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Cabinet and Government

It is one of the mysteries of the English constitutional structure that the single most important operating body within it, in terms of power, is one that in legal theory does not exist at all. This is the Cabinet.

As explained by David Walker in *The Oxford Companion to Law* Cabinet evolved from a small committee of the Privy Council. This committee consisted of the monarch's most trusted advisers. Originally they met separately and took decisions before joining in full meetings of the Privy Council. In the reign of Queen Anne (1702-1714) this committee became the most important one in the administration of Government. From about the time of George I, who succeeded Anne in 1714, the monarch ceased attending meetings. In the first instance apparently this was because of the acrimonious disputes that George I became involved in with the Prince of Wales at such meetings. While Cabinet continued its existence the King developed a practice of dealing directly with Ministers on an individual basis and thereby substantially reduced the importance of the body. However, Cabinet continued in existence and by the late 19th century it was completely responsible for the carrying on of the government of the country.

New Zealand, as usual, followed the English example and so maintained and developed the practice of Cabinet government in New Zealand. The Executive Council was the local equivalent of the earlier Privy Council.

In *Halsbury* (4 ed, vol 8, para 1084) Cabinet is defined in the following way:

> All important questions of policy and the general scope and character of the legislation to be initiated by the party in power are determined by the smaller group of Ministers known as the Cabinet, whose functions as a body are purely consultative and advisory, and whose advice in executive matters the Sovereign must, generally, accept.
>
> Details of the executive administration and the ordinary routine work of the executive are left to the various Government offices and departments, supervised and controlled, in the case of such of them as are political departments, by individual Ministers.

In New Zealand, of course, the matter has developed a little differently although it still follows the English pattern. Cabinet Committees are now a very important and significant part of Government administration. In years to come it may well be that membership of one or two key Cabinet Committees will be more significant and important in terms of the exercise of power than holding a particular portfolio. In New Zealand for the first time there has now been the development of the appointment of Ministers who are not members of Cabinet. They are however members of the Executive Council which is the formal legal body that gives effect to the policy decisions of Cabinet. Both in Australia and England it has long been common, of course, for there to be Ministers of the Crown who are not in the Cabinet.

It may be unfair or unrealistic to compare the description of Cabinet by practising politicians with that in *Halsbury*. But it is instructive. In *Halsbury* (4 ed, vol 8 para 1138) the functions of Cabinet, meaning of course the Cabinet in Great Britain, are set out in the following terms:

> In all ordinary matters of administration departmental ministers take full responsibility, subject to the control of the Treasury in matters of expenditure. Questions of policy raising important principles or involving ministerial differences, and questions which are likely to evoke serious debate in Parliament are, in practice, submitted either to the Cabinet or to the Prime Minister; and the Prime Minister may make any subject a matter for discussion by the Cabinet.
>
> The functions of the Cabinet have been defined as (1) the final determination of the policy to be submitted to Parliament, (2) the supreme control of the national executive in accordance with the policy prescribed by Parliament and (3) the continuous co-ordination and delimitation of the activities of the several departments of state.

In 1970 Mr B E Talboys, later Deputy-Prime Minister, described the New Zealand Cabinet almost exclusively in

terms of spending money. This is perhaps as good an indication of the New Zealand political ethos as one is likely to find. In the *New Zealand Journal of Public Administration* vol 33 p 3, he wrote:

> In New Zealand all the major decisions are made by Cabinet whether or not they involve more than one department. In fact, it is Cabinet which governs. It is Cabinet which determines the financial authorities granted to Ministers and unless a Minister has this authority he cannot spend, regardless of what the relevant Act may say. The sanction is not that of the law, of course; it is that of his Cabinet colleagues.

Attention needs to be drawn to the phrase "regardless of what the relevant Act may say." So much for the conceit of the supremacy of Parliament. It is not surprising that the present Deputy-Prime Minister, as everyone knows from his book, thinks of Cabinet in terms of power – apparently still unbridled even when he is in the saddle.

There is relatively little case law relating to the Cabinet. This is only to be expected in view of the fact that it is an informal body. For instance, it does not exist in the written Constitution of the Commonwealth of Australia. Nevertheless, it is obviously the body that matters, there as elsewhere, in terms of power and real authority.

There was recently in Australia a case considered by the Federal Court in which the nature and functions of Cabinet and the nature and functions of the Governor-General in Council came under consideration. It is interesting to see what comments were made in that case.

The case in question was *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218. The facts of the case related to a decision of Cabinet which had results affecting the interests of mining companies. The question was whether the mining company concerned had been denied natural justice because Cabinet had not given the company the opportunity of a hearing. Inevitably there were other related matters.

In the decision of Bowen CJ, at p 225, there is a discussion of the constitutional function of the Cabinet. Among other things Bowen CJ points out that the Cabinet is not mentioned in the Constitution. It is, he says, a body which functions according to convention. Until 1956 it was the practice in Australia for all members of the Ministry, including Ministers without portfolio, to be members of Cabinet. In 1956 this was changed by the then Prime Minister Robert Menzies who introduced the practice of a small Cabinet comprising some but not all members of the Ministry. Bowen CJ then explained:

> It is to Cabinet that the highest decisions of policy affecting Australia are brought. Often the questions arising involve intense conflict of interests or of opinion in the community. In Cabinet these conflicts have to be resolved. Decisions have to be taken in the public interest, notwithstanding that the lives, interests and rights of some individual citizens may be adversely affected by the decision.
>
> This is not to say that Cabinet should decide matters without considering all relevant material. But there are recognised channels for communicating arguments or submissions. Each Minister has the support and advice of a department of state. Representations may be made to the relevant department or in appropriate cases to the Minister. Every citizen has access to a local Member of Parliament or a Senator in the particular State, who can assist in the advancement of the individual citizen's point of view. The prospect of Cabinet itself, even by delegation, having to accord a hearing to individuals who may be adversely affected by its decisions, is a daunting one. It could bring the proceedings of Cabinet to a grinding halt.

In his concurring decision Sheppard J also made some comments on the questions of the reviewability of Cabinet decisions. For various reasons the three Judges decided they did not have to deal, in this case, in any final way with the relationship of Cabinet to the powers of the judiciary. At p 226 Sheppard J said:

> The question whether any decision of Cabinet can ever be the subject of the exercise of the Court's supervisory jurisdiction is, I think, a difficult one. In this case it is not necessary to give an answer to that absolute question and I do not propose to endeavour to do so. There are, however, a few remarks about the matter that I would make. It seems unlikely that Parliament will ever specify the Cabinet as the body empowered or required to make any decision or perform any act pursuant to a statute. There is no reason to think that the long-settled practice of designating the Governor-General (that is, the Governor-General in Council, which in turn means the Governor-General acting with the advice of the Federal Executive Council – see s 63 of the Constitution) or a Minister of the Crown (or other officer of the Commonwealth) as the person by whom a decision is to be made or an act performed will not continue to be followed. But, if a statute were to designate the Cabinet as the body empowered or required to make a decision pursuant to it, the decisions of the High Court in *R v Toohey* (1981) 151 CLR 170; 38 ALR 439 and *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; 41 ALR 1 would suggest that the Court would entertain an application for review of the decision on conventional judicial review grounds provided the application for relief was made by a person with sufficient standing to sue.

The significant point that arises from all this, and in particular from the comments by Sheppard J, is that there is considerable value, from the point of view of the Government, in retaining the informality of Cabinet as a body which does not have a statutory basis nor any statutory obligations. Clearly, as soon as Cabinet is given certain statutory obligations then it can become subject to the "supervision" of the judicial system as to the manner in which it carries them out because the Courts must be able to ascertain and consider whether in fact the law embodied in a statute has been given effect to in accordance with the intent of Parliament. Like "tradition" in theology, "convention" in relation to Cabinet as part of the constitutional framework allows development within flexible limits in accordance with the needs or political convenience of the times.

P J Downey

Case and Comment

A further endorsement of the Quistclose Trust: *Re EVTR Ltd* (1987) 3 BCC 389.

The important commercial significance of the extension of the *Quistclose* line of cases is underlined by this decision. In this case the appellant appealed to the Court of Appeal for the resolution of this fact situation.

The appellant had agreed to provide some financial assistance to a business (EVTR Ltd) run by a friend of his which was in considerable difficulties. The assistance provided (£60,000) was to be a loan solely to be applied for the purpose of enabling EVTR Ltd to purchase new equipment. However, even with the appellant's £60,000 EVTR Ltd did not have the purchase price of the new equipment it wanted. An agreement was therefore reached whereby the new equipment was ordered but with a leasing company interposed between the supplier and EVTR Ltd. The supplier informed EVTR Ltd that it could not supply the equipment requested immediately but would supply a rather cheaper temporary piece of equipment within two months from receipt of the order for the permanent, new equipment. In order to secure this temporary equipment the £60,000 was paid over to the supplier and the leasing company as a deposit against the other equipment which was to be supplied when it became available. It was common ground that EVTR Ltd knew that the £60,000 lent to it by the appellant was to be used solely to enable the company to purchase new equipment. The temporary system was delivered to EVTR Ltd but the ownership of it remained in the supplier.

Before the original order was fulfilled and the temporary equipment taken back by the supplier, Barclay's Bank appointed receivers under its floating charge debenture on the undertaking and assets of the company. At this point EVTR Ltd ceased trading and the supplier took back the temporary system. The new equipment which had been ordered was, naturally, never delivered. In total, the supplier and the leasing company returned to EVTR Ltd over £48,000 of the £60,000 paid over to them (the balance constituted agreed expenses which the two companies had incurred under their respective agreements).

The central issue for the Court's consideration was: was the appellant entitled to the £48,000-plus which had been returned or was the money part of the general assets of the company?

The appellant claimed that the sum should be paid to him because it was a refund of money which he had paid to EVTR Ltd for a specific purpose (the purchase of new equipment) which had failed. One of the leading authorities relied on for the appellant was the House of Lords decision in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. In that case, Quistclose lent a company (Rolls Razor Ltd) money to cover a dividend which the company had already declared. The sum was advanced on an agreed condition (known to the bank) that it would be deposited in a separate bank account and used only to pay the dividend. Rolls Razor Ltd went into liquidation after receiving Quistclose's money but without having paid the dividend. The bank claimed to be entitled to retain the money to reduce the company's indebtedness to it. It was held, however, that Quistclose could claim all the money back, the specific purpose having failed. Quistclose was therefore not limited to having to prove as an unsecured creditor in the liquidation of the company.

Lord Wilberforce (at p 580) stated that two questions had to be answered favourably by Quistclose if it was to recover its money. The first concerned whether, as between Quistclose and Rolls Razor Ltd, the terms on which the loan was made were such as to impress on the sum advanced a trust in favour of Quistclose in the event of the dividend not being paid. The second was whether, in that event, the bank had notice of the trust or of the circumstances giving rise to it as to make it binding on them. Where such conditions obtained Lord Wilberforce characterised the agreement as one which was

> for the payment of a person's creditors by a third person [and which gave] rise to a relationship of a fiduciary character or trust, in favour, as a primary trust of the creditors, and secondarily, if the primary trust fails, of the third person . . .

On the facts, as stated, Quistclose succeeded.

Reverting to the instant case, it was clear (following the *Quistclose* decision) that if the £60,000 had not been used before the receivers were appointed that the appellant would have been entitled to recover his full £60,000. Equally clearly, if the £60,000 had been outlaid on the original order for the new equipment and it had been delivered then the appellant would only have been an unsecured creditor of the company. But what was the position when the money was outlaid on a temporary system which was repossessed and some of the money returned? Dillon LJ at p 393:

> On *Quistclose* principles, a resulting trust in favour of the provider of the money arises when money is provided for a particular purpose only, and that purpose fails. In the present case, the purpose for which the £60,000 was provided by the appellant to the company was

> . . . the purpose of the company's buying new equipment. But in any realistic sense of the words that purpose has failed in that the company has never acquired any new equipment. . . . True it is that the £60,000 was paid out by the company with a view to the acquisition of new equipment, but that was only at half-time, and I do not see why the final whistle should be blown at half-time. The proposed acquisition proved abortive and a large part of the £60,000 has therefore been repaid by the payees. The repayments were made because of, or on account of, the payments which made up the £60,000 and those were payments of trust moneys. It is a long-established principle of equity that, if a person who is a trustee receives money or property because of, or in respect of, trust property, he will hold what he receives as a constructive trustee on the trusts of the original trust property. . . . It follows, in my judgment, that the repayments made to the receivers were subject to the same trusts as the original £60,000 in the hands of the company. There is now, of course, no question of the £48,536 being applied in the purchase of new equipment for the company, and accordingly, in my judgment, it is now held on a resulting trust for the appellant.

Woolf and Bingham LJJ agreed with Dillon LJ.

Several aspects of this decision call for comment.

First, the object of the loan was to secure *new* equipment. The installation of *temporary* equipment did not secure that end and, consequently, the appellant did not lose his rights under the trust. Such a narrow view augurs well for suppliers of credit who employ the *Quistclose* type of trust to protect their advances of credit until particular purposes are carried out. The more specific suppliers of credit are the longer are they likely to retain the protection of equity or see the exact purpose of their loan achieved.

Secondly, the interplay of equity and law seems clearly to have been accepted at a judicial level (*Re Kayford* [1975] 1 WLR 259; *Re Northern Holdings* Unreported 6 October 1978 Sir Robert Megarry VC; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (in liq)* [1985] Ch 207) but problems remain. For some the difficulties lie in characterising the relationship as a fiduciary one rather than that of debtor-creditor (see for example, Finn (ed) *Equity and Commercial Relationships* (1978) at p 237). For others the main difficulties lie in questions of enforceability: PJ Millett "The Quistclose Trust: Who Can Enforce It" (1985) 101 LQR 269.

Thirdly, the Quistclose trust may be criticised in that it does give a lender some of the advantages of a charge yet avoids any publicity as to that fact. If this situation is to alter legislation seems the only means. Austin and Vann (eds) *The Law of Company Finance* (1986) Ch 14 at p 387.

Fourthly, the ambit of the Quistclose trust is as yet ill defined. From Carreras the issue is raised whether a supplier of credit's actions in making a loan may be analysed in the same way as a debtor paying a debt. As Mr Justice Kennedy comments in Finn (ed) *Equity and Commercial Relationships* (1987) at pp 9 and 10:

> It would be a surprising result if any ordinary debtor of a trader could deny to that trader's unsecured creditors access to moneys paid by the debtor in satisfaction of his debt by imposing a particular trust upon those moneys.

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Insurance and social policy:

Mayfair Ltd v Pears or how to raise the blood pressure of ageing insurers

By Trevor Roberts, Executive Director of the Insurance Council of New Zealand Inc

In this not-too-solemn note Mr Trevor Roberts who was for a number of years in practice in Wellington tells of his car-parking misadventures. He then goes on to consider a related case concerning his car-parking landlord. He expresses concern about a comment by Cooke J in his judgment in the Court of Appeal in that case where the Judge refers to the practice of fire insurance as a matter to be taken into account. It is perhaps of interest to recall an earlier reference to this point in the Court of Appeal. Gartside v Sheffield, Young & Ellis *1983 NZLR 37 was a case of professional negligence. Richardson J in his judgment at p 51 said, "In so far as an action in negligence may be viewed in social terms as a loss allocation mechanism there is much force in the argument that the costs of carelessness on the part of the solicitor causing foreseeable loss to innocent third parties should in such a case be borne by the professionals concerned for whom it is a business risk against which they can protect themselves by professional negligence insurance and so spread the risk, rather than be borne by the hapless individual third party." The author of this article expresses some concern about the possible development of a legal concept relating liability to the likelihood or possibility of insurance cover.*

I have parked in Aurora House on the Terrace in Wellington ever since the building opened, and that's a period of about 20 years. The landlords were reasonably enlightened as landlords go, and when a "pirate" decided that notwithstanding the fact that I paid for the carpark he was going to use it, they towed the car away with alacrity. The situation deteriorated when the "1860 Tavern" opened across the road from the Mayfair carpark. I have even had a face-to-face confrontation with one of the pirates who when I remonstrated with him for parking in my carpark suggested that I could go and park somewhere else. The suggestion I made to him about where he could put his car, I regret reflected a lesser knowledge of the availability of carparking in and around the city of Wellington than it did of the details of the lower digestive tract. And, then there was the infamous occasion when I found my carpark occupied, I parked my car behind the offending vehicle to make sure that it wasn't shifted before the tow wagon arrived, and unfortunately the tow wagon arrived in my absence and towed my car away.

