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Justice on the cheap?

In his poem, *In Memoriam*, Tennyson wrote of his dead lawyer friend Arthur Hallam coming down to visit the Tennyson country house

> How often, hither wandering down
> My Arthur found your shadows fair,
> And shook to all the liberal air
> The dust and din and steam of town.
>
> He brought an eye for all he said;
> He mixt in all our simple sports;
> They pleased him, fresh from brawling courts
> And dusty purlieus of the law.

It is perhaps a somewhat poetic vision to see the argument of counsel before bewigged and berobed Justices as a form of "brawling". But a contest, a Court case certainly is, a contest at once intellectual and theatrical. But a Court is more than a forum, a theatre, a circus (in the classical Roman sense). Courts are the places where and, they are in another sense, the means whereby justice is sought to be done within the limits of human understanding and of social resources. No system of justice can be perfect; but every system of justice must have the idea of perfection as its ideal or it will become merely a convenient means of finalising disputes. Any dispute can be determined by blind chance, by the toss of a coin, by arbitrary caprice on the part of a sovereign. Law, however, is an attempt to do justice, to the degree and in the way that is human; and admittedly therefore inevitably prone to error. Which of course is why any legal system worth the name has a system of appeals, and develops a jurisprudence of rational principles.

Any concept of the Courts as being merely one means of dispute resolution is obviously inadequate. The new Report from the Law Commission on *The Structure of the Courts* does not make this error, but nevertheless sees Courts in a somewhat less exalted way. The opening paragraph reads:

> 1. The Courts have an essential role in our system of constitutional government. They are essential to a free and fair society. With the executive and Parliament, they comprise the main branches of government. They are charged with enforcing the law, clarifying and developing it, upholding constitutional relationships, protecting New Zealanders against abuses of the power of the State, and settling disputes peacefully and according to law.

The Report then goes on in paragraph 4 to ask two questions. What resources need to be provided to meet the obligations imposed by the constitutional and social role of the Courts, and how are the Courts to be organised to fulfil these obligations. The Report continues:

> That second question — of organisation or structure — is our primary concern in this Report. There are two main structural questions: how should the original jurisdiction of the courts be organised and how should appeals be organised? The questions — especially about appeal — are given particular point by the announcement by the Government of its decision that appeals to the Judicial Committee of the Privy Council are to be terminated. This Report is written on that basis.

A reading of the Report however leads one to the view that the writers of the Report have imbibed a large dose of the current economic medicine being so liberally administered. The Report appears — whether this was its authors' intentions or not — to have been designed to make it palatable to accountants and other such market oriented decision-makers. Thus the somewhat ludicrous use of statistics about empty Court rooms and non-working Judges, and highly suspect comparisons with Courts in other countries. Indeed the effect of the Report, in the way it has been presented to the public, is to brand the judiciary as basically lazy. The Report seems to claim, apparently as the main justification for its proposed changes, that Judges can be made to work harder and longer. Certainly that is the basis on which some editorial writers have welcomed it.

The Report proudly notes in paragraph 518, that this could mean over a period of time reducing the number of High Court Judges from 26 to 20 and of District Court

Judges from 98 to 73. It is not altogether clear whether the High Court figures include or do not include the Chief Justice.

One cannot but be highly sceptical of this. It looks more like a piece of salesmanship for the benefit of politicians and the public, than a realistic assessment of what will be likely to happen. It is significant that the first reported reaction from the President of the New Zealand Law Society, Mr Graham Cowley, was that the Society

> would be particularly interested to see if increased jurisdiction of the District Court was matched by appropriate resources. The Society had been concerned present resources were already inadequate in terms of staff, buildings and Court recording methods. If the Commission's proposals were adopted, there might be a need to make a large financial commitment.

In short it is quite probable that the promised savings on judicial salaries (even if it were to happen) could well be more than offset by increases in the way of substantial requirements for new support services. There is, for instance, a reference (paragraphs 328, 536) to the use of Masters at the District Court as well as the High Court level. To what extent, one wonders, is this merely an attempt to get Judges on the cheap? The Report implies this is not so with its recommendation (paragraph 538) that the role of Masters be reassessed in five years' time. Others however might see it differently. That Masters have already shown their worth, and that there might well be room for developing the office is true enough. But as a means of reducing the number of Judges it would probably require a very substantial increase in the number of Masters. All of that however is hypothetical at this stage.

