer questions under s 57 was "reasonable" and "demonstrably justified in a free and democratic society" within the meaning of Art 3 – the "express limitations" clause. The s 57 limitation on the rights guaranteed by Art 16(b) would need to bear a rational connection with the legislative objective sought, and would need to be no wider than was reasonably necessary to achieve it (see the White Paper, supra, para 10.31). In *Keenan* the Court accepted that the object of s 57 was to enable particulars of a person in lawful custody to be taken and used for any "legitimate police purposes" – in the instant case to allow the police to record and use as evidence supporting the charge those particulars which "at that time, in the aggregate, served to single him out from the rest of the population" (per Casey J). However Cooke P accepted that there are "major limitations on any power of the police to interrogate the accused under s 57"; indeed that any power to question under s 57 "could not safely be assumed to go beyond the narrow and basic matters of name and date and place of birth, as sanctioned in *Moulton*". Casey J rejected any suggestion that the police could dig into a suspect's past "and build up a biographical resume or personality profile" by way of further evidence.

The remaining question then is whether a power to demand name and date and place of birth of an arrested person would be a justifiable limitation under Art 3. We may second-guess from Cooke P's comment in *Keenan*: that such a power "is after all scarcely a serious inroad into the right to silence. Such extension of police powers as it involves would probably not warrant justifiable concern". This suggests that the limitation on the Art 16 rights would not be viewed as excessive. Furthermore, all three members of the Court in *Keenan* seemed to accept that the power to demand name and date and place of birth of an arrested person was not unreasonable (albeit without expressing opinion whether the power would be consonant with the legislative object of s 57).

Finally, Cooke P in *Keenan* also observed the existence of legislation authorising non-custodial questioning by a police or other officer placing individuals under a liability to answer.[2] In *Taylor v New Zealand Poultry Board*, supra, the Court of Appeal held that the common law privilege against self-incrimination was not limited to testimony and discovery in judicial proceedings; that it was capable of applying outside Court proceedings when the obligation to answer questions or to provide information was imposed by statute. However the privilege could be excluded by the particular authorising statute. While Art 16 of the draft Bill would not afford protection against non-custodial questioning, the possibility remains that Cooke P would refuse to uphold a statute which sought to enforce a duty to answer by literal physical compulsion or a power of interrogation that was unfair or oppressive (*Wilson*, supra). □

---

1 But cf s 20 of the Evidence Act 1908 expressly distinguishing between a "promise or threat" and "the exercise of violence or force or other form of compulsion". *Semble* a threat of violence or force would clearly amount to "other form of compulsion" leading to automatic exclusion of statements under s 20 whether or not the threat was likely to cause an untrue admission.

2 See eg Transport Act 1962, ss 66, 67 and 68B; Sale of Liquor Act 1962, s 207; Customs Act 1966, s 297; Apple and Pear Marketing Act 1971, ss 41 and 45; Sales Tax Act 1974, s 60; Inland Revenue Act 1974, ss 17, 17A and 19; Statistics Act 1975, s 21. For further examples, see *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, pp 404 and 407.