I was sympathetic to my landlord when it decided to sue one Brian George Pears who parked his car in Aurora House "conveniently but unlawfully", to use the words of Cooke P, (*Mayfair Ltd v Pears* unreported CA 175/85) and who when he returned found that the car had caught fire and the fire brigade was in attendance. The fire spread to the building, damaging the ceiling, the fire detection system, electrical cabling and lights. Mayfair Ltd sued Mr Pears for damage amounting to $8,475.81. Mayfair Ltd did not succeed.

As I recalled the number of occasions when I had trudged to my office from an alternative carpark, seething with anger, after my carpark had been nobbled yet again by a pirate, I experienced a twinge of regret that the Court of Appeal had been unable to find a way to discourage the customers of the "1860 Tavern". I read the judgment with both regret and, I think, understanding, and a certain amount of sympathy, until I came to a passage towards the end of the judgment of Cooke P which notwithstanding the fact that it is obiter dicta, raised the blood pressure of an oppressed car parker with insurance industry connections to unprecedented levels. I quote in full from page 7 of the judgment:

> The practice of insuring buildings against fire is so common that the loss in this class of case will normally be borne by insurers and thus spread. It is less likely, though perfectly conceivable, that the vehicle owner will have insured against this form of liability to the property of third parties. The comparative likelihood as to insurance should not have as much weight as the other considerations, but need not be dismissed as altogether irrelevant.

If that passage, tucked away towards the end of the judgment, foreshadows the establishment of a principle that liability follows the likelihood of the availability of insurance, then we have the development of a legal principle that will have a far more profound effect on my sense of wellbeing and those of insurers than the fact that people like Mr Pears occasionally

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Takaro Properties decision of the Privy Council

By Stephen Todd, LLM, of the Inner Temple, Barrister, Senior Lecturer, University of Canterbury

The decision of the Privy Council in Rowling v Takaro Properties Ltd *has been awaited with interest. Stephen Todd looks at the background to the case and analyses the judgment of their Lordships delivered by Lord Keith of Kinkel.*

On 30 November 1987 the Judicial Committee of the Privy Council delivered its judgment in the case of *Rowling v Takaro Properties Ltd*, [1988] 1 All ER 163. This brought to a conclusion a protracted and complex legal dispute which had begun as long ago as 1974. The full facts of the saga are set out in [1986] NZLJ 356 but a brief résumé will be given here.

Takaro Properties Ltd had run into financial difficulties in building and operating a luxury tourist fishing lodge near Te Anau. Mr Stockton Rush, the majority shareholder, sought to resolve these difficulties by arranging for an injection of fresh capital from an overseas source. The acquisition by a foreign company of shares in a New Zealand company needed the consent of the Minister of Finance, Mr Rowling, under the Capital Issues (Overseas) Regulations 1965, made pursuant to powers contained in the Reserve Bank of New Zealand Act 1964, s 28(1). Mr Rowling, however, declined to give that consent. Takaro commenced proceedings for judicial review and it was held by Wild C J in the Supreme Court (*Takaro Properties Ltd v Rowling* unreported, Wellington, 22 August 1974) and affirmed by the Court of Appeal (*Rowling v Takaro Properties Ltd* [1975] 2 NZLR 62) that the Minister had acted invalidly and in excess of his powers. The dominant reason for Mr Rowling's decision was the so-called "reversion factor" – a desire that the Takaro land should revert to New Zealand interests – and this, it was held, was a consideration that Mr Rowling was not entitled to take into account in terms of the empowering Act and regulations. In the meantime, however, the overseas company had lost interest in the project. Takaro could find no other source of capital and shortly afterwards went into receivership.

Takaro then sued Mr Rowling claiming damages on a number of grounds. In particular it was alleged that the Minister had been negligent in taking into account an irrelevant factor when deciding to turn down the application. Mr Rowling sought to have all the claims struck out as disclosing no cause of action. His application was successful at first instance (*Takaro Properties Ltd v Rowling* [1976] 2 NZLR 657) but in the Court of Appeal it was held to be at least arguable that the Minister might owe a common law duty to Takaro to take care in the actual making of his decision (*Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314). This allegation thus was allowed to stand.

When the matter eventually came to trial, Quilliam J accepted that the Minister owed a duty to Takaro but held on the facts that the duty had not been broken and also that the plaintiffs had failed to show that the refusal of consent had caused the losses being claimed ([1986] 1 NZLR 22). Takaro appealed once more to the Court of Appeal which held unanimously that in all the circumstances the Minister had in fact been negligent and that the negligence did cause Takaro's loss, although the amount of the loss was admittedly very difficult to quantify ([1986] 1 NZLR 51). Mr Rowling appealed in turn to the Privy Council, which allowed the appeal and restored the judgment of Quilliam J. Their Lordships discussed whether a claim in negligence could properly be maintained at all but actually decided the case by agreeing with the trial judge that Mr Rowling had not been negligent.

Various special features to *Takaro's* case are considered in my article on the Court of Appeal's decision in [1986] NZLJ 356. This discussion supplements that article.

The duty of care

Lord Keith, delivering the judgment of their Lordships, recognised that the character of Takaro's claim was novel. He said that so far as their Lordships were aware it had never previously been held that where a Minister or other governmental agency mistakes the extent of its powers and makes a decision which is later quashed, an aggrieved party has a remedy in damages for negligence. In *Dunlop v Woollahra Municipal Council* [1982]

AC 158 Lord Diplock had expressed reservations in respect of such a claim and Lord Keith made it clear that in the present case their Lordships entertained similarly grave doubts. They had in fact found it unnecessary to make a final determination on the question of the existence or (if it existed) the scope of any duty resting on the Minister, as will be explained below. Such was the importance of the case, however, that they felt it would be inappropriate and perhaps discourteous if they were to make no reference to the relevant considerations bearing upon the duty issue.

The first of these considerations was the distinction between policy or planning decisions and operational decisions. Quilliam J had not found it easy to attach these labels to the decision of the Minister but had concluded that the decision was the antithesis of policy or discretion and therefore he equated it with having been operational. Lord Keith expressed sympathy with Quilliam J in his difficulty in solving the problem by simple reference to this distinction. He inclined to the opinion that the distinction did not provide a touchstone of liability but rather was expressive of the need to exclude altogether those cases in which the decision under attack was of such a kind that the question whether it had been made negligently was unsuitable for judicial resolution, as concerning for example the allocation of scarce resources or the distribution of risks. Classification of the relevant decision as a policy decision might exclude liability but a conclusion that it did not fall within that category did not mean that a duty would necessarily exist.

Lord Keith observed at this stage that one of the considerations underlying recent decisions of the House of Lords (*Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210) and of the Privy Council (*Yuen Kun Yeu v The Attorney General* [1987] 3 WLR 776) was the fear that a too literal application of Lord Wilberforce's two stage test in *Anns v Merton London Borough Council* [1978] AC 728 at 751-752 might be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it was appropriate that a duty of care should be imposed. The question was of an intensely pragmatic character, well suited for gradual development but requiring most careful analysis. It was, furthermore, one upon which all common law jurisdictions could learn much from each other for the Courts all were searching for and weighing the relevant competing considerations.

Policy Considerations

It was in this spirit that a case such as the present ought to be approached. Lord Keith thought that the decision of the Minister was capable of being described as having been of a policy rather than an operational character, but that the allegation of negligence was not of itself of such a character as to render the case unsuitable for judicial decision. There were, nonetheless, certain considerations which militated against the imposition of liability. Attention should, he thought, be given in particular to the following matters.

First, the only effect of a negligent decision such as was alleged to have been made was a delay until it was corrected by the processes of judicial review.

Secondly, in the nature of things it was likely to be very rare indeed that an error of law of the kind in question could properly be described as negligent. Anybody, even a judge, was capable of misconstruing a statute without such misconstruction attracting the epithet "negligent". Although this simple fact pointed to the extreme unlikelihood of a *breach* of duty, it was nevertheless relevant to whether a duty should be recognised in the first place.

Thirdly, there was a danger of overkill. It was to be hoped that imposition of liability in negligence would generally lead to a higher standard of care in the performance of the relevant act. Sometimes, however, the cure might be worse than the disease. Thus building inspectors might react to the imposition of liability for negligent inspections of building foundations by unnecessarily increasing the requisite depth of the foundations, thereby imposing a substantial financial burden upon members of the community. Liability for negligent decision-making, as in the present case, might prompt a cautious civil servant to go to extreme lengths in ensuring that legal advice, or even the opinion of the Court was obtained before decisions were taken.

Fourthly, there would be great difficulty in identifying cases where there was a duty to seek legal advice. A Minister was not always under a duty to seek such advice whenever he was called upon to exercise a statutory power and it was difficult to see how cases in which a duty to seek advice should be imposed should be segregated from those in which it should not.

Fifthly, the Minister in exercising his discretion was acting as the guardian of the public interest. In the present case he was acting under legislation enacted not for the benefit of applicants for consent to share issues but for the protection of the community as a whole.

Lastly, the Minister was under no duty to exercise his discretion within any particular time; and if he acted ultra vires and delay occurred before he made an intra vires decision in the plaintiff's favour, the effect of the delay would only have been to postpone the receipt by the plaintiff of a benefit he had no absolute right to receive.

Summary

In summary, Lord Keith thought that the imposition of a duty would on the one hand lead to recovery only in very rare cases and then only for the consequences of a delay which should not be long; and might, on the other hand, lead to considerable delay occurring in a greater number of cases, for which there could be no redress. In all the circumstances it had to be a serious question whether it would be appropriate to impose liability in negligence in these cases or whether it would not rather be in the public interest that citizens should be confined to their remedy in those cases where the Minister or public authority has acted in bad faith.

Although not finally deciding the matter, it is thus apparent that their Lordships were strongly inclined against recognition of a duty. This cautious view is in line with the decisions in *Peabody* and *Yuen Kun Yeu*, the two cases mentioned, and

other recent decisions of the House of Lords in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 and *Curran v Northern Ireland Co-ownership Housing Association* [1987] 2 WLR 1043. In New Zealand, on the contrary, the Court of Appeal generally has been prepared to continue enlarging the boundaries of liability, as is illustrated by *Takaro* itself and by such controversial decisions as *Meates v Attorney-General* [1983] NZLR 308 and *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (as to which see below).

The Privy Council did not treat the fact that *Takaro's* claim was for pure financial loss as in itself a broad reason for negating a duty. It looked instead to any special factors bearing upon the particular type of claim. As to these factors, we can agree that the Minister could not shelter behind a discretionary function immunity and that the character of the claim was not unsuitable for judicial decision. To recognise a duty to make a valid decision does not call into question any political, economic or social merits of the decision.

The other identified factors, however, in their totality, do seem to justify their Lordships' caution. The problem of identifying cases where legal advice should be taken is, perhaps, especially significant. In the interlocutory proceedings ([1978] 2 NZLR 314) the Court of Appeal had affirmed that merely to prove without more that a decision was invalid was not sufficient foundation for an action for damages. This obviously correct conclusion arguably sits uneasily with recognition of a duty in negligence. Every invalid administrative decision potentially could lead to a common law action. It would, however, be quite uncertain when such an action could be maintained.

United Kingdom cases

The opportunity to mount a collateral attack on any wrongful decision via the law of negligence could indeed open up a new and highly fertile field for litigation. The attempt has been made in cases analogous to *Takaro* and in the United Kingdom a duty has been specifically rejected. In *Jones v Department of Employment* (*The Times*, 27 November 1987), the English Court of Appeal held that the correctness of a decision made by a social security officer concerning a claim for unemployment benefit could be challenged by statutory process of appeal or by way of judicial review, but the adjudication officer owed to the claimant no duty at common law to take care when coming to his decision. In New Zealand, on the other hand, there is *Craig v East Coast Bays City Council* [1986] 1 NZLR 99, decided shortly after *Takaro*. The Court of Appeal held here that a local authority owed a duty of care to a landowner injuriously affected by the authority's grant to his neighbour of building permission for a new house, in circumstances where the permission was given by way of an unnotified dispensation from the requirements of the district planning scheme, whereas it should have been given only on a notified application. No doubt the policy factors mentioned in *Takaro* do not all apply to the situation in *Craig* in exactly the same way, although the "looking over the shoulder" factor could be particularly potent. In broad principle the cases would seem hardly distinguishable.

Purpose of the empowering legislation

Their Lordships declined to answer the duty question because they had come to the conclusion that, on the findings of fact of Quilliam J, the Minister's error was not negligent. They thus turned to what was perceived as the central question in the case, that of breach of duty. This involved in the first instance an examination of the legislation which conferred the ministerial powers and duties. In the result their Lordships doubted whether Mr Rowling's decision should have been held to be invalid in the first place.

In the original review proceedings the first instance Judge and the Court of Appeal had given a restrictive construction to the words of s 28 of the 1964 Act. These conferred a power on the Governor-General by Order in Council "if he is satisfied that it is necessary to do so for the purpose of safeguarding in the public interest the credit, overseas resources, or development of New Zealand" to make regulations providing for "the . . . control of overseas exchange transactions and of other transactions affecting or likely to affect at any time the overseas resources of New Zealand". It was held that the expression "development of New Zealand" contemplated development by reference to the essential need of the country to maintain its overseas resources and that the ownership of land within New Zealand by overseas persons was an entirely distinct and different matter. The reversion factor accordingly was irrelevant. Lord Keith, however, observed that the three matters to be safeguarded, "credit", "overseas resources" and "development of New Zealand" were expressed disjunctively and were not of a like character. He doubted whether there was good reason for construing "development of New Zealand" in a narrow fashion. It was true that the only types of transactions which might be subjected to control were those affecting or likely to affect overseas resources, but this went to definition, not to the purposes for which the control might be exercised. The proposed share issue qualified for it involved an increase of capital provided by non-residents, an increase in the claims of non-residents to payment of income and profits from New Zealand land and a dilution in the interests of New Zealand residents.

Lord Keith found support to this view in s 28(2)(c), which authorised the making of regulations in respect of the commencement of business in New Zealand by companies incorporated outside New Zealand. The 1965 regulations made unlawful such commencement of business without the consent of the Minister. The effect on the overseas resources of New Zealand could not, he thought, reasonably have been intended by the legislature to be the only relevant aspect for consideration by the Minister when presented with an application of this kind. A Reserve Bank of New Zealand booklet "Investment in New Zealand by Overseas Residents" gave current government policy as the governing consideration and this was only reasonable. The Minister might wish to take into account matters such as the likely effect on competition, the social desirability of the proposed

business and the standing in New Zealand eyes of the government of the country where the company was incorporated. It would be strange if the Minister could not refuse his consent unless an adverse effect on overseas resources could be shown. If, however, the development of New Zealand could be seen to embrace all aspects of such development, social, economic, cultural and environmental, reasonably considered important by the responsible Minister, the undesirable consequences envisaged would be avoided.

That view, said Lord Keith, clearly was a tenable one. Mr Rowling could not be regarded as unreasonable or negligent in holding it. If he did hold it he could reasonably regard the reversion factor as bearing upon the development of New Zealand such as was proper to influence his decision.

This interpretation of the Act and regulations was advanced at the time of the Court of Appeal's decision: see Keith (1977) 7 NZULR 264. It has now ultimately found judicial support.

Breach of duty

In his judgment Quilliam J pointed out that Mr Rowling in his evidence at no stage acknowledged that he knew that he was not entitled to take the reversion factor into account. The Minister conceded, however, that he could not take it into account if it stood alone but thought he could do so in combination with various other factors. These included the doubtful viability of the project, the unwise deployment of resources that was involved, the company's under-capitalisation and total indebtedness and the lack of clear benefit to New Zealand as a whole. In their totality they justified his refusal of consent. Quilliam J held that all these factors were irrelevant but that the Minister's entirely honest mistake nonetheless could not be regarded as a negligent mistake. His sharing of the responsibility with other colleagues on the Cabinet Economic Committee also showed that he had been careful. As regards an alleged duty to seek legal advice, His Honour thought there was no more reason for the Minister to have felt under an obligation to take advice on this matter than upon any other.

The Court of Appeal reversed Quilliam J's decision. Cooke J referred to the Minister's evidence that he knew that he had no right to take the reversion factor into account if it stood alone but that on his understanding of the regulations he was entitled to take it into account provided he also took into account other considerations. His Honour said that was such an unusual supposition that he could not help thinking that the Minister should reasonably have seen it as crying out for legal advice. Woodhouse P similarly maintained that the honest use of material known to be irrelevant involved an illogicality which hardly met the standard of care to be expected.

Lord Keith pointed out, however, that the Court of Appeal appeared to have ignored the prior finding of fact by Quilliam J that Mr Rowling did not know that the reversion fact was not relevant. The only fair interpretation of the Minister's evidence was that he considered the reversion factor alone could not justify him in reaching his decision, not that he knew that it was not open to him to take it into account. A reading of the transcript reinforced this conclusion. The interpretation favoured by the Court of Appeal admittedly required that the Minister must have been in an extraordinary state of mind but Lord Keith could see no proper basis upon which so absurd a view should be attributed to him. For this simple reason His Lordship considered that the Court of Appeal was not entitled to depart from the conclusion reached by Quilliam J on the issue of the reversion factor. It followed that there was no basis either for interfering with his conclusion about the alleged obligation to seek legal advice.