The most important aspect of this Report is the consideration of the restructuring of our Court system consequent on the abolition of the present right of appeal to the Privy Council. On this issue many will disagree with the recommendations of the Law Commission. It is an important issue because essentially the Report seeks to restructure the present system dramatically: to institute a Supreme Court to replace the present Court of Appeal, and also, to be the final Court in the system; to make the High Court largely an appellate Court; and to make the District Court with almost full concurrent jurisdiction, for practical purposes, the Court of original jurisdiction. It is suggested that even those matters to be dealt with by the High Court as a Court of first instance, should nevertheless be commenced in the District Court and then transferred (excepting for those few cases in which the High Court will have exclusive jurisdiction).

The key problem in all of this is the nature and role of the to-be-created Supreme Court. As described it is essentially to replace the present Court of Appeal – as well as the Privy Council. It would be presided over by the Chief Justice who would no longer sit in the High Court. There is an alternative, and less dramatically unsettling possibility however, which is not considered in the Report. The Supreme Court could simply deal only with very special cases of major significance. Cases should go there only by leave of the Court of Appeal or the Supreme Court itself, except for two or three specific issues such as criminal appeals on questions of law (but not of sentence); civil cases where the damages claimed exceed say $750,000; and constitutional cases directly involving, say, issues of the Treaty of Waitangi, or the Electoral Act, or the Bill of Rights (when we get one). Perhaps all civil cases should only be by leave which should be sparingly granted and only in matters of great complexity or substantial legal principle.

Effectively the work of the Supreme Court ought not to involve more than eight or ten sittings in a year. We are a relatively small country and should not expect to have a large number of legally significant cases each year that should need to go higher than the Court of Appeal. There could be a leap-frogging system similar to that now available in England for appeals to the House of Lords. For instance the relatively few cases that are currently considered appropriate for consideration by a board of five Judges in the Court of Appeal should be referred directly on to the Supreme Court. The Supreme Court should consist of seven Judges who would be expected to sit as a full bench, but with a quorum of five in any event. The members should be the Chief Justice, the President of the Court of Appeal, three other Judges of the Court of Appeal, the Senior Puisne Judge, and one retired Judge of the Court of Appeal. If the requisite number of Court of Appeal Judges is unavailable then other retired Court of Appeal Judges could be called on. With the increase in the size of the Court of Appeal and the lowered retiring age that should not be a problem for the future – even as it is not at present.

The inclusion of the Senior Puisne Judge from the High Court would bring a direct input from those involved on a regular practical basis in the day-to-day work of the Court system with witnesses and juries. That of course is the present practice with the Court of Appeal.

The retired Court of Appeal Judge or Judges would be selected as and when needed. Again this is not an unknown practice at present, and in England former Lord Chancellors, like Lord Elwyn-Jones, have been called in for sittings on occasion. To avoid any possible lack of a quorum there could be a provision for alternates for the three Judges specified by office namely the Chief Justice, the President of the Court of Appeal and the Senior Puisne Judge. But in any event either the Chief Justice or the President of the Court of Appeal should have to preside in person. There should be no sitting without one or other of them.

The particular benefits of the proposed system include:

1 The Supreme Court would clearly be a final Court and for only the most significant cases in terms of the seriousness of consequences for the parties, the establishment of legal principles, or the resolution of serious constitutional issues.

2 The Chief Justice, who would preside, would clearly be seen to be the head of the judiciary.

3 For practical purposes the Chief Justice could continue his present practice of sitting in the High Court, thus emphasising the homogeneity of the judicial system.

4 The office of President of the Court of Appeal would remain as it is, with the additional responsibility of membership of the Supreme Court, as of right.