On this question of breach there is little that needs to be added. Quilliam J's conclusion that there was no negligence was, it is submitted, quite justifiable: see [1986] NZLJ at 360-361. The Privy Council was right to restore his decision.

Counsel's concession

One further point concerned the effect of certain concessions said to have been made by counsel for Mr Rowling. Cooke J and Somers J both stated in their judgments that it had been conceded before the Court of Appeal that, if legal advice had been taken, it would have been to the effect that the reversion factor could not be taken into account. Before their Lordships it was asserted by counsel, and not disputed by counsel for Takaro, that no such concession had been made. Lord Keith added, however, that their Lordships had been informed that on their return to New Zealand counsel were called to the Court of Appeal; and, after discussion with certain members of that Court it was accepted that counsel for the Minister had conceded to the Court of Appeal that the Minister said that he knew that he could not take the reversion factor into account if it stood alone, and further that, if legal advice had been taken, it would have been that the reversion factor could not be taken into account. Lord Keith said that the former concession reflected the actual words used by Quilliam J (although not the actual words used by the Minister as recorded in the transcript) but begged the question of the proper interpretation to be placed upon those words. The second concession was of no relevance as there was no basis for departing from the decision of Quilliam J that the Minister was not negligent in failing to seek legal advice. Lord Keith had difficulty, however, in seeing on what basis counsel came to make any such concession, bearing in mind that the Minister had always asserted that he believed that he was entitled to take it into account.

An explanation for counsel's apparent concession needs to be given. It was made in response to questions from the bench concerning the advice the Minister would have received if he had said to his legal advisers that he knew that he could not take the reversion factor into account on its own but had asked them whether it could nonetheless be relevant in conjunction with the other factors militating against the application. This is explained in a joint memorandum of counsel for the appellants and counsel for the respondents which was prepared for the Judicial Committee after the hearing. Given the premise, counsel conceded that the advice would have been that the reversion factor could

not be taken into account. Counsel did not, however, accept the premise of the question but on the contrary argued throughout that the Minister could lawfully take that factor into account or, if not, that he could reasonably think that he could. Certainly the concession as it is presented in the judgments in both the Court of Appeal and the Privy Council, where the premise is not mentioned, would seem to run directly counter to the argument that Mr Rowling had not been negligent.

Causation and damages

Since their Lordships had reached the clear conclusion that, on the assumption that he was under a duty of care, the Minister committed no breach of duty, it was unnecessary for them to deal with the issue of causation or damages. This, perhaps, is a pity. The Court of Appeal had awarded damages based on the value of the opportunity to trade out of trouble of which the plaintiff had been deprived. The appropriate figure could, it was admitted, be assessed only very approximately. In *Craig* damages similarly were based on the chance that the plaintiff might have been successful in objecting to his neighbours' building plans. Damages were thus given in both cases for loss of a chance of a benefit. The circumstances in which this approach may be taken certainly need elucidation.

It has been held in the House of Lords that the debate on damages for loss of a chance cannot arise where there has been a positive finding that before the duty arose the damage complained of had already been sustained or had become inevitable. In such a case, once liability is established on the balance of probabilities the plaintiff's loss is payable in full. It is not discounted by reducing his claim by the extent to which he has failed to prove his case with 100 percent certainty. See *Hotson v East Berkshire Health Authority* [1987] 3 WLR 232 per Lord Ackner at 248. The controversial question is whether the all or nothing approach is appropriate where at the time of the breach of duty any consequential damage is entirely speculative. If it is not, recovery would not depend on proof that the chance of loss could be assessed as being greater than 50 percent. Any discount on the full value of the benefit in theory could range from 1 to 99 percent.

Perhaps it might be helpful to revert to the question of duty, with which this issue seems to be intimately bound up. A duty of care does not exist in the air. It must be defined by reference to the foreseeability of some damage. In the present context the damage can only be the chance of gaining or avoiding a consequence, as the case may be. The duty must be to take care not to deprive the plaintiff of that foreseeable chance. It seems therefore that whether a novel duty of this kind ought to be recognised should be seen as ultimately a question of judicial policy, not as one of strict causation or of damages. If this is right it perhaps simplifies the nature of the enquiry. The matter has in fact been discussed in these terms in the context of claims against solicitors by disappointed beneficiaries for negligently depriving them of the hope of a benefit under a will. The policy arguments that the proposed right of action would produce less than perfect justice in the light of its imponderables, that it had little to do with any moral claim on the part of the plaintiff and that the quantification of loss would be complex and difficult were all rejected: see *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37; *Ross v Caunters* [1980] Ch 297; cf *Seale v Perry* [1982] VR 193.

Interest on damages

A final matter dealt with by the Judicial Committee concerned the award of interest under s 87 of the Judicature Act 1908. The Court of Appeal allowed interest at the prescribed maximum rate at the date of judgment, which was 11 percent, for the whole of the period from the date of the decision to refuse consent to the date of judgment. For part of that period, however, the prescribed rate was less than 11 percent. Their Lordships were unable to infer an intention on the part of the legislature that the prescribed rate should be retrospective. The results if it were so would be unfair and even bizarre. They were clearly of the opinion that regard should be had to the rate of interest from time to time prescribed during the relevant period and that the maximum rate for each part of the period should be reckoned accordingly.

A concluding observation

It is appropriate to end this article with a word of sympathy for Mr Rush. His attempt to promote a tourist lodge at Te Anau resulted in 13 years of litigation, seven Court hearings and the ultimate failure of both his business and his claim in negligence. Certainly he might be forgiven for taking a jaundiced view of the whole affair. □

Correspondence

Sir,

Does the maxim, "Certum est quod certum reddi potest", still have relevance in the common law which appears to be approaching a state of chaos? Over 200 statutes, to say nothing of regulations, in 12 months. Many of them amended before leaving the Government Printer, and much of the drafting thereof being gobbledegook.

Everything is being left to the discretion of the Judges who often cannot agree or say "what is fair". It depends on the individual approach of each Judge which differs like "The Chancellor's foot", and the Courts are cluttered with appeals. Even in your latest issue the problem emerges in various articles, eg, Matrimonial Property (extraordinary circumstances), Indecent Publications (test for indecency – is evidence required?), Recklessness in Criminal law (conflicting decisions here), What is serious violence? (Criminal Justice Act), Contractual Mistakes Act referred to in the article as "the triumph of private intentions unknowable to others". How does one advise one's client?

Perhaps we may eventually come to the stage of returning to simple trial by combat, and as a fitting tombstone place a Bill of Rights in the graveyard.

F G Opie

A Scottish Lord Chancellor

By Michael L Nash, School of Administration Studies, Norwich City College

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Lord Mackay of Clashfern is the first member of the Scottish bar to be appointed Lord High Chancellor of Great Britain since the Act of Union in 1707.

Since that time there has been a number of Lord Chancellors who were Scots, but none of them have been trained at the Bar of their native land. This is bound to make a difference to the way Lord Mackay looks at his onerous office. The ordinary man in the street (if there is such a person) does not usually know that there is a different system of law altogether in Scotland; he may, it is true, have heard of the third possible verdict in Scottish criminal law of "Not proven", but this is about all. In more exalted circles there is also some ignorance. Writing in 1979, Lord Kilbrandon declared:

> I am continually being astonished to find how few non-lawyers outside Scotland know that England and Scotland have distinct systems of law and independent courts of justice – except that they share a supreme civil court of appeal in the House of Lords – so that the courts of one country have no jurisdiction in the other, unless reciprocity has been arranged for by statute. Indeed in England Scottish law is foreign law and vice versa, with all that that implies.

That is now bound to change somewhat, for Lord Mackay has been not only a judge in the Court of Session (the highest Court of Appeal in Scotland), but also one of the two Scottish Law Lords.

Lord Mackay's Scottish predecessors in the office emphasised their English connections by studying at the English bar, and usually going to English universities. Thus, Lord Erskine, who become Lord Chancellor in 1806, was the son of an impoverished Scots earl, and went to Trinity College, Cambridge, in common with the new Lord Chancellor. Lord Campbell, who became Lord Chancellor in 1850, was the son of a minister of the Kirk, and graduated from St Andrew's at the age of fifteen! His chief claim to fame in this quarter, however, lies in the fact that in 1845, he produced two volumes of the *Lives of the Lord Chancellors*. These are still referred to, and useful, but both in his lifetime and since, they have received a hammering from the critics, as has the noble Lord himself! Thus Gareth H Jones, Downing Professor of Laws at Trinity College Cambridge, wrote:

> As true history the *Lives* are sadly wanting; authorities are misquoted, and statements of fact are misstated. It is impossible to rely on the sources of his information!

However, if we cannot rely on his sources, we may perhaps quote from his eminently readable works when he makes apposite statements himself. One of the best of these is: "the history of the holders of the Great Seal is the history of our Constitution as well as of our jurisprudence". Lord Loreburn, Lord Chancellor in 1905, born Robert Threshie Reid, had the notable distinction of being a Scot born in the island of Corfu in 1846, when, with the other Ionian Islands, it was under British administration. He returned to Dumfries as a child, and, in the words of Rubert Heuston, he shared with the Prime Minister who appointed him, Sir Henry Campbell-Bannerman, "some of the complexities of mind and character which appear occasionally in the Lowland Scot". However, for one who was Lord Chancellor it appears particularly damaging that "he was not interested in law"! It reminds one of the aphorism of Louis XV, who thought that the Archbishop of Paris "should at least be a Christian"!

A Scottish Lord Chancellor

Dear Sir,

I refer to Michael Nash's article (*NLJ*, December 25, 1987) which commenced with the statement that: "Lord Mackay is the first member of the Scottish bar to be appointed Lord High Chancellor of Great Britain since the Act of Union in 1707."

Further research will, however, reveal that Alexander Wedderburn, afterwards Lord Loughborough, was admitted to the Faculty of Advocates on June 29, 1754. He received the Great Seal from George III on January 28, 1793.

Lord Loughborough, who was also 1st Earl of Rosslyn, was the son of a Scottish judge. He left the Scottish bar for the English in 1757 and entered Parliament in 1762.

Yours faithfully,

M N Tanner

New Law Journal January 15, 1988

Lord Finlay, born Robert Bannantyne, in Newhaven, near Edinburgh, was Lord Chancellor briefly for twenty-five months during the First World War; and David Maxwell Fyfe, who became Lord Kilmuir, and Chancellor in 1954 was born in Edinburgh in 1900. Finally, Lord Haldane, certainly not the least of these, was born in Edinburgh in 1856. Although a man of great and varied talents, he himself recognised that "he did not have the passionate absorption in the law required of a really great judge".

Unknown Quantity

So what of the new Scottish Lord Chancellor? He is to many a new and largely unknown quantity. What he will make of an office with many duties will make interesting reading. These many duties are well known, and it is not within the scope of this article to enumerate them all. But it is always worth remembering that the office of Lord Chancellor is the living denial of Montesquieu's "Separation of Powers", which so impressed him in the English [or then British] legal system in 1748 (Book XI of *Esprit des Lois*). It is true that Montesquieu thought of "an appropriate distribution" of the executive, legislative and judicial powers, rather than a rigid separation, nevertheless the Lord Chancellor does seem to deny all that by having a finger in every pie. It is no wonder that Lord Havers considered at last, with his failing health, that it was all too much for him.

Duties and Tradition

Yet for some of the facets of the office there has been emphasis at one time, while the same aspect has been given a low profile at another time. The royal connection remains indelible. The nickname which all remember "Keeper of the King's Conscience", was appropriate not only when the Lord Chancellor was the King's confessor, but also on account of the equitable jurisdiction which grew up as the result of being the king's representative and surrogate.

The Lord Chancellor cannot legally leave the country without the Sovereign's permission; it is high treason to slay him. His purse formerly held the Great Seal, although now it is empty except on the occasion of the State Opening, when it holds a copy of the Queen's Speech. Nineteenth century Chancellors were very conscious of this, for after Prince Albert's death, Queen Victoria either did not attend the State Opening (and without her, it was devoid of State) or, if she did, would not read the Speech! From 1866 until 1886 it was read by the Lord Chancellor in her presence.

It is also his duty to report the Royal Assent to Bills, and he is the "medium of communication with the Sovereign". It is foreseeable that there will be a coronation within the next twenty years, and on that occasion the Lord Chancellor looms large indeed: presiding over the Court of Claims, and taking a largely supportive role in the ceremony itself. Before we think that unlikely, Lord Eldon was Chancellor from 1807 until 1827, and it was not his first time as Chancellor!

The office of Lord Keeper of the Seal, (often held with that of Lord Chancellor) ended in 1772, and nowadays the Great Seal Act, 1884, and regulations made under it, provide for the classes of state documents which must be authenticated by the Great Seal of the Realm.

A Working Judge

Lord Mackay has been very much a working judge, and the judicial side of his office will occupy him a great deal. Although a member of the Court of Appeal, nominally Head of Chancery Division, and a Law Lord, his actual appearances in Court will be few, for, as Heuston noted, since 1945 the judicial side of the Lord Chancellor's work has become less. The reason is one of timetabling! The House of Lords as a political entity now convenes at 2.30 instead of 4.15, and this has meant that the Lord Chancellor does not have the time he once did to preside in the House of Lords as a judicial body. Moreover, since the coming of the Welfare State, his duties have increased enormously with reference to special or administrative tribunals, which now exceeded 420 in number. His political timetable includes not only Cabinet meetings, but Cabinet Committees, many of which he presides over as Chairman.

As the first Scots Chancellor to be a member of the Scottish bar, Lord Mackay is doubtless very conscious that what has been called the third phase since the Act of Union in 1707 is not an easy one, when one considers the relations between England and Scotland. The Union itself is subject to recurrent criticism, and constitutionally may be a bed of thorns.

Scots Law

The influence of Scots law upon English law will be well known to the new Lord Chancellor, but he will also doubtless be aware of the case of *Lyle v Rosher* [1959] 1 WLR 8, where Lord Reid issued a warning against attempting to apply English equitable principles to Scottish cases, since Scotland has never had a separate equitable jurisdiction!

When a statute is common to both England and Scotland, it is highly desirable, to avoid confusion, that antecedent Scottish decisions should if possible be followed, (Sir Carleton Kemp Allen, Law in the Making, 1964). Decisions in Scots law may be decisive in appeals from Scottish judgments to the House of Lords. In special circumstances our courts in England show no hesitation in borrowing from the law of Scotland. Thus, when after the passing of the Homicide Act 1957 [one of the first really important statutory interferences with the Common Law of murder] the first English case arose of the interpretation of "diminished responsibility", and the Lord Chief Justice, Lord Goddard, said that the doctrine had been borrowed from Scots law, and he accepted as the governing pronouncement on a notoriously difficult question the Scottish case of *HM Lord Advocate v Braithwaite* (1945) SC (J)55.

"Not a Thatcherite"

Many other Scottish precedents may be taken up by the new Lord Chancellor; although described by *The Times* as "not a Thatcherite" (it may have been one reason why he was chosen) he will have to steer towards such reforms as are needed in conveyancing, legal aid, and perhaps certain amendments in criminal law and procedure. "Gazumping" is impossible in Scotland, and the conveyancing

continued on p 45

Mining legislation and the reservation of mineral resources in New Zealand

By Peter Ackroyd of the Centre for Resource Management, Lincoln College and University of Canterbury

It is the argument of this article that mining rights should vest in the owner of land, rather than, as at present, largely in the Crown. The present allocation of mining rights through a licensing system attempts unsuccessfully in the writer's opinion to resolve conflicts between landowners, and miners and environmentalists and what he calls recreationists.

Introduction

Mining legislation establishes rights to minerals and so institutes a system of rewards and penalties for mining development; a system which is an important determinant on whether minerals are to be mined and how they are to be mined. Minerals are but one element of a natural resource complex comprising land, water, plants and animals, and the structures the land supports; a resource complex upon which diverse and competing values are placed. The fact that minerals are located within a resource complex makes it difficult to specify a system of rights to minerals which allows competing interests of miners, landowners, conservationists, and recreationists to be considered in an efficient and just manner.

Mining legislation in New Zealand reserves most mineral resources to the Crown. The Crown also allocates rights to minerals and establishes controls on mining activity. Reservation to the Crown of rights to minerals is an important provision severing the rights to minerals from the bundle of rights which comprise private property.[1] The consequences of this severance of rights dominates present institutional arrangements for allocating and managing mineral resources in New Zealand. The purpose of this paper is to examine the rationale for the separation of rights to minerals from the rights to land.[2]

Mining legislation and mineral reservation

Under common law mineral ownership was determined in accordance with the maxim: *cuius est solum eius est usque ad coelum et ad inferos* (To whom belongs the soil it is his, even to Heaven, and to the middle of the earth: McVeagh, op cit, 39.) The apparent exceptions to the maxim were the "royal metals", gold and silver, which remained subject to Crown ownership.

The claim of the Crown to a prerogative right to gold and silver within lands of the Realm of England was first asserted in the Case of Mines 1567 which was authoritative for the proposition that natural deposits of gold and silver belong to the Crown, irrespective of the ownership of the surrounding soil.[3] The relevance of the royal prerogative to modern resource management is not at all clear.[4] The advocates for royal prerogative in the Case of Mines argued its justification in terms of excellency (the most excellent products of the soil should go to the most excellent person in the realm), necessity (the King needed money to raise an army and enforce laws while treasures of gold and silver in the hands of a subject would enable the subject to raise up forces against the Crown), and convenience (gold was necessary for coin of commerce and only the Crown could mint). (Parcell, 13-14)

In Britain, the United States of America, and Canada there is extensive private ownership of minerals and as a consequence the legal regime governing mineral exploration and production in these countries facilitates private leasing and licensing arrangements between landholders and mining companies. Australia and New Zealand also inherited common law and until the last quarter of the nineteenth century private landowners were usually entitled to all minerals other than gold and silver within their

land. Subsequently both colonies adopted the policy of reserving all minerals from Crown grants of land.[5]

Throughout the history of mining legislation in New Zealand the right of the Crown (ie the state) to minerals has been progressively extended to include minerals other than gold and silver leading to consistent abrogation of the common law maxim. (McVeagh, 39) Reservations of minerals have been perpetuated in successive consolidations of legislation; for example, provisions within the Mining Act 1971 replaced provisions in the Land Act 1948 (s 59) which reserved to the Crown mineral ownership and access rights in respect of all land alienated by the Crown since April 1949. The reservation of coal, to which the Mining Act 1971 does not apply, has been similarly perpetuated with reservation provisions in the Coal Mines Act 1979 (s 5) replacing reservation provisions of the Coal Mines Act 1925.[6] Landowners with old titles to their land, however, may retain the rights to minerals as the legislation in place at the time the land was alienated did not allow for reservation, and minerals other than gold and silver belong to the landowner as does the land itself.[7]

Mining legislation and resource management

New Zealand's mineral legislation is currently under review. The aims of the review are to provide simpler and faster methods of dealing with licence applications, to give local people more opportunity for comment, to overhaul environmental provisions, and to consider the rights of property owners affected by mining. New legislation is also anticipated as achieving a balance between conservation and development. (*The Press*, Christchurch, 30 July 1985) In April 1987 the planned changes to the mining legislation were deferred, partly as a result of environmentalists' concerns that their interests were inadequately considered. (*The Press*, Christchurch, 4 April 1987)

Many, if not all, of the major problems to be addressed by the review of mining legislation are related to the separation of rights to minerals from rights to land. Under current arrangements the Crown allocates both rights to access and rights to mine administratively.[8] This allocation procedure means the value of the resource is not indicated by price, making it difficult to balance the value of mining against the interests of other affected parties such as landowners and environmentalists. Removal of rights to minerals from the surface owner creates the problem of accounting for the surface owner's interests and, moreover, miners holding rights granted under existing procedures have no financial incentive to consider the costs of mining to surface owners other than the costs they are liable for.[9] Conflict situations result. Further problems result from the complex procedures for granting rights, and the accompanying raft of regulatory measures, to allow landowner and third party interests to be represented in negotiations for the transfer of rights to miners. These measures attempt, albeit unsuccessfully, to resolve conflicts between landowners and miners (and of course environmentalists) but effectively contribute to delays in approval for mining rights and impose costs on all parties.

Interestingly enough the 1986 review of mining legislation concentrated on the implementation of legislation rather than evaluation of the character of that legislation. The argument used against abandonment of mineral reservation and ownership to the Crown was that such action would represent a complete reversal of the policy which has been followed for most of this century; indeed, complete resumption of minerals by the Crown was seen as the simplest option for overcoming difficulties inherent in the fragmented system of mineral ownership in New Zealand. (Ministry of Energy, "Review of Mining Legislation" 9 (1986)) Such arguments are hardly compelling. To argue uncritically for a continuation of past practice simply because it is past practice is unsound. To argue that resumption of ownership by the Crown is the simplest option for resolving the fragmented system of mineral ownership is specious. The common law maxim is the simple option; the complicated situation has been created by the reservation of minerals to the state. Cogent arguments in support of rights to minerals being vested in the surface owner include the facilitation of contractual negotiations between landowners and miners, the removal of problems of access, and the protection of the surface owner's interests.[10]

Ownership of minerals by the surface owner is compatible with allocation of mineral resources in the national interest. With rights to minerals the surface owner has regard to the economic value of alternative land uses and is in the best position to balance the value of alternative land uses and is in the best position to balance the value of mining (ie what miners are prepared to pay) against the value of alternative land uses. Complex planning procedures which attempt to evaluate the worth of alternative land uses and assess compensation to the surface owner are unnecessary. In addition full account is taken of the value a landowner places on the land; not just the commercial value. Mining proposals which are not expected to yield sufficient return to compensate landowners for their loss will not proceed. Alternatively, where landowners do allow mining to proceed it can be concluded that miners adequately compensate landowners for their costs. Ownership of minerals by landowners thereby allows conflicts of interest between miners and landowners to be reconciled privately and in this way resources can be allocated to their most valued use. By definition any exchanges that are entered into voluntarily make the parties involved better off.[11]

The opportunity for contractual negotiations between landowners and miners also has direct benefits for third parties in that without conflict of interests the state can concentrate fully on the environmental effects of alternative land uses, including mining, through either revised mining legislation or planning procedures.

Rationale for reservation

Provisions reserving mineral resources, or the rights to mine minerals, are detailed in various Acts.[12] Whilst this legislation establishes the fact of Crown ownership or control of most

mineral resources in New Zealand neither the existing legislation, nor earlier acts, make explicit the reason why abrogation of the common law maxim has been perpetuated. Critical analysis of legislation dealing with mineral ownership has to a large extent been circumscribed through taking Crown ownership as given.[13] An understanding of the rationale for the reservation of Crown ownership of mineral rights is, however, necessary in any evaluation of reforms to the existing legislation.

Clearly the intention of early legislation, especially after the discovery of major goldfields in the 1860s, was to facilitate and encourage mining:

> Honourable members were very fond of saying the miner's interest was the interest of the Colony, but they should act up to that principle . . . (*NZ Parliamentary Debates*, 14 (1873) 480)

> The Colony, however, could not afford to dispense with the mining industry, and every effort should be made by the Legislature to assist in maintaining its position. (ibid, 481)

The first New Zealand Goldmining Act, introduced in 1858, was based directly upon a Victorian Act of 1855 and included an important provision affecting finances of provincial government: the establishment of a gold export duty to be retained by provincial treasuries. (J H M Salmon *A History of Goldmining in New Zealand* (1963) 38) The pre-eminence accorded to goldmining as a land use reflected its position as a direct source of revenue for government. It is also probable that policy embodied in early mining laws reflected a community consensus favouring exploitation of resources.[14] As well as provisions regulating mining activity Gold Mining Acts conferred wide ranging powers on the Governor:

> . . . To constitute and appoint any portion of the Colony to be a "Gold Field" under the provisions of this Act . . . (Gold Fields Act 1862, s 3)

> . . . To cause licenses to be issued . . . authorising the Holder to occupy Waste Lands of the Crown for the purpose of carrying on business upon any Gold Fields . . . (ibid, s 6)

> When any Gold Mine or Gold Field shall be discovered and proclaimed upon any Crown lands held under License or Lease for depasturing purposes it shall be lawful for the Governor at his discretion to cancel the license or lease under which such land shall have been held in occupation . . . (ibid, s 10)

> . . . To demise for agricultural or business purposes to any person for any term not exceeding seven years from the making of the lease any land within a Gold Field not exceeding ten acres in the whole . . . (ibid, s 35. Gold Fields Act 1866, s 35 increased the maximum size of agricultural leases to 50 acres.)

The apparent incompatibility of any pastoral or agricultural activity and gold mining, and the priority given to gold mining, is explicit in the provisions of this legislation, which the authorities were not slow to apply.[15] However, the situation which appears to have led directly to the notion of mineral reservation arose from conflict between miners and owners of land alienated from the Crown before the creation of mining districts and upon which the Gold Field regulations could not be applied. Hence the Mining on Private Property Bill 1873 sought authorisation for mining gold and silver on private properties. The government remained undecided on this measure although the Premier noted:

> It might be worth the consideration of those who dealt with public lands in the various provinces, whether the difficulty might not in a great measure be overcome, at least in regard to future sales of land. It was well known that in portions of the United Kingdom there was not only a reservation of the minerals but of the right to obtain them on payment of compensation for surface damage. It might, then, be worth while to consider whether, in future sales of land in this colony there should not be attached a condition that the minerals and the right to mine should be reserved on payment of compensation for surface damage. (*NZ Parliamentary Debates* 14 (1873) 82)

Inherent difficulties in separating mineral and surface rights were, however, recognised:

> There was no doubt that one of the most difficult problems which the House had to solve was, how to dissociate surface from mineral rights, and the present measure did not solve that problem. (ibid, 480)

> If they could bring down a measure which would at one and the same time protect the future interests of the Colony without doing injury to persons who come to the Colony to settle and to devote their means to the improvement of their property, then the House might pass such a Bill . . . (ibid, 483)

The Resumption of Land for Mining Purposes Bills 1873 and 1882 sought to provide legislation for the resumption of alienated land for mining purposes. Again the clear demarcation of land uses and the pre-eminence accorded to mining is apparent from the debates on this legislation.

> Its object was to facilitate the dealing with agricultural land in gold districts, so that it might be taken up for purposes of ordinary settlement without interfering with mining. (*NZ Parliamentary Debates* 15 (1873) 1275)

> The same law . . . was in force in the other gold mining colonies: land could be resumed whenever it was required. We took land for railways and other public purposes; and what could be a better public purpose than the encouragement of the gold mining industry. (*NZ Parliamentary Debates* 43 (1882) 639)

Significantly the 1882 Amendment

sought extension of the Land Resumption Act to all parts of the Colony and included not only mining for gold and silver but also for all other metals and minerals. (ibid, 638) Comment had been raised in earlier debates, however, as to the desirability of entire possession being resumed:

> His impression was that they should reserve to the Crown power to issue licences to mine under the surface; but he did not think entire possession should be resumed. The resumption of land would involve great difficulties . . . as regarded the interests that might have accrued under settlements . . . (*NZ Parliamentary Debates* 15 (1873) 1275)

Subsequently mineral reservation provisions were incorporated into the forerunners of the present Land Act. The Land Act 1892 provided that if there were found minerals or valuable stones adjacent to Crown lands, the Government could reserve those Crown lands from sale and lease that Crown land with that exemption. (Land Act, 1892, s 121) The Land Bill 1895 sought to extend this provision so that all metals, minerals, oils, gases, gravel, limestone and valuable stones of any description would be reserved to the Crown in every subsequent alienation of Crown land. (*NZ Parliamentary Debates* 91 (1895) 457) The debate surrounding the mineral reservation issue reveals the differences in attitude of legislators.

> Here a man will have to take up land on this condition: That at any moment . . . his land may be taken from him. (ibid, 457)
>
> This provision has no more likeness to the [1892] Act than light has to darkness. Is the House going to sanction this? If the House is going to sanction it, who are ever going to hold land in New Zealand under such conditions. This Bill is like all other Bills of the present Government. The Government are to have all the power. The people are to have no liberty. (ibid, 457)
>
> If we want to offer an incentive to the improvement of property it is somewhat dangerous to give such a power as is given in this clause — a power which might prove disastrous, if not absolutely ruinous, to settlers who make improvements on their land. (ibid 461)
>
> It altogether destroys the security of the freehold tenure; and I do not think it is desirable in the interests of the settlers of the colony that this clause should become law. (ibid, 461)
>
> Then with regard to minerals: It is quite right that the Government should retain in its own hands the minerals of the country, and thus prevent their going into the hands of monopolists. (ibid, 462)
>
> . . . It is right that the Crown should retain the minerals, and, as we know, it is believed by some people that it is right the Crown should retain the land altogether. Where proper provision is made for compensation, I do not think the lessee or the owner of land can suffer any hardship . . . (ibid, 463)
>
> Well, we are at the present time disposing of land at 5s. to 10s. an acre. It is given away entirely, and the right to that land is quite enough to give away, without parting with the minerals. (ibid, 463)
>
> . . . In places where there is no gravel for the roads, and a man happened to get a section with a bed of gravel under it at 10s. an acre, would he have the right to put the whole of the rest of the district under contribution to him . . . (ibid, 464)

The 1895 Amendment to the Land Act, which sought universal reservation of minerals on Crown land, was struck out by the Legislative Council and whilst the House of Representatives accepted the amended Bill the Minister of Lands, Mr J McKenzie, warned of the consequences of disallowing legislation that was in the country's interest; a threat that perhaps foreshadowed the disestablishment of the Legislative Council. He went on to state:

> It was of great consequence to the country that minerals, limestone and so forth, should be reserved to the Crown, and there were a large number of people in the colony buying back from private individuals the lime deposits already. Why, therefore, should the Crown part with their lime deposits, which should be the property of all? (ibid, 885)

Despite the failure of the 1895 amendment successive governments in the twentieth century continued with efforts to reserve mineral rights to the Crown. The Land Act 1924 reserved the rights of the Crown to the minerals of all land sold within a mining district, and to resumption of the land for mining purposes, subject to compensation. (Land Act, 1924, ss 135, 153, 315) Complete reservation was accomplished by the Land Act 1948 which reserved to the Crown all minerals of all land alienated from the Crown under the terms of that Act (with ownership of coal being determined by these general provisions or by specific coal legislation). The only debate at that time concerned the rights of landowners to the use of minerals on their properties. (*NZ Parliamentary Debates* 284 (1948) 4054, 4068)

Other than in the 1986 review of mining legislation, the twentieth century has seen a curious lack of reported debate on legislation relating to mineral ownership. This lack of debate would indicate that positions adopted in the 1890s continue to be used by advocates of the Crown's reservation and ownership of minerals.

Conclusion

The history of New Zealand's mining legislation reveals the progressive control by the Crown of mineral and mining rights and the separation of these rights from those of the surface owner. Reservation of minerals to the Crown has been advocated to ensure that mineral resources remain the property of all, the public good being advantaged by the Crown controlling and facilitating mining. The value of competing uses of the resource complex within which minerals were located was of little or secondary concern.

It is clear that the historical

justification for Crown ownership of minerals in large measure no longer applies. Whilst mining is a valid land use it can no longer be presumed pre-eminent. The assertion that through being held by the state minerals remain the property of all, presumably for the betterment of all, has not been supported by substantial evidence or argument. Indeed the need for a comprehensive review of mining legislation would indicate that the Crown's allocation and administration of rights to minerals has inadequately accounted for all interests. Other considerations that may be involved in Crown ownership have never been made explicit. In any debate over the management of New Zealand's mineral resources the appropriateness of severed rights to minerals and land must be critically evaluated against the potential advantages of combined rights. □

1 Mining Act, 1971 s 8. R J Somerville in 26 *McVeagh's Local Government Law in New Zealand* 39 (1984) comments on the significance of this provision as cutting across the rights of landowners who hold freehold title to their land.

2 The critical application of property rights theory to mining legislation is based on concepts developed in R Hide, "Property rights and natural resource policy" (1987).

3 The Case of Mines is documented in 1 *Plowden* 310, reproduced as 75 *English Reports* 472.

4 An interesting discussion of both the Case of Mines and the royal prerogative is presented in J D Parcell, "A Thesis on the Prerogative Right of the Crown to Royal Metals" (1960).

5 This comment is adapted from M Crommelin in P Drysdale & H Shibata (eds), "Federalism and Resource Development" 90 (1985).

6 Coal Mines Act, 1925 s 168. The ownership and reservation of coal is somewhat more complicated than described here. For more detail see G W Hinde and D W McMorland, *Introduction to Land Law* (1986) 555.

7 The situation regarding ownership of minerals in New Zealand is explained concisely in Ministry of Energy, "Mineral Ownership" (1986).

8 The advantages of tradeable mining rights versus administrative allocation are documented by the NZ Department of Trade and Industry in an unpublished submission on "Review of Mining Legislation" 9 (1986).