5 Effectively therefore the suggestion would solve the problem raised in paragraphs 542 and 544 of the Report of the unnecessarily conflicting views of the High Court and Court of Appeal Judges concerning the offices of Chief Justice and President of the Court of Appeal.

6 The jurisdiction and work of the Court of Appeal could continue to be largely as it is at present.

7 The present two-tier appeal system would be preserved for really important cases and legal issues.

8 The Court of Appeal would be the final Court on the question of sentence, and in civil cases it could also be so on disputes concerning the assessment of damages, at least up to a certain amount. There would of course be the power for the Supreme Court to refer a matter back to the Court of first instance for assessment of damages.

9 The involvement of the Senior Puisne Judge would give a practical perspective and emphasise the distinction between High Court Judges and District Court Judges.

10 The involvement of at least one retired Court of Appeal Judge would make a valuable contribution of long legal experience and emphasise the continuity of legal principles being subject to development rather than arbitrary change for the sake of change.

11 The profession and the public would be given greater confidence in the legal system in that truly important legal issues could be seen to have received full consideration instead of being finally determined by one of two panels of only three Judges, as proposed by the Law Commission.

12 Constitutional issues would be seen to have that degree of importance that is appropriate.

Whatever is finally done about the restructuring of the Court system the Report of the Law Commission should be treated as only the start of the debate and discussion. Some of the recommendations are obviously useful, but some have implications of far-reaching importance related to the very nature of a legal system. The proposals set out above are tentative and are put forward in the hope of stimulating further discussion and debate within the legal profession. They may well contain some difficulties that would need further refinement. The point is that the Report needs further consideration, because the proposals in it are not really satisfactory. Perhaps no solution is wholly satisfactory. In practical terms however, the Report should not be adopted because of its promise (probably mythical at best) of reducing the number of judicial officers and of limiting appeal rights, and thus saving money. Justice on the cheap means cheap justice.

P J Downey

Recent Admissions

Barristers and Solicitors

Mark AM	Auckland	2 December 1988
Martelli KA	Auckland	2 December 1988
Matthews CS	Auckland	2 December 1988
Mikaere AL	Auckland	2 December 1988
Mikkelsen LA	Auckland	2 December 1988
Miles LD	Auckland	2 December 1988
Mitchell KJE	Auckland	2 December 1988
Mobberley AK	Auckland	2 December 1988
Moore AJD	Auckland	2 December 1988
Moorhead JD	Auckland	2 December 1988
Munro SC	Auckland	2 December 1988
Murphy EP	Auckland	2 December 1988
Norris GW	Auckland	2 December 1988
O'Brien AJ	Auckland	2 December 1988
O'Sullivan PF	Auckland	2 December 1988
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Parata HS	Auckland	2 December 1988
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Patel AD	Auckland	2 December 1988
Pauling TM	Auckland	2 December 1988
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Stephenson DJ	Auckland	2 December 1988
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Syme LCE	Auckland	2 December 1988
Tabron JS	Auckland	2 December 1988
Taylor AJ	Auckland	2 December 1988
Tollemache VM	Auckland	2 December 1988
Tolmie JR	Auckland	2 December 1988
Trotman AM	Auckland	2 December 1988
Walker TJ	Auckland	2 December 1988
Westbrooke BD	Auckland	2 December 1988
Westenra B	Auckland	2 December 1988
Williams JL	Auckland	2 December 1988
Wood MAJ	Auckland	2 December 1988
Wu YF	Auckland	2 December 1988
Smith PMcG	Auckland	2 December 1988
Tan KS	Auckland	2 December 1988
Todd MT	Auckland	2 December 1988
White DL	Auckland	2 December 1988
Wong GL	Auckland	2 December 1988

Case and Comment

Letters of comfort update

The English Court of Appeal's decision in *Kleinwort Benson Ltd v Malaysia Mining Corporation Berhad* [1989] 1 All ER 785, has now been released, with the decision of Hirst J in the Queens Bench Division [1988] 1 All ER 714 being overturned.