9 The ability of the price mechanism to signal the value of alternative uses of the resource, while simultaneously providing a financial incentive for individuals to take these values into account, is described by H Demsetz, "The Exchange and Enforcement of Property Rights", 7 *J Law & Econ* (1964) 11.

10 A critical analysis of Crown resumption versus private ownership is presented in A Hearn, "Review of the Town and Country Planning Act, 1977" (1987) 197-201. It is important to note that implicit in ownership of land, with or without rights to minerals, are restrictions, such as Town and Country Planning Acts, which limit landowners' use of land in order to protect the interests of the wider public and other property owners.

11 The concept of values other than pecuniary value, and their incorporation into contractual negotiations, is described by W Block, "Coase and Demsetz on Private Property Rights", 1 *J Lib Studies* (1977) 111. Somewhat melodramatically Block refers to the immorality and impossibility of outside observers determining psychic value. See also A Hearn, op cit 198 for comment on the implications of the success or otherwise of negotiations between miners and landowners who hold rights to minerals.

12 Mining Act, 1971 s 8, Coal Mines Act, 1979 s 5, Iron and Steel Industry Act, 1959 s 3, Petroleum Act, 1937 s 3, Geothermal Energy Act, 1953 s 3.

13 See for example V Pyke *Land-Laws of New Zealand* (1893) 28-39, G W Hinde & D W McMorland op cit 554-555 and K Palmer, *An Outline of Mining Law* (1982).

14 After T Hearn, "Mining and land: a conflict over use 1858-1953", [1983] *NZLJ* 235. Hearn also attributes the character of early mining law to ". . . The Benthamite principle that the 'invisible hand' of providence, the unrestricted private pursuit of profit, would ensure the general good and the community's prosperity and progress".

15 See also J H M Salmon op cit 11 and T Hearn op cit, for comment on the significance of this conflict. The subjugation of pastoral interests is evident in the cancellation by the Superintendent of Otago, of part of W Shennan's Run 221 (Dunstan Goldfield) on October 20 1863 and W G Rees's Run 356 (Queenstown) on November 6 1863. See G J Griffiths, "King Wakatip" (1971) 107.

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system there has often been looked at with envious eyes from across the border. Scotland has had legal aid by statute since 1424! The possibility of the third verdict of "Not proven" is viewed with interest in the light of unsatisfactory trials; and the legal position of women in Scotland can tell much to a less equitable English system. Women can sue in their maiden names in Scotland (well known to students of the English law of Tort from the seminal cases of *Donoghue (or McAlister) v Stevenson and Bourhill (or Hay) v Young).*

Despite the Sex Discrimination Act 1975, an obvious lacuna was the succession of women to titles. The law is much fairer in Scotland. An obvious example was when the Duke of Norfolk died in 1975. His string of titles went to a distant male cousin but the title he had inherited from his Scots mother, Baroness Herries, passed to his eldest daughter, denied all the other (English) titles.

The Civil Law system of Scotland, deriving ultimately from Roman law, has made it much easier for Scottish lawyers to adapt to the laws of the European Community, and it is no accident that the President of the European Court is Lord Mackenzie Stuart.

Perhaps, then, his appointment will enable Lord Mackay really to familiarise more Englishmen with the benefits of Scots law, long overdue.

Lord Mackay may moreover take much heart from Lord Denning, with whom he shares a common background in mathematics, and whom he possibly knows well. Lord Denning, that arch dissident, who knows all there is to know about equitable jurisdiction, paid a fine compliment to Scots law when, in *Minister of Pensions v Higham* [1948] 2 KB 153, he followed a decision of the Court of Session which was at variance with one of his own previous judgments, "so to avoid a conflict of view on an important point".

Lord Mackay is the 213th appointment to the office of Lord Chancellor, although that does not mean there have been 213 men in the office, for many have held it twice, three times, and one (Archbishop Arundel) even five times. He may, with his background of Scottish equity, prepare the way for a woman Chancellor. The only experience was Queen Eleanor of Provence, who in 1253, was made Lady Keeper of the Seal for one year. Like a number of other things in the new Lord Chancellor's mind, another such appointment is perhaps overdue. □

The Chattels Transfer Act 1924: Variations and priorities

By R J Scragg a Christchurch practitioner

The author lectures and takes tutorials at the University of Canterbury on the Chattels Transfer Act. Early in 1987 he was a co-presenter of the New Zealand Law Society Seminar on Chattels Securities. From his experience in that Seminar he realised that practitioners throughout the country were facing real problems regarding the question of variations and priorities. This article accordingly deals with this immediate problem in general and in relation to the Companies Act.

Introduction

It is a principal defect in the statutory scheme of the Chattels Transfer Act that the Act does not contain within its detailed provisions a procedure for variation of instruments by way of security and rearrangement of priorities of such instruments by the agreement of grantees. This is a situation which creates problems for both grantors and grantees of instruments and expense for grantors.

Statutory Scheme

The Chattels Transfer Act 1924 creates a statutory scheme for loans made on the security of chattels. It provides a system whereby lenders (grantees)[1] can register instruments by way of security[2] in the office of the Registrar of the High Court and thereby give notice to all the world of their interest in the chattels so secured. Section 18 of the Act states that every instrument unless registered within 21 days of its execution or any extended period of time, "shall . . . be deemed fraudulent and void as against –

(a) the assignee in bankruptcy of the estate of the person whose chattels or any of them are comprised in any such instrument:
(b) the assignee or trustee acting under any assignment for the benefit of the creditors of such person:
(c) the sheriff, bailiff and other person seizing the chattels or any part thereof comprised in any such instrument in execution of the process of any court authorising the seizure of the chattels of the person by whom or concerning whose chattels such instrument was made, and against every person on whose behalf such process was issued:"

provided the chattels secured under the instrument are in the possession or apparent possession[3] of the grantor or the person against whom the process is issued. Accordingly the defined parties can acquire rights over the chattels secured under an instrument in the face of the grantee of an unregistered instrument who will not be able to maintain his right to the chattels unless before the time specified in Section 18 the chattels have been removed from the possession or the apparent possession of the grantor.[4]

Once registered, instruments by way of security can be searched by members of the public who simply need to attend at the office of the Registrar of the High Court and can do so without payment of fee.

In considering the scheme of the Chattels Transfer Act, we must also have regard to the Insolvency Act 1967. The doctrine of *relation back* under the Insolvency Act 1967 (s 42 (4)) makes provision so that a grantee with an unregistered instrument by way of security must bring the chattels governed by such instrument into his possession before the period of relation back, if the grantor is adjudged bankrupt, if he is to retain them against claims by the Official Assignee. The concept of "relation back" provides that the bankruptcy of an individual takes effect from the date of the available act of bankruptcy on which the petition is founded not from the date of the adjudication of bankruptcy itself and to this extent it is retrospective.

Variation

Curiously there is no provision in the Chattels Transfer Act allowing for a simple variation of a registered instrument by way of security nor, in consequence, one creating a procedure by which such variation can be achieved. This must be compared with the situation under the Land Transfer Act 1952 s 102, which provides, with regard to mortgages under the Torrens land registration system:

In the case of every mortgage under this Act –

(a) The amount secured by the mortgage may be increased or reduced;
(b) The rate of interest may be increased or reduced;
(c) The term or currency of the mortgage may be shortened, extended, or renewed; and
(d) The covenants, conditions, and powers contained or implied in the mortgage may be varied, negatived, or added to.

The Chattels Transfer Act deals with mortgages of chattels but there is no equivalent provision to s 102 of the

Land Transfer Act which deals with mortgages of land. The need for a variation can arise in a variety of circumstances.

The parties to an instrument may wish to vary the stated interest rate by increasing it or reducing it; they may wish to extend the term of the loan or they may wish to vary any of the other covenants and conditions contained in the instrument. It is no answer to say that existing instruments can be released and new ones incorporating the variations registered. Such an approach may be at risk under the doctrine of relation back. It may also amount to a voidable preference (s 56 Insolvency Act) or a voidable security (s 57 Insolvency Act). There may also be a loss of priority. Let us examine each of these matters in turn and determine what must be done in order to avoid their application.

(a) *The doctrine of relation back*

As stated above, the Official Assignee's title to the debtor's property arises not from the date of the adjudication of bankruptcy but from the commencement of actual bankruptcy. The adjudication divests the bankrupt of his title to property owned by him at the date of the adjudication and permits the Official Assignee to treat any transactions with the bankrupt's property during the period of relation back as transactions with property to which he had no title. If during the period of relation back the bankrupt has transferred or mortgaged his assets he is in effect transferring or mortgaging the Official Assignee's property and accordingly a mortgagee, grantee or transferee receives no protection from registration under the Chattels Transfer Act unless s 47 of the Insolvency Act applies.

Section 47 protects payments by the bankrupt to any of his creditors and disposition of property by the bankrupt for valuable consideration provided that the person dealing with the bankrupt had:

1 No notice of any available act of bankruptcy and,
2 Otherwise acted in good faith and,
3 The payment, disposition, contract, dealing or transaction took place before adjudication.

Section 47(1)(c) provides that the Official Assignee cannot invalidate any disposition of property made for valuable consideration by:

1 A person who became entitled to the property under a disposition made by the bankrupt or
2 A person who became entitled, whether before or after the adjudication of the bankrupt, through a person to whom the preceding paragraph applies.

(b) *Voidable preference*

If a transaction is entered into by a debtor favouring a particular creditor in the period of one month immediately preceding the adjudication of bankruptcy or in the period between the service of a creditor's petition on an insolvent party and the adjudication of bankruptcy, the intention of the debtor in so acting is irrelevant. The transaction may be avoided by the Official Assignee at any time after the service of the petition and this period may extend for more than a month. The Official Assignee is entitled to avoid any such transactions as occur within this statutory period. Where there are transactions which are entered into within the two years preceding adjudication by an insolvent debtor and they are entered into with a view to preferring a creditor, a trustee or a guarantor for that creditor, they may also be avoided by the Official Assignee as voidable preferences. In this case, the transactions must be entered into "with a view to giving that creditor or any surety or guarantor for the debt due to that creditor a preference over the other creditors".

In both cases we are concerned with the following transactions:

(i) Every conveyance or transfer of property and
(ii) Every charge made thereon and
(iii) Every obligation incurred and every execution under any judicial proceedings suffered and
(iv) Every payment made (including any payment made in pursuance of a judgment or order of court) by a person unable to pay his debts as they fall due.

Where we are looking at dispositions within one month of adjudication the following must be established:

(i) An act of the kind specified above.
(ii) The act to be by a person "unable to pay his debts as they become due from his own money".
(iii) The act must be in favour of a creditor.
(iv) It must have been done within one month of the adjudication.

For cases within the two year period an act of the kind specified must be established and the act must be performed by a person "unable to pay his debts as they become due from his own money". Also the act must be done with a view to giving that creditor a preference over other creditors but within two years of the adjudication.

(c) *Voidable securities*

Any securities or charges over a debtor's land or other property are voidable against the Official Assignee if they are given within the following periods:

(i) Where there is a creditor's petition, in the period commencing 12 months before the filing of the petition and ending upon adjudication.
(ii) Where the debtor files his own petition, in the 12 months preceding the filing of that petition.

Securities are not voidable in the following circumstances:

(i) Where they relate to money actually advanced or paid or the actual price or the value of the property sold or supplied or any other valuable consideration given in good faith by the grantee of the security or charged to the grantor at the time or at any time after the execution thereof.
(ii) A security is not voidable if it is a security over any property of the grantor securing unpaid purchase money such security being executed not later than 21 days after the purchase of the property.

(d) *Priorities*
There may also be a problem with loss of priority if an instrument is discharged and a new one registered incorporating the required variation.

Plainly the answer to the problems outlined above is statutory amendment with the creation of a right to vary existing securities in accordance with a simple variation procedure.

Priority
There is a similar problem with rearrangement of priorities by grantees amongst themselves. The fundamental rules of priority are found in s 22 of the Act: Where two or more instruments are executed comprising in whole or in part any of the same chattels, priority shall be given to such instrument or instruments in the order of the time of their registration respectively as regards the title to or right to the possession of such chattels:

> Provided that where a grantee under a second or subsequent instrument claims priority by virtue of prior registration he must prove that at the time of the execution of the instrument under which he claims he had no notice of any existing unregistered instrument.

In this connection s 80A of the Property Law Act 1952 must be borne in mind. This provision enables an instrument to have specified in it a maximum amount up to which the sum for the time being shall rank in priority to any subsequent instrument and where a maximum amount is so specified the instrument takes effect accordingly.

Once an instrument has been registered it remains effective for five years. To remain effective registration must be renewed within five years of the previous registration. Any renewal is itself effective for five years.

As in variation, there is no provision in the statute authorising a rearrangement of priorities amongst lenders by themselves. By contrast s 103 of the Land Transfer Act 1952 provides as follows:

> The priority between themselves of the mortgages affecting any land may from time to time be varied by a memorandum of priority . . . registered under this Act.

In practice priorities are rearranged by grantees who utilise deeds of modification — deeds executed by the grantor and the grantees of the instruments for which priority is being rearranged setting out the agreed order of priority. These documents are not registered in the office of the Registrar of the High Court and third parties searching the Chattels Register would simply discover records of instruments by way of security registered over the same chattels taking priority in the order set out in s 22 of the Act.

The question arises whether a registrable memorandum of priority can exist under the statute. Instruments by way of security are defined in s 2 in very wide terms. In part the definition is by way of exclusion with a list of transactions which do not amount to instruments under the Act. The substance of the definition is that instrument means and includes any bill of sale, mortgage, lien or any other document that transfers or purports to transfer the property in or right to the possession of chattels, whether permanently or temporarily, whether absolutely or conditionally and whether by way of sale, security, pledge, gift, settlement, bailment or lease.

It may be that this definition is wide enough to encompass a registrable memorandum of priority equivalent to the type of document we are familiar with pursuant to s 103 of the Land Transfer Act 1952.

The case of *re Goldstone's Mortgage* [1916] NZLR 19 is instructive with regard to this matter. This case involved mortgages under the Land Transfer Act. Here a third mortgage was presented to the Land Transfer Office for registration. Endorsed on the mortgage was a consent by the second mortgagees to variations effected in the first mortgage by the third mortgage and, in particular, to an extension of term and increase in rate of interest. By the same endorsement, the second mortgagees also consented to the third mortgage taking priority over the second mortgage as though registered before it. The Registrar-General of Land refused to register the third mortgage unless the consent purporting to give priority was deleted.

The then Supreme Court held that although the third mortgage varied the terms of the first mortgage it was a registrable instrument. The Court was influenced by the lack of a provision in the Land Transfer Act prohibiting such a practice. The Court also held that the endorsed consent of the second mortgagees waiving their priority did not itself require registration and did not prevent registration of the third mortgage.

It is significant that there is no provision under the Chattels Transfer Act prohibiting rearrangement of priorities amongst lenders by way of their own agreement.

The High Court Registrar in Christchurch has informed the writer that he would accept a memorandum of priority under the Chattels Transfer Act for registration provided that the formal requirements of the Act were complied with.

As has been seen above, one of the principal concerns of the Chattels Transfer Act is to give grantees of instruments protection in the face of seizure of assets by the Official Assignee. How should the Official Assignee act when confronted with a Deed of Modification? The answer is not clear.

Professor R M Goode in "Legal Problems of Credit and Security" pp 54-55 has addressed this problem in the field of company law with regard to the subordination of a fixed charge to a floating charge where the borrowing company subsequently goes into liquidation. In his example, a fixed chargee, C, who would ordinarily have priority over an earlier floating charge, F, in the absence of restrictions of which he has notice, agrees that his charge will be subordinated to the floating charge. The borrowing company then goes into liquidation and has preferential creditors, P. The free assets are not sufficient to meet the preferential claims and therefore the liquidator proposes to pay P out of the assets comprised in the floating charge pursuant to the provisions of the Companies Act. The liquidator must allow C to satisfy his claim out of the assets comprised in the fixed charge — which are also within the floating charge — as a fixed charge

has priority over preferential claims. F protests that he has priority over C by virtue of the subordination agreement.

The situation is then as follows:

1 P has priority over F under the Companies Act.
2 C has priority over P as a matter of general principle.
3 F has priority over C by virtue of their subordination agreement.

How should the liquidator proceed?

Professor Goode proposes that the difficulty can be solved by resort to the principles of subrogation. F has priority over C by virtue of their agreement, making C accountable to F for moneys received in the liquidation to the extent of C's subordination. Accordingly, all interests are satisfied by treating F as subrogated to C to the extent necessary to give effect to the subordination agreement. F therefore collects from the liquidator *in right of* C the amount due to C or such part of that amount as is necessary to satisfy his claim. Any balance due to F is postponed to the claims of P under the Companies Act.