Malaysia Mining Corporation Berhad (MMC) had issued to the merchant bankers Kleinwort Benson Ltd (KB) a "comfort letter" as part of an "acceptance credit/multi-currency cash loan facility" granted by KB to MMC Metals Ltd (MMC Metals), a wholly-owed subsidiary of MMC. The letter contained the following paragraph:

> It is our policy to ensure that the business of MMC Metals Ltd is at all times in a position to meet its liability to you under the [facility agreement]. . .

When the facility was subsequently increased to £10,000,000 a further letter of comfort was given, essentially in the same terms as the first letter, but with the inclusion of a provision recording that it superseded the previous "letter of awareness".

MMC Metals became unable to meet its obligations under the facility agreement, and so KB called on MMC to comply with the letter of comfort and ensure that KB received the payment due to it under the agreement. MMC refuted liability.

At first instance Hirst J found in favour of KB. His Honour was not prepared to regard the letter as a "gentleman's agreement" binding in honour only, but instead ruled that the letter of comfort had contractual status and as MMC had not complied with it, KB was entitled to recover damages accordingly.

MMC appealed that decision arguing that Hirst J had incorrectly construed the terms of the relevant paragraph in the letter.

In the writer's note at [1988] NZLJ 142 two aspects of Hirst J's decision were mentioned.

1 That there was room for arguing that the introductory words "It is our policy. . ." allowed the giver of the letter to have a change of policy at a later date. In the Court of Appeal, Ralph Gibson LJ felt that the central question in the case was whether words in the relevant paragraph, considered in their context, were to be treated in law as a contractual promise or merely as a warranty or representation of fact. The Lord Justice was in no doubt that the provisions of the paragraph constituted "a statement of present fact and not a promise as to future conduct":

> In my judgment [MMC] made a statement as to what their policy was, and did not in . . . the comfort letter expressly promise that such policy would be continued in the future. It is impossible to make up for the lack of express promise by implying such a promise. . .

2 That Hirst J had established a fine line between a "guarantee" document and a letter of comfort of the type given by MMC, and that it was arguable that a greater distinction should have been drawn. Prior to the letter of comfort being given, KB had asked MMC to acknowledge that it would be jointly and severally responsible for, or alternatively give a guarantee in respect of, the liability of MMC Metals under the the facility agreement. MMC had specifically refused to assume such obligations. The letter of comfort was, in essence, a compromise between the parties. Ralph Gibson LJ was prepared to regard these facts as being admissible evidence on the question of whether MMC's affirmation in the relevant paragraph was intended as a warranty or a contractual promise. The Lord Justice found it impossible to hold that the terms of the paragraph "were intended to have any effect between the parties other than in accordance with the express words used". Again, it was clear that the particular provisions of the letter of comfort could not be regarded as intending to contain a contractual promise as to the future policy of MCC. Ralph Gibson LJ concluded by observing that MMC's decision to repudiate its moral responsibility to KB was not a matter for the Court.

The term "comfort letter" has, of course, no singularly identifiable meaning. At a Conference in Atlanta (see report in *The International Lawyer*, 1978) Dr Bohloff noted of letters of comfort:

> Bank lawyers all over the world are often confronted with letters of responsibility, comfort letters and letters of awareness . . . . Under most jurisdictions the legal scope of such letters . . . ranges from clearly non-committing language (often referred to as cold comfort letters) over a legally grey area to letters which come close or are identical to guarantees . . .

In the end, however, ascertaining the

"status" of any particular letter of comfort must begin with a consideration of the actual words used in the document by the parties. In drafting "comfort" arrangements, the suggestions proffered in the writer's note at [1988] NZLJ 142 remain.

Stuart D Walker

Delay in bringing proceedings as an abuse of process

Russell v Stewart [1988] BCL 1891; *Watson v Clarke* (unreported, Robertson J, Dunedin, AP 55/88; 12.10.1988)

Introduction

In recent months two quite distinct High Court judgments have explored the powers of a District Court to stay or dismiss proceedings as an abuse of process. Both analyses came in the context of excessive delay in the bringing of prosecutions. The conclusions reached are significant:

1 A District Court as part of its inherent powers (not jurisdiction) may control abuses of its process.
2 The form of control may include dismissal of, or staying, the proceedings.
3 Delay on the part of the prosecuting authority may be a basis for exercising the powers outlined in 1 and 2.
4 The delay may have occurred at any stage in the proceedings, ie, prior to the information being laid, in serving the documents or in bringing the issue to trial.
5 The power can be exercised even though the prosecution was initiated within the requisite statutory limitation period.

At first blush, it may seem a radical suggestion that a prosecution commenced within the deadline set by Parliament should nevertheless be stopped without a hearing by the Courts on the basis that it had taken too long to bring. However, upon further consideration the case for such a discretion becomes compelling. The standard limitation period for the minor run of offences is six months (Summary Offences Act 1957, s 14), but this may be, and often is, varied by legislation. Thus in the first of the cases, *Russell v Stewart*, [1988] BCL 1891 (Wylie J), the prosecution involved benefit fraud under the Social Security Act 1964 where the limitation period has been extended to one year from the time when the facts giving rise to the offence become known to the Department (s 128). Similarly, the second case, *Watson v Clarke* (unrep; Robertson J, Dunedin, AP 55/88; 12/10/1988), involved prosecutions under the Fisheries Act 1983, where the limitation period is extended to two years (s 104(2)). It becomes possible then, in an extreme case, for a prosecution not to be commenced for two years after the offence and facts become known to the prosecuting authority. On some occasions there may be valid reasons for this; however, there is also undoubted potential for abuse, and for prejudice to the ability of an accused to present a defence, not to mention the potential impact such delay can have upon personal lives. Finally, overriding, or perhaps reflecting all these factors, is the fundamental principle that a civilised system of justice requires that allegations of criminal conduct against people ought to proceed as speedily as possible. Such a proposition is included in most constitutional documents, including New Zealand's draft Bill of Rights (Article 18(e)).

The potential impact of this power is significant. Recent similar developments in Australia have led to the Courts in New South Wales being "flooded with applications". (P Byrne "The right to a speedy trial" (1988) 62 ALJ 160; this article provides a very useful tabulation of the Australian developments and the factors relevant to the exercise of the discretion there. Although New Zealand's law is clearly not yet as settled or advanced, the similarities are likely to be great.) The purpose of this note is primarily to bring to practitioners' notice the existence of these two quite recent decisions and to explore the factors that are likely to be relevant to the exercise of the discretion. That the two judgments are not here fully analysed is simply a reflection of the extensiveness of the research they contain. There is little point in repeating it; rather at this stage it seems more useful to concentrate on the use that might be made of them.

1 Jurisdiction

It has been established for some time that a District Court may control abuses of its process. The primary contribution these two recent judgments make to this area is (i) to resolve an apparent conflict in a number of relevant High Court decisions, and (ii) to give further guidance on the means by which abuses of process may be controlled by a District Court. Concerning the conflicting authorities, both Judges suggest that the problem lies in the failure to differentiate sufficiently between the concepts of inherent jurisdiction and inherent power. Being a creature of statute, a District Court does not have inherent jurisdiction. Any jurisdiction that it exercises must be sourced in Parliament. However, as with all Courts, it must be accepted as having the inherent power needed to control the processes through which the jurisdiction is exercised. As for how it may control those processes, both Judges conclude that the powers extend to dismissing an information or entering a stay of proceedings, and in appropriate circumstances to taking that action without hearing what appear to be properly constituted proceedings.

2 Delay as a basis for exercising the discretion

The second major finding is that delay may be the basis for exercising the discretion to prevent abuses of process. The starting point is the purpose for such a discretion. It exists to "safeguard an accused from oppression and prejudice" and "to prevent unfairness to the accused". (*Clarke*, p 5) The Ontario Court of Appeal expressed it this way: "there is a residual discretion in a trial court to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency, and to prevent the abuse of a court's process through oppressive or vexatious proceedings". (*R v Young* (1984) 13 CCC (3d) 1, 31.)