Subordination is a complex matter and Professor Goode's proposition is put forward without supporting authority.[6] The Official Assignee in Christchurch is essentially non-committal when it comes to commenting on the approach proposed by Professor Goode and set out here.

All that can be said for certain concerning this matter is that the position is not clear, there is a lack of authority on the point and certainty will only be achieved by way of amending legislation.

The Relationship of the Chattels Transfer Act 1924 with the Companies Act 1955[7]

In New Zealand we have a dual system of security over chattels operating under both the Chattels Transfer Act and the Companies Act. Section 2 of the Chattels Transfer Act excludes from the definition of instrument debentures issued by any company and secured upon the chattels of such company and mortgages or charges granted or created by a company. Therefore where a borrower (grantor) is a limited liability company it does not register charges taken over its assets in the office of the Registrar of the High Court. Instead it proceeds in terms of s 102 of the Companies Act 1955 and if the charge falls within one of the nine categories set out in subs 2, must perform registration of instruments over its chattels in the office of the Registrar of Companies.

The nine categories of charge are as follows:

(a) A charge for the purpose of securing any issue of debentures.
(b) A charge on uncalled share capital of the company.
(c) A charge created or evidenced by an instrument which, if executed by an individual, would require registration under the Chattels Transfer Act 1924.
(d) A floating charge on the undertaking or property of the company.
(e) A charge on land, wherever situated, or any interest therein.
(f) A charge on book debts of the company.
(g) A charge on calls made but not paid.
(h) A charge on a ship or any share in a ship.
(i) A charge on goodwill, on a patent or licence under a patent, on a trade mark or on a copyright or a licence under a copyright.

The term "charge" includes "mortgage". In the case of a charge registered under any other act, it is sufficient to file particulars of the charge.

Only the nine categories of charge specified have to be registered with the Registrar of Companies. If a particular charge is not within the definitions it will not have to be registered anywhere because *all* company charges and mortgages are excluded from the operation of the Chattels Transfer Act.

To complicate the system further, instruments by way of bailment (hire purchase agreements and leases) and absolute assignments of book debts fall outside these exclusions because they are *not* charges but they do fall within the ambit of the Chattels Transfer Act. Hire purchase agreements and chattel leases are "instruments" and book debts are defined as chattels for the purposes of the Act. Accordingly such instruments entered into by companies registered under the Companies Act 1955 are registrable in the office of the Registrar of the High Court under the Chattels Transfer Act 1924.

Again, as with the Chattels Transfer Act, there are no provisions under the Companies Act for variation and alteration of priorities by consent of the chargeholders. As regards the question of variation, the attitude of the Registrar of Companies, relying on the case of *re Goldstone's Mortgage* (supra) appears to be that if the variation relates to the principal sum or the interest rate, it should be registered. If it varies particular covenants other than those concerning payment of principal and interest then it is not registrable.[8]

As regards priorities, it is common practice for Deeds of Modification to be entered into by chargeholders rearranging priorities amongst themselves and as a matter of practice the Registrar of Companies will accept Deeds of Modification to be held on the Companies office file for public inspection.

The position in Australia

In Australia the whole question of security under the legislation controlling companies came under the scrutiny of the Eggleston Committee in 1972.[9] In consequence, simple, workable provisions were enacted which provide an excellent model for New Zealand to follow with regard to both the Companies and Chattels Transfer Acts.

Priorities[10]

Under s 204(2) of the Companies Code there is provision that the order of priority of charges may be varied by express or implied consent given by the holder of one of two charges, being a charge that would otherwise be entitled to priority over the other charge. The order of priority under the rules is also subject to any agreement between chargees that affects priorities in relation to their charges. These provisions are essentially analogous to the provisions for Memoranda of Priority under the Land Transfer Act in New Zealand.

Variation[11]

Section 206(2) of the Code provides that where, after a registrable charge on property of a company has been created, there is a variation in the terms of the charge having the effect of increasing the amount of the debt or increasing the liabilities (whether present or prospective) secured by the charge or prohibiting or restricting the creation of subsequent charges on the property, a company shall, within 45 days after the variation occurs, ensure there is lodged with the local registering authority a notice setting out particulars of the variation accompanied by the instrument (if any) effecting the variation or a certified copy of that instrument. This is entered on the Register of Company Charges which is available for public searching.

Section 205 makes provision for notice of variation. The variation of a charge is not void against a liquidator or an official manager just because it is not registered within the 45 days specified, provided that proper notice is lodged at least six months before the start of liquidation or the appointment of an official manager. A variation of charge is void against a liquidator or an official manager if it is registered within six months of the start of liquidation or official management unless it is registered within the 45 day period or any Court ordered extension thereof. Variations are invalidated only to the extent of the increase in the liability secured: The charge remains valid as far as the original liability is concerned but void with regard to the increase in liability.

Clearly similar provisions could be introduced into New Zealand in both the Chattels Transfer and Companies Acts. Furthermore, the Macarthur Committee[12] recommendation that the cross referencing of the two statutes be abolished should also be implemented, but that is another matter.

Conclusion

The situation in New Zealand concerning variation of instruments by way of security under the Chattels Transfer Act and the rearrangement of priorities by grantees under that Act amongst themselves is not clear. Both the Chattels Transfer Act and the Companies Act are inadequate in this respect although the Land Transfer Act has specific provisions covering the situation under the Torrens system.

Legislation is needed to clarify the position. In this respect the Australian Companies Code provides a model and a model which New Zealand could well follow in amending this country's statutes which control the question of registration of charges over chattels. □

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1 The grantor of an instrument is defined in the Chattels Transfer Act as the party who grants or assigns chattels or any interest in chattels and this is, of course, commonly the borrower but in hire purchase agreements the vendor is the grantor and in a bailment the grantor is the lessor or bailor. The grantee is the party to whom the chattels or interest are assigned, commonly the lender but, in a hire purchase agreement the conditional purchaser or hirer is the grantee and in a bailment the grantee is the lessee or bailee.

2 Instrument by way of security means an instrument given to secure the payment of money or the performance of some obligation. "Instrument" means and includes any bill of sale, mortgage, lien or any other document that transfers or purports to transfer the property in or right to the possession of chattels, whether permanently or temporarily, whether absolutely or conditionally and whether by way of sale, security, pledge, gift, settlement, bailment or lease. Exclusions are also listed in s 2 of the Chattels Transfer Act to indicate what does not amount to an instrument.

3 The term "apparent possession" is not defined in the Chattels Transfer Act. Compare the cases of *Official Assignee of Casey v Bartosh* [1955] NZLR 287 and *Official Assignee v The Colonial Bank of New Zealand* (1887) NZLR 5 SC 456. The concept of "apparent possession" does not have any application in situations where the owner does not have to rely on the instrument for his title as with, for example, bailments: see *Bowmakers v Barnett Instruments* [1945] KB 655.

4 The scheme of the Act is wide. Under s 19 the grantee of an unregistered instrument by way of security can have his interest defeated in favour of a subsequent purchaser or ranked later in priority after a second mortgagee acting bona fide and for valuable consideration. Section 57 creates the concept of customary hire purchase – hire purchase agreements which are valid and effectual without the need for registration under the Chattels Transfer Act. Sections 28, 29 and 30 deal specifically with instruments comprising stock, ss 35, 36 and 37 with securities over crops and ss 38, 39, 40 and 41 with securities over wool.

5 See G Cain: "Chattels Transfer Act: Oddities and Oddments" [1959] NZLJ 87.

6 See R R Pennington: *Company Law* 5 ed and see W J Gough: *Company Charges* London 1978.

7 See [1978] NZLJ 137: D W McLauchlan: "Corporate personal property secured transactions, Chattels Transfer Act, Companies Act or neither?"

8 J H Farrar and M W Russell: *Company Law and Securities Regulation in New Zealand*, p 175.

9 The 7th interim report (registration of charges) to the Standing Committee of Attorneys-General by the Company Law Advisory Committee dated 7 July 1972.

10 See "Corporate debt securities: A restatement and critical evaluation of existing priority rules" by LGS Trotman (1986).

11 ibid.

12 The final report of the special committee to review the Companies Act, March 1973.

Correspondence

Dear Sir,

As a volunteer, amateur, visitor to Arohata Prison, I hear a good deal about the service supplied to women, by the Legal Aid system's lawyers. It is not a happy story.

For a start, about three-quarters of the population of Arohata is Maori. I wonder why? Why is it that Maori women are put in gaol for debt, for failure to pay fines, and for all sorts of non-threatening-to-the-public offences? Could bad service from the legal profession be partly responsible?

I suppose, most legal aid lawyers are young, Pakeha (privileged) men. How much understanding and sympathy have they, for Maori women who have been state wards, or, perhaps, abused children turned "street kids", or battered wives who have retreated into being "solo mums"?

A thing that particularly concerns me is that, from what I hear, after a woman is sentenced, she never sees or hears from her lawyer again. So, she gets no advice on whether she should appeal. I believe many women should appeal, but, by the time they realise that, it is too late.

I suppose lawyers have consciences, and I would earnestly ask your readers to consider, very carefully, if they are really giving their legal aid clients the service those people deserve.

Gwenda Martin

Books

Drug Users and the Law in Australia

By T Carney

The Law Book Co Ltd, Sydney, 1987, 374 pp, plus index, bibliography and tables.

Reviewed by Dr Don Mathias of Auckland

This review by Dr Don Mathias points out some comparisons between the situation concerning drug abuse and the law in Australia and New Zealand. Dr Mathias has written a book Misuse of Drugs *dealing particularly with the New Zealand situation. The book is to be published shortly.*

"Addiction is not purely a medical matter, nor is it exclusively a criminal justice, or welfare issue." That sentence appears on p 331 of this detailed treatment of the question of how the law should respond to those who abuse drugs. It reflects the three approaches considered: the various ways by which treatment is offered to or imposed upon addicts, the responses of the criminal law by way of sentencing drug offenders, and the ways by which persons afflicted by addiction may be given financial support. The book is written from an Australian perspective, but it is not without interest for readers in New Zealand who are concerned with reform of the law because it provides a comprehensive critical survey of relevant legislation in Australia, New Zealand, Canada, and the United Kingdom.

Of the New Zealand legislation referred to, the Alcoholism and Drug Addiction Act 1966 attracts the most attention, followed by the Social Security Acts of 1938, 1964 and 1972. The Mental Health Act 1969 is mentioned once, s 42 providing substance for part of one sentence, while the Criminal Justice Act comes under scrutiny in its 1954 trappings – the author's endeavour to state the law as it was known to him on June 30 1986 makes one wonder whether Monash University has ceased to subscribe to legislation from this country which came into effect on or after 1 October 1985. The damage done by this oversight is lessened by the fact that only s 48A of the 1954 Act is considered. The Misuse of Drugs Act 1975 is not mentioned, and the survey of sentencing practices in relation to drug offenders is orientated to the Australian Courts.

From the point of view of the criminal lawyer, Carney's treatment of the Australian case law on sentencing will probably confirm what is reasonably obvious:

> . . . there is a basic choice to be made between a tariff measure and a rehabilitative or individual sentence; but the balance plainly favours selection of a tariff measure as the general rule when serious drug or other offences are at stake. Rehabilitative orders would generally require both evidence of suitability for treatment plus an absence of grounds for applying a deterrent measure to protect the public interest. (p 170)

Consideration of the Thomas model of sentencing decision-making results in the conclusion that

> . . . it is not possible to say more than that the Thomas model is not contradicted by existing legal principles in these areas. (p 171)

A comment in a concluding chapter (Standards for Legislative Policies for Drug Users) seems to contradict the finding that tariff sentences are the norm; these sentences are of their nature reasonably precise in that the seriousness of the offending is measured on a time scale for a custodial sentence, or in dollars fine imposed for the less serious offences, and factors personal to the offender carry little weight. But at p 331 we find that one feature of the present legislation "of particular importance is the marked preference for non-directive legislative schemes, which leave considerable room for discretion. This characteristic is also prominent in the sentencing case law, where appellate decisions tend to be expressed in general or broadly-grained language." This contradiction, if that is what it is, may reflect a weakness in the organisation of the material. Whereas most of the chapters can be read as cohesive wholes, their individual relationships with the carefully drawn conclusions of the book are not easy to discern. Perhaps the author was endeavouring to overcome this when he included in the Introduction a section entitled "A Synopsis of the Argument", but it is not until the last 44 pages that we are reminded of where all the comparative analysis that is in between has been leading.

With some exceptions, it is not easy to work back from the conclusions to see what reform is called for in a given area. For example it may occur to the reader that possession of cannabis seems to have been omitted from the

concluding chapters, so to ascertain what the exact recommendation was the Index might be consulted. There is no entry for Cannabis, nor for Marijuana nor Indian Hemp nor Possession nor Minor Offences nor Non-addictive Drug Possession nor Use. Even Decriminalisation is omitted from the Index, as is its cousin Diversion.

Turning back to Chapter 8, "The Statutory Imperatives and the Drug Market", we find a section entitled "4. A New Policy For the Mere Consumer?", but even here it is not clear whether cannabis is being included in the discussion or, if it is, whether decriminalisation is being advocated: on p 227 we find "Not until late in 1986 (as mentioned in Chapter 5 [)] did a new front open up: the civil fine model for certain cannabis offences, though, is certainly more in harmony with the objectives set out here." Assuming that the omitted bracket should go where I have indicated, this is still not a clear statement of a recommendation. Turning therefore to Chapter 5, "The Framework and Practice of Sentencing", we find buried in a section entitled "2. The Range of Dispositions Available to the Courts", "(c) The original model", on p 136 a reference to the Controlled Substances Act 1986 [Vic], where it is disclosed that late in 1986 the legislature in Victoria made the possession of small quantities of cannabis for personal use, in private, a civil offence which attracts payment of a "prescribed expiation fee" calculated according to the weight of the cannabis or other designated factors, payable within 60 days. Even so, we are none the wiser about Carney's evaluation of this scheme.

The point is that although this book is full of valuable information, it is not always an easy task to locate specific material. Blame for this cannot attach to the publishers, for the book is well set out and the typeface is pleasant; it has been well proofread, although Venn (who invented those mathematical diagrams of interlaced circles) would have been sad to see his name reproduced as "ven" (p 331), and there is a supernumerary repetition of the words "party civil" on p 371.

What, then, is Carney advocating? He wants a Commission to be established to formulate, implement and evaluate policy across the criminal, medical and social welfare sectors, so that co-ordination of policy development and its application might be promoted. In no sense does he suggest that the task of the Commission would be easy, and his accomplished survey of the issues will convince the reader of the enormity of the problems to be faced.

He endorses (p 366) J S Mill's principle that treatment should not be provided other than on a purely voluntary basis; yet this may not be appropriate in practice. I have encountered the endorsement of a degree of judicial compulsion by, for example, the Salvation Army's Bridge Programme, which frequently asks the Courts to defer the sentencing of clients afflicted by alcoholism in order to provide an added incentive to succeed. Odyssey House also regularly asks for deferment of sentence so that the Court can be informed of the defendant's progress. Threat of punishment (or the prospect of a reward by way of a lighter sentence in return for making progress with treatment) is definitely a motivating factor for many offenders who enter treatment programmes. And the frequency with which one discovers that clients only seek help for their addiction when they are confronted with imprisonment as the only alternative, is such that a strong person could become cynical. Finely stated though Mill's philosophy was, the world is not run by philosophers.

Carney endorses (p 367) the proposition that the Courts should become the approach of last resort, on the basis that the criminal sanction should be relied on less extensively in dealing with social problems. Presumably many alcoholics are not criminals, but people who abuse other addictive drugs usually are, and the abuse leads to criminal offending. Inevitably the Courts will become aware of an offender's drug abuse when mitigation of penalty on that account is sought. This is not to criticise Carney's argument that the medical and social welfare aspects of the problem of what to do with drug abusers need reform. But the role of judicial encouragement in the motivation of an addict should not be understated.

Unfortunately the judicial contribution to the welfare of an addict will be slow to arrive because of the nature of criminal proceedings. I remember with sadness one year in which in two unrelated cases clients who were addicted to controlled drugs died of overdoses before the criminal proceedings advanced beyond the initial appearance in Court. Now that the Courts have greater powers to attach conditions to bail there is improved opportunity for compulsory assistance at an early stage, and where the client is unwilling to offer to comply with appropriate conditions the prosecution could have the role of suggesting them when it is aware of the addiction.

In considering legislation relating to the consequences of public drunkenness, Carney makes the interesting observation (p 237) that

> in Ontario the six year trend of slowly declining arrests [for public drunkenness] in the period before detoxification [action] was introduced did not perceptibly accelerate with the introduction of the new programme. Section 37A of the New Zealand Summary Offences Act 1981, has a similar focus. Action may be taken by police in respect of any person found intoxicated in public.