Delay in bringing criminal proceedings to a conclusion can lead to such oppression and prejudice. The United States Supreme Court in *Barker v Wingo* (407 US 514 (1972)) identified three general interests protected by the extension of abuse of process to delay:

(i) to protect oppressive pre-trial incarceration,
(ii) to minimize anxiety and concern of the accused; and
(iii) to limit the possibility that the defence will be impaired. Of these the most serious is the last.

The fact situations in the two cases under consideration provide helpful illustrations of the type of delay that can attract the ire of the Court. In *Russell*, the basis of the charge was that the accused had not advised the Department that she was living in a de facto relationship while continuing to receive a domestic purposes benefit. The information was laid on 11 February 1985, being 17 months after the date first mentioned in the information, and 17 days within the Department's extended limitation period. The file was enlarged on several occasions for service until 23 June 1987, when the District Court Judge refused any extension on the grounds of excessive delay. In this case then, there was delay both in laying the information and in effecting service. On appeal, Wylie J upheld the dismissal.

In *Clarke*, three separate prosecutions were involved. Clarke was alleged, in association with another, to have illegally used a set fishing net on Boxing Day of 1986. The informations were not sworn until 10 February 1988; a hearing date was set for 18 March 1988. The associate Leigh, had been served but did not appear. Formal proof was given, whereupon a s 19 discharge was entered. Turning to Clarke, the Judge noted that service had not been effected. He then held that "the delay in the swearing and service of the information constituted an abuse of the processes of the Court" and in the absence of any explanation for the delay dismissed the information. It should be noted that the relevant delay must be that which occurred prior to the laying of the information, for less than six weeks had elapsed since the filing of the information. Robertson J upheld the dismissal, noting in addition that a s 19 discharge would have been inevitable had the matter proceeded.

The third prosecution included in *Clarke*, Lawlor, involved the offence of discharging sheep dip into a river; it was alleged to have occurred on 17 April 1987; the information was sworn on the same date as the other cases, 10 February 1988. Here, then, the delay was only ten months, and service was effected prior to the 18 March hearing date. Lawlor was represented by counsel who sought an adjournment to make further inquiries. However, the Judge, rather than granting the application, called on the prosecuting body (the Acclimatisation Authority) to explain the delay. When it was unable to do so, the Judge, contrary to standard practice, required them to proceed immediately. As they were unable to do so, the information was dismissed. Robertson J held this to have been an improper exercise of the discretion. Where counsel was present,

> I am of the view that where a defendant appears and is represented, and there is an application for an adjournment so that further investigations can be made, the learned Judge should not in those circumstances exercise the power to prevent oppressive or vexatious processes simply because there has been a substantial delay in bringing the matter to Court. . . . It would generally be contrary to the principles of natural justice to allow a case to go unheard. There must be some evidence of actual or presumed prejudice to the defendant arising in the circumstances of the case, before the Court is justified in refusing an application by either the prosecution or the defendant for an adjournment. (*Clarke*, p 32)

From this it can be inferred that different factors or at least a different process will need to be followed depending upon the stage which proceedings have reached.

3 Factors relevant to the exercise

(a) Presumptive prejudice

The first question is whether it is necessary for the defendant to establish actual prejudice. Surprisingly for a discretion sourced in a desire to protect defendants from unfairness and prejudice, the answer is no. Both judgments refer to "presumptive prejudice", a concept which emanates from *Barker v Wingo* (supra). To establish this prejudice, it is necessary to show that there has been delay over and above that which normally attends charges of the particular type. Thus, one year in a murder trial may well seem predictable, whereas in a minor fisheries matter where the prosecuting authority has been aware of the incident from the date it occurred, such delay would give rise to a presumption of prejudice.

In *Wingo* the Court observed, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to a speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." (pp 530-531).

Whether anything more than excessive delay is required is uncertain at this stage. In *Russell*, Wylie J inferred prejudice from the fact that there was no evidence that the defendant had been informed of the charge, and that "the nature of the charge is such that its outcome may depend on recollections of conversations which may have taken place with now unidentifiable or untraceable persons over four years ago. The presumption of prejudice is in my view overwhelming." (p 34) In this case the defendant had not been served and the "inferred prejudice" can be argued as amounting