Of course in New Zealand persons are not now arrested for public drunkenness as such, but the point is that the detoxification centres may have no ascertainable effect on the incidence of public drunkenness. But then why should they?

Carney notes that (p 238)

> repeal of the drunkenness offence also has its limitations. Police may respond in practice by substituting other public order charges for the repealed offence, or may opt out of the area, leaving intoxicated people to find their own salvation ... this occurred with the Northern Territory reforms, leading to their collapse and replacement with even more draconian criminal provisions. It is also a weakness in the 1981-82 New Zealand reforms.

Provision of financial support for

addicts is considered by Carney in two chapters which analyse the Australian legislation relating to unemployment benefit, special benefit (payable to alleviate the economic effects of delay in processing applications for other benefits), sickness benefit and invalid pension. Here the discussion centres on Australian law at the expense of comparison with that of other countries, and this concentration on the local scene is appropriate in view of Carney's objective here of identifying problems in catering for the needs of addicts under the existing legislative schemes. He points out that an addict may have difficulty in convincing the authorities that he or she is a genuine job seeker, particularly if there are commitments to supportive agencies which require time during normal working hours. Drawbacks which deprive the special benefit of its purpose as far as addicts are concerned arise from what Carney identifies as the conservative policies applied by those officials who are charged with administering the benefit.

Reform of the sickness benefit so as to cover incapacities of indefinite duration is one recommendation which Carney advocates could be adopted from the New Zealand legislation. There is also a need to dispense with waiting periods (this can be done in New Zealand by production of appropriate medical certificates) which have the function of avoiding the need to process applications based on illnesses which are cured by the time the procedures have been completed; as Carney points out (p 305) addicts often have low disposable incomes and minimal cash reserves on which to draw. Further hurdles for addicts are the cost and inconvenience of applying for medical certificates to support applications.

The invalid pension may be granted in Australia if the degree of permanent incapacity to work is not less than 80%; Carney notes that in New Zealand the mathematical concept is avoided and the capacity for work must be "severely restricted". The invalid pension appears to be the one most suited to the needs of addicts, but certain limitations are noted: there is both psychological and economic inducement to remain on it. In public perception the notion of being an invalid carries with it the concept of permanence, and the benefit associated with it is seen as a valuable right not lightly discarded (p 322). Furthermore, the invalid pension is paid at a higher level than the others, and means testing is more favourable to the recipient of it. Needless to say, there should be an incentive to cure the addiction.

Essentially this book is about the balance of power between the State, independent welfare organisations, and the individual addict. Its faith in the inclination of an addict to seek treatment on his or her own initiative and to persevere with it is probably misplaced. The need for accountability on the part of those charged with the exercise of discretion in the treatment of addicts sounds axiomatic, but perhaps consideration could have been given to the efficacy of existing methods for questioning such decisions (which indeed may be inadequate). A problem with securing reform in this area is that of how to generate interest in overcoming the deficiencies of present practice. This book by Professor Carney contains a survey of legislation and suggestions for appropriate goals; if it is not particularly readable, it nevertheless repays diligent study.

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Compulsory Arbitration in New Zealand. The First Forty Years

By J Holt

Auckland University Press, 1986, pp 247, $39.95

Reviewed by

Dr M Vranken, Lecturer, Industrial Relations Centre, Victoria University of Wellington

New Zealand has known a formal statutory system of industrial conciliation and arbitration in the private sector for almost a century now. Its origin dates back as far as 1894 when an Act was passed "to encourage the Formation of Industrial Unions and Associations, and to facilitate the settlement of Industrial Disputes by Conciliation and Arbitration" (No 14). In retrospect this Act, the short title of which is the Industrial Conciliation and Arbitration Act 1894, arguably constitutes one of the most famous pieces of industrial legislation in this country. The Act formed the basis for the development of a system very different from the pattern of industrial relations machinery in most other countries (J M Howells, New Zealand, in R Blanpain (ed), *International Encyclopaedia for Labour Law and Industrial Relations*, Kluwer, Deventer, 1982, p 17). The publication under review sets out to write the history of the 1894 Act. In doing so, the book facilitates a better understanding of the New Zealand system of industrial relations as it operates today.

The original purpose of the book was to explain why the IC & A Act was enacted, how it was amended and interpreted over the years, why it was finally repealed in 1973, and what it meant for New Zealand during the 79 years it was on the statute books. Unfortunately, two subsequent events meant that this design could never be completed. A first and most unexpected event was that its author died prematurely in 1982. At that stage the story had

been brought up to 1932. Hence, the scope of the book is now limited to the first 40 years of the 1894 Act only. Secondly, the Industrial Relations Act 1973 itself has been replaced by the Labour Relations Act 1987. The philosophy behind the latter statute is profoundly different from the underlying rationale of both the 1894 and 1973 legislation. The occurrence of both these events may cast some doubt upon the relevance of the publication as of 1988. It is this reviewer's opinion, however, that any such doubts are unwarranted.

At least three major justifications for the publication under review come readily to mind. First of all, the book under review contains a detailed and in-depth account of the early history of the IC & A Act. This historical survey has been put in its proper political, social and economic context and builds up logically to the eventual repeal of compulsory arbitration (for interest disputes) in 1932. All this is done in a narrative commendable for its clarity. In short, the book makes enjoyable reading for a broad public and not just for the specialised labour historian.

Secondly, this publication is to be welcomed in that it throws new light upon the rationale behind the introduction of the arbitration system itself. The first two chapters of the book are of particular interest in this respect. Previous commentators have stressed the elimination of "sweating" as well as the encouragement of trade unionism as the key objectives of the 1894 Act (see eg N S Woods, *Industrial Conciliation and Arbitration in New Zealand*, Wellington, Government Printer, 1963; A E C Hare, *Report on Industrial Relations in New Zealand*, Wellington, Whitcombe and Tombs, 1946; K Sinclair, *A History of New Zealand*, Middlesex, Penguin 1980). Holt, however, rejects any reference to the Act as "legislation against sweating" (p 34). He also argues that there has been a tendency to greatly exaggerate the importance of the phrase in the Act's original title stating that one of its purposes was "to encourage the formation of industrial unions and associations" (ibid). Instead, Holt asserts that what W P Reeves, the principal author of the Act, did stress in his advocacy of compulsory arbitration was the harmful effects of strikes and lockouts and the subsequent need for a means of enforcing the industrial peace (p 35). Without claiming that the Act was effectively responsible for the industrial peace of the late 1890s and early 1900s, the remainder of the book clearly serves as an illustration that this particular piece of legislation, once it had been enacted, started leading a life of its own rather quickly. The Arbitration Court played a central role in this evolutionary process. Dr Holt shows how the Arbitration Court became a tribunal charged not only with resolving conflicts but with fixing minimum wages, maximum hours, and conditions of employment in ever-growing areas of the private sector. K Hince as well has commented on this "development of an agency (Court) role from one of social control (control of strikes) to one of formulating and implementing policy (in relation to wages and employment conditions)" (M Vranken and K Hince, *The Labour Court and Private Sector Industrial Relations*, Wellington, Industrial Relations Centre, Working Paper No 2/87, p 6).

A third and associated justification for the publication under review lies in the parallel that can be drawn between the 1894 legislation and the Labour Relations Act 1987. The primary purpose of the latter Act is not to provide substantive employee protection either. Rather it is left up to the collective parties themselves to work out their own contractual arrangements. Moreover, the parties are actively encouraged to set up their own machinery to govern their relationship during the currency of the collective instrument they have entered into. The effectiveness of that machinery in allowing for the peaceful settlement of potential disputes is the primary responsibility of the parties themselves (s 186(e) Labour Relations Act 1987). It is only when one of the parties fails to abide by the contractual rules it itself helped to establish that outside assistance can be invoked through the application for a compliance order (s 186(f) Labour Relations Act 1987). In addition, a remedy for an unlawful strike or lockout may be obtained through a civil action for an injunction (s 230(e) Labour Relations Act 1987). Briefly, the statutory purpose of the Labour Court is again social control rather than policy making. Reference can be made here to the long title of the Act where it is stated that the 1987 legislation is "An Act to reform the law relating to labour relations" and, in particular, "(b) To provide procedures for the orderly conduct of relations between workers and employers".

The outlook for the future is still unclear. In the four months since it was established, the Labour Court has issued 24 decisions on applications for compliance orders or injunctions, of which 18 were brought by employers. So far the Court has isued *ex parte* decisions to restrain unions in four disputes. In light of the Court's apparent readiness to issue such remedies, there seems to be an increased emphasis on the procedural aspects of industrial legislation by the parties and the Court alike. The inherent risk of this trend continuing can be appreciated. The Labour Court's legalistic approach may indeed take it dangerously close to that previously adopted by the High Court. With respect to the latter, J Hughes observed "that individual property rights are commonly accorded greater significance than the collective interests of organised labour and that the Courts are unsympathetic to, if not unable to comprehend, the underlying issues presented by strike action from the union's point of view" (J Hughes, "Injunctions against strikers", (1986) *Otago Law Review*, Vol 16, No 2, p 318). After all, it must be borne in mind that the dividing line between social control and the implementation of social policy, especially in an industrial setting, ultimately is a thin one. □

User pays — a response

By C A McVeigh, Barrister of Christchurch

Mr C A McVeigh takes up the suggestion of Mr D F Dugdale of Auckland published at [1987] NZLJ 381 suggesting that the User-pays principle should be extended by the Minister of Justice to instituting a fee payable by Queen's Counsel for the right to use the Sovereign's name as an advertising "gimmick".

Mr D F Dugdale (known to all his close friends and confidants - both of them — as Mr D F Dugdale) has written a spirited defence of the Deputy-Prime Minister. For this effort alone he deserves praise (and no doubt he's already given himself plenty); for the ranks of those still in the business of springing to the defence of the Deputy-Prime Minister are about as thin as a Labour Party election manifesto — and almost as plentiful.

But the learned Auckland scribe's short piece (the one in the December 1987 *NZLJ* that is) warrants close scrutiny for quite another reason: it is a sensible and thoughtful proposal for revenue assistance to the present Administration. It is novel, it is adventurous, and some might even call it courageous (Mr Dugdale probably already has). The pity of it is that Mr Dugdale's reputation for iconoclasm being what it is, nobody will take it seriously. Cheeks will tremble and sides will shake in the inner corridors of impotence in most of the leading law firms in Wellington. "Good old Don," will wheeze and puff an ecstatic Trevor de Cleene as he contemplates, yet again, the prospect of having to play Barnum and Bailey to the Government's economic policies. Shortland Chambers in Auckland will declare a half holiday as Roger McLaren, Colin Nicholson and George Howley try and work out an appropriate response to what they see as the Milton Berle of the legal profession pretending to be serious.

All of this is highly regrettable. Beneath Mr Dugdale's breezy exterior there lurks a priceless lode of scholarship and wisdom. Just occasionally some of it manages to seep out through the chinks in an otherwise fairly brittle armour. This is, I am delighted to report, one of those rare occasions.

Older readers of this publication (hi there, Dame Anne) will recall another similar coup de foudre some years ago now, when the egregious Mr D presented (or rather re-presented) the New Zealand Law Society's submissions on the Bill of Rights (remember the Bill of Rights?). At that auspicious juncture, the Queen City jurist distinguished himself by managing to infiltrate vertically the nasal passages of most, if not all, of the political and legal luminaries who happened to hear, or learn of, his quixotic fulminations. His fellow apologists for the school of jurisprudence which abjures all forms of legal expression other than those contained in the cosy tabulations of a revenue statute, whilst coyly acknowledging some of the more extravagent excesses of his rhetoric, were nonetheless going quietly bananas.

Elsewhere the air was less thick with hubris than with dudgeon. And, one suspects, in a certain office in the Beehive not totally unfamiliar to the Minister of Justice, there could be heard the unmistakable sound of a spleen being vented.

There were still those sceptics, however, who remained unconvinced — well, all right . . . dubious. Was he for real? Wasn't Don just playing Eric Morecombe to Geoffrey Palmer's Ernie Wise? Wouldn't the curl of his lip soon vanish to reveal the twinkle in his eye? Well, no, actually. On that occasion, in launching his one-man D-day landing against the Minister's favourite inamorata, Mr Dugdale was being, as they say, deadly serious. Just as he is now. But please see the point I am at some pains to make. Please do not treat this as just another dose of the author's usual benign ribaldry. When Mr Dugdale proposes a tithe for QCs as a sort of dollar pro quo for being able to charge more and dress up in fancy black threads, he means it. And good on him I say. I think it's a writ-hot idea. Mind you, for your average punter his proposed annual minimum of thirty big ones (plus GST?) seems a bit rich. But let us not cavil. The proposal is sound and his motives are splendid. At the risk of being accused of plagiarism, I am so impressed with it all that I would, to employ the current argot of the market place, like to pick up this particular ball and run with it.

Like Mr Dugdale, I too have not checked the law list lately, but I am prepared to assume that there are still some firms in Auckland and Wellington who have not yet merged with Kensington Swan. As this, or the appointment of a new partner/consultant/associate seems to occur with alarming frequency, and to be accompanied by the not insubstantial publicity attendant upon the obligatory four column ad in *Lawtalk* (not to mention the glossy brochure with the Ektachrome prints and the snappy prose), then it seems only fair (and what is more important, profitable) that the revenue generated by this sort of legal matrimony or midwifery should be taxed.

Now I know this suggestion may have its detractors, not the least no doubt the partners in Kensington

continued on p 56

The history of the legal profession

By Charles Hutchinson, Queen's Counsel of Auckland

Laws and lawyers have long been known to history. The legal profession here in New Zealand is, of course, essentially a derivative from the developments of the profession in England. This article traces the historical development of the profession of the law including cases in Australia and New Zealand.

The profession of the law is an honourable profession and has been so recognised down through the centuries. Pliny (AD 23-79) termed "the profession of the law the most honourable of all professions". The Emperor Justinian AD 482-563 promoted the study of the law and bestowed upon its professors numerous awards and distinctions and his name was immortalized in the law by the Laws of Justinian which used to be the textbook concerning Roman Law which was compulsory subject for an LLB degree in New Zealand. In Justinian's precepts it is stated that it was the duty of a lawyer – "to live honestly – to injure no one – to give every man his due".

The origins of the Bar in England have not been specifically established. After the Norman Conquest in the reign of King Stephen the municipal laws were studied in the Monasteries and seminaries. In early times the lawyers were clerks in Holy Orders and the Judges were Bishops, abbots, deans, canons and archdeacons. The clergy sought to introduce the civil law into England but this was rejected as many persons at an early date devoted themselves to the study of the "common law" or the "law of the land" as it was then called.

In 1207 the clergy were prohibited by canon law from acting in the temporal courts. In view of the role that the church played in respect of the law, it is not surprising that St Ives – "the advocate of the poor" became the Patron Saint of the Legal Profession. After the creation of the Court of Common Pleas in the 13th century there were "narratores" attached to the Court who pleaded on behalf of the litigants. These were equivalent to the "countors" in Normandy who were professional pleaders. At the beginning of the 14th century the "narratores" or "countors" commenced to be admitted in batches numbering from four to nine persons at irregular intervals. In the course of time some of the "narratores" or "countors" became Serjeants. There were two types, the King's Serjeants and Serjeants-at-law, both types had the prerogative right to plead at the Bar of the Court of Common Pleas. The King's Serjeants although not nominated or appointed by the Sovereign held offices under the Crown and were also in due course appointed Judges. The Serjeants-at-law had the right to plead on behalf of litigants in the Court of Common Pleas and at a later stage with the consent of the Judge might plead in other Courts. After the abolition of the Common Pleas, in 1870 there was no real point for the existence of the Order of the Coif and the last Serjeant was sworn on 12 May 1875. The rank of King's Counsel was first created in 1604.

Those persons who studied the

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Swan. But perhaps they could give this some serious consideration when they gather again for their monthly partners' meeting at the Michael Fowler Centre. I know it may be suggested that it is a little unfair to single out one firm, and why shouldn't this impost apply to all mergers or partnership announcements? The answer is of course that it should apply to any firm which, like Kensington Swan, announces a change in personnel once a month. For all I know, even as I tap out this jotting on my battered portable, the ad agency with the Kensington Swan contract is preparing the copy for next month's new batch of associates, all of whom no doubt will specialise in corporate/commercial practice, and most of whom will have exotic sounding qualifications from Cornell or Stanford.

Just a moment's sober reflection will, I know, convince the partners of the integrity of my scheme. But, as I hope I have demonstrated, I owe it all to the brilliance of Mr Dugdale's original idea.

As to amount, I would not be quite so tough as the idea's originator. With all respect, as I mentioned before, his minimum seems a bit steep, and for all I know there may be the odd junior partner in Kensington Swan earning less than $300,000 a year. How about one percent of the revenue generated by each monthly announcement? Something like that anyway. I 'm not really fussy; whatever the formula used, I'm sure the return will be healthy.

Well, there it is. Anyone with any other suggestions on how to develop Mr Dugdale's idea, drop him a line or give him a bell. He's an agreeable fellow with a good line in deft banter, except, remember . . . on this occasion. □

Municipal Law resided in houses situated between the King's Courts at Westminster and the City of London. Before the end of the reign of King Edward II schools which had been set up earlier for the teaching of law in Inns or Hotels separated into the four Inns of Court: the Middle Temple; the Inner Temple; Lincoln's Inn and Gray's Inn, all of which were leased from their respective owners. The Temple Inns were erected on the site owned by the Knights Templars which had been founded in Jerusalem in the twelfth century by Baldwin, King of Jerusalem, as a religious order known as "The Poor Fellow Soldiers of Jesus Christ and of the Temple of Solomon". Their objects were to protect the Holy Sepulchre of our Saviour from the ravages and sacrilege of the infidels and to protect pilgrims. In 1312 the Order, having fallen into disrepute and venal practices, was abolished by Pope Clement the Fifth. On the abolition of the Monasteries during the reign of Henry VIII the property of the Temple passed into the hands of the Crown but the two Inns of Court continued there undisturbed until the Temple properties in 1609 became the free hereditary property of the Middle and Inner Temple of their respective sites. The name Lincoln's Inn derives its name according to tradition from the de Lacey family, the Earls of Lincoln, who may have at some time owned the site. The freehold of Lincoln's Inn was purchased by the Society as to part in 1536 and the remainder in 1580. Gray's Inn, according to tradition, was originally owned by the family of Gray of Wilton but it had passed into the hands the Prior of the Convent of East Sheen before the abolition of the Monasteries when it passed into the hands of the Crown and the society paid rent to the Crown at the same rate as had previously been paid to the Monks of Sheen. At some later date the society acquired the freehold of the site. The dates when the four Inns of Court were originally formed remain in obscurity. According to tradition when they started the students' studies were not confined to law but included such other exercises as might make them serviceable at the King's Court as stated by Sir William Dugdale. Sir John Fortescue (c 1477) stated that the students in order to serve the courts of Justice and profit their country "did learn to dance, to sing, to play on instruments on the ferial days" [holidays not being a festival or fast day] "and to study divinity on the festival". In addition to the four Inns of Court there were at one time ten Chancery Inns, each of which was attached to one or other of the four Inns of Court and all of which eventually disappeared.

The four Inns of Court are all equal in their authority and privileges, none of which takes precedence over any of the others. Their rules concerning the admission of students, the keeping of terms, the education and examinations of students, and the calling of candidates to the Bar, which confers upon them the right of Audience in all the Courts in England and Wales, are similar. It is customary that after being called to spend a year's pupilage with an established barrister. Ben Jonson (1573-1637) described the Inns of Court as "the noblest nurseries of humanity and liberty in the Kingdom".

The members of an Inn of Court comprise the Benchers, Barristers and students. The formal title of the Benchers is "the Masters of the Bench" the members of which are self-elected and there is no restriction as to numbers. The duties of the Benchers are the supervision and management of the affairs of the Inn and the exercise of discipline over its members. In each year one of the Benchers is elected to be the Treasurer of the Inn and during his term of office acts as the Chief Officer of the Inn. The Judges of the Superior Courts are the visitors of the Inn, and an appeal may be made to them against any Inn refusing to call a student to the Bar or to reinstate a member who has been disbarred by the Inn for professional misconduct.

Over the centuries a series of rules has been laid down concerning the status of a barrister.

On 27 May 1532 a rule of Court was made in Scotland by the Court of Session that

> No advocate without any cause shall refuse to act for any person tendering a reasonable fee under pain of deprivation of office.

Sir Christopher Hatton (1540-1591) was educated at Lincoln's Inn but devoted his time to dancing, of which he became a master of that art, and the stage rather than the study of the intricacies of the law. He became a great favourite of Queen Elizabeth I and as such he was appointed to various offices connected with the Palace. On the death of Lord Chancellor Bromley on April 12 1587 Her Majesty retained the Great Seal herself. There was much speculation at Court, in Westminster Hall and in the City of London as to whom should be appointed Lord Chancellor. On 29 April 1587 Her Majesty appointed Sir Christopher Hatton as the Keeper of Her conscience to preside over the Chancery Court and the Star Chamber and the House of Lords and to superintend the administration of Justice throughout the Realm (see Campbell: *Lives of the Lord Chancellors*, Vol II, Ch XLV). He made an order that when he sat in the Chancery Court that four Masters in Chancery should always sit on the Bench with him. He was always exceedingly cautious, "not venturing to wade beyond the shallow margin of equity, where he could distinctly see the bottom". He did marvellously well and it was said "that he made up for his want of law by his constant desire to do what was just". His most elaborate effort while he held the Great Seal was his address on the elevation of Mr Clerke to the dignity of a Serjeant-at-Law in which he said

> No man can live without lawe. Therefore I do exhort you that you have good care of your dutie in the calling and that you be a father to the poore. That you be carefull to relieve all men afflicted. You ought to be an arm to helpe them, a hande to succoure them. Use uprightness and followe truthe. Be free from cawtell. Mix with the exercise of the lawe no manner of decepte. Let these things be farre from your harte. Be of an undoubted resolution. Be of good courage, and feare not to be carried away withe the authoritie, power or threateninges of anye other. Maynteyne your clientes cause in all right. Be not put to sylence. As it is alleged out of the booke of Wisdome, "*Noli quarere fieri Judex, ni forte extemescas faciem*

potentis, et ponas scandalam in agilitate tua". Know no man's face. Go on withe fortitude. Do it in uprightnes. *"Redde cuique quod suum"*. Be not parciall to yourself. Abuse not the highest guift of God which no doubt is great in equity. Theis thinges be the actions of nobilite. He that doth theis thinges dewlie deserves high honour, and is worthy in the world to rule. Let truthe be famyllier with you. Regard neither friende nor enemye. Proceede in the good worke layed upon you. And the laste point that I am to saye to you — Use diligence and carefulnes. And although I have not been acquainted withe the course of the lawe, albeit in my youthe I spent some time in the studys thereof, yet I find by daily experience that diligence bringes to pas greate thinges in the course and proceedinge of the lawe, and, contrarilie, negligence overthrowes many good cawses. Let not the dignitie of the lawe be geven to men unmeete. And I do exhorte you all that are heare present not to call men to the barre or to the benche that are so unmeete. I finde that there are now more at the barre in one house than there was in all the Innes of Courte when I was a younge man.

He concludes by an exhortation to avoid Chancery and to settle disputes in the Courts of Law.

> Wee sit heare to helpe the rigor and extremities of the lawe. The holy conscience of the Queene for matters of equitie in some sorte is by her Majesties goodness committed to mee, when *summum jus* doth minister *summam injuriam*. But the lawe is the inheritance of all men. And I praye God blesse you and send you as much worshipp as ever had anie in your cawlinge.

Note: "Cawtell" was the Elizabethan word for "trickery".

In 1792 in Erskine's defence of Tom Paine (State Trials XXII p 411) he said:

> From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or the defence, he assumes the character of the Judge [or the jury] nay, he assumes it before the hour of judgment, and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principles of the English Law makes all presumptions, and which commands the very judge to be his counsel.

In 1822 in the case of *Ex parte Lloyd* (Montague's Reports 1.70) Lord Eldon said:

> He (the advocate) lends his exertions to all, himself to none. The result to him is a matter of indifference. It is for the Court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer assisting in the administration of justice, and acting under the impression that truth is best discovered by powerful statements on both sides of the question.

Another important question arose in 1840 in *Regina v Courvoisier*, a foreign manservant was accused of murdering his master, Lord Russell, who was found dead in his bed with his throat cut, a lot of jewellery and silverplate was missing. Some of the jewellery was found in Courvoisier's pantry and during the course of the morning of the trial, evidence was given that at the behest of Courvoisier a parcel, which on opening contained the silverplate, was delivered to a publican. This discovery was final and conclusive in the chain of evidence against Courvoisier. The latter, at lunch time, requested his counsel Phillips and his junior, to confer with him and said to them:

> I have sent for you, gentlemen, to tell you I committed the murder.

Phillips, after a pause, said:

> Of course then you are going to plead guilty?
>
> No sir — was the reply — I expect you to defend me to the utmost.

Phillips sought advice from Baron Parke, who told him he was bound to continue the defence, and to use all fair arguments arising on the evidence.

This advice, though simple, imposed a task of great delicacy upon Phillips and led to a storm of protest because in his preroration he said inter alia:

> But you will say to me, if the prisoner did not do it, who did it? I answer, ask the Omnipotent Being above who did it. Ask me not, a poor finite creature like yourselves. Ask the prosecutor who did it. It is for him to tell you who did it and until he shall have proved by the clearest evidence, that it was the prisoner at the Bar, beware how you imbue your hands in the blood of that young man.

The presiding Judge expressed the opinion that Phillips had discharged his difficult task without transgressing those limits within which he was bound to confine himself. No counsel is ever entitled to express his own belief in his client's innocence.

Arising out of this, if before the commencement of the trial, Counsel's client tells Counsel that he is guilty but wants to be defended against the charge, Counsel should tell him to engage some other Counsel, but once he has commenced the trial like Phillips, he must continue the defence.

In 1844 in the Irish case of *The Queen v O'Connell* (7 Irish Reports at p 313) Crampton J said:

> He (the advocate) is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents, and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law — he will not wilfully misstate the

> facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case or for any party or purpose can discharge him from that primary and paramount retainer.

The Right Honourable the Lord MacMillan in his speech to the Royal Philosophical Society of Glasgow in February 1916 summed up the position of an advocate in saying:

> Hence the advocate is bound by a host of unwritten obligations, which are designed to maintain the integrity of his professional conduct. *The code of honour of the Bar is at once its most cherished possession and the most valued safeguard of the public.* In the discharge of his office the advocate has *a duty to his client, a duty to his opponent, a duty to the Court, a duty to the State, and a duty to himself.* To maintain a perfect poise amidst these various and sometimes conflicting claims is no easy feat. Transgression of the honourable obligations which these duties impose upon the advocate is not like making a mere mistake in business. It involves infringement of his moral duty. It is a matter of conscience. And his offence cannot be his, for all his work is done in the presence of his brethren and the public. *His conduct is always exposed to the searching if salutary scrutiny of many critics.*

In order to show that these principles, which have been the tradition handed down and emphasised by the Judges through the centuries, are still in existence in this day and age is proven by the judgments in the case decided in the House of Lords in *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993 Lord Reid said at pp 227-8; 998-9:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is not sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.
>
> Is it in the public interest that barristers and advocates should be protected against such actions? Like so many questions which raise the public interest, a decision one way will cause hardships to individuals while a decision the other way will involve disadvantage to the public interest. On the other hand, if the existing rule of immunity continues there will be cases, rare though they may be, where a client will be deprived of a remedy. So the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable. I would not expect any counsel to be influenced by the possibility of an action being raised against him to such an extent that he would knowingly depart from his duty to the court or to his profession. But although the line between proper and improper conduct may be easy to state in general terms it is by no means easy to draw in many borderline cases. At present it can be said with confidence in this country that where there is any doubt the vast majority of counsel put their public duty before the apparent interest of their clients. Otherwise there would not be that implicit trust between the Bench and the Bar which does so much to promote the smooth and speedy conduct of the administration of justice. There may be other countries where conditions are different and there public policy may point in a different direction. But here it would be a grave and dangerous step to make any change which would imperil in any way the confidence which every court rightly puts in all counsel who appear before it. ([1969] 1 AC 191, 227-228)

In the same case Lord Upjohn at p 1033 (1967 3 All ER):

> Therefore, the immunity of the Barrister, if it exists at all, must depend on some other ground than his status, his inability to sue or his inability to contract. I think that public policy necessitates, that, at all events in matters pertaining to litigation, a Barrister should have this immunity, and basically it depends on two factors. First, a Barrister is in a unique position, even different from a physician, for he is bound to undertake litigation on behalf of a client provided that it is in the usual way of his professional practice and that he is properly instructed or, to put it more bluntly, properly paid according to his standing at the Bar. Whatever may be the powers of counsel to compromise civil litigation contrary to his client's instructions during its course there can be no doubt that, however much he may believe it to be in the interests of his client that the latter should plead guilty, if the client refuses to accept that advice counsel is bound to continue with the defence of the prosecution, however distasteful it may be. I make no apology for quoting yet again the famous words of ERSKINE when he accepted a brief to defend Tom Paine:
>
> From the moment when any advocate can be permitted to

> say that he will or will not stand between the Crown and the subject arraigned in the courts where he daily sits to practise, from that moment the liberties of England are at an end.
>
> That at once distinguishes the position of the barrister from even the physician who is not bound to undertake any treatment which he does not advise.

Extracts from the opinions of Their Lordships in that case have been applied by the Court of Appeal in New Zealand in *Rees v Sinclair* [1974] NZLR 180.

Mr Justice White in the case of *Gazley v Wellington District Law Society* [1976] 1 NZLR 452 applied the above cited passage from the opinion of Lord Reid. In this case Mr Justice White, who delivered the judgment of the Full Court then went on to say:

> Clearly, in our view, what is said applies to a practitioner acting as both barrister and solicitor in the conduct of litigation in New Zealand.
>
> In *Clyne v NSW Bar Association* (1960) 104 CLR 186, professional misconduct was considered by the High Court of Australia (Dixon CJ, McTiernan, Fullagar, Menzies, and Windeyer JJ). In the judgment of the court in that case it was said that rules which govern the members of a professional body can be divided "roughly into two classes" (ibid, 199). There are rules which can be called "conventional in character" (ibid) and rules which are 'fundamental" (ibid 200). The latter, it was said, are "for the most part, not to be found in writing . . . because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness" (ibid). Later in the judgment the court refers to "great privileges both de jure and de facto" which a member of the bar enjoys, and the absolute privilege conceded on the grounds of public policy to ensure freedom of speech (ibid). With that, however, there is the professional duty to which Lord Reid referred in *Rondel's* case, stated in *Clyne's* case as follows:
>
> > But, from the point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege, and the power of doing harm which it confers, should not be abused. Otherwise grave and irreparable damage might be unjustly occasioned. The privilege may be abused if damaging irrelevant matter is introduced into a proceeding. It is grossly abused if counsel, in opening a case, makes statements which may have ruinous consequences to the person attacked, and which he cannot substantiate or justify by evidence. It is obviously unfair and improper in the highest degree for counsel, hoping that, where proof is impossible, prejudice may suffice, to make such statements unless he definitely knows that he has, and definitely intends to adduce, evidence to support them. It cannot, of course, be enough that he thinks that he may be able to establish his statements out of the mouth of a witness for the other side. (104 CLR 186, 200-201)
>
> The privilege and the immunity bring with them a professional responsibility not to make allegations "without a sufficient basis" or "without reasonable grounds". This responsibility applies irrespective of the persons against whom allegations are made.

Accordingly, in New Zealand a lawyer whether a Barrister sole or a barrister and solicitor when acting in Court is bound to conduct a case in conformity with the highest responsibilities which have been placed upon barristers and developed over the centuries. These duties and obligations are not well known or understood by the general public in New Zealand. □

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pinch our carparks. I had always thought that the underlying principle of insurance was that it was a contract of indemnity between insurer and insured. The Courts seem to have consistently said so since the classical case *Castellain v Preston*. The idea that insurance should form some sort of fund for the world at large is a new one except perhaps in the United States where the "deep pocket" approach to insurers' liability is beginning to spread from California like a sort of jurisprudential attack of AIDS.

In *Mayfair v Pears* the Court seems to be going rather further than recognising the convenience of the litigants and potential litigants and reaffirming the rule in *Beswick v Beswick* [1968] AC 58 as it recently did in *Phoenix Assurance Co v Borthwick CWS Ltd* (CA 115/86). The principle found there, namely that if there is an indemnifier in the picture, it ought to be involved in the proceedings, is a commonsense one. The suggestion that liability should follow insurability is quite another matter.

If the principle is going to be "He who has the insurance pays", then we have a minor revolution on our hands. Of course in the long run the public will pay as insurance premiums increase to take into account this new principle. We do not even have the comfort that the denizens of the "1860 Tavern" are likely to bear their fair share of the increased load. A fair proportion of them are probably totally uninsured.

From a practical point of view my problem is now solved. Pirates are now excluded from my carpark. The landlord has installed card operated barrier arms. It has also increased the cost of my carpark. Should I blame the Court of Appeal, Mr Pears, or both, and will one or other pay the bill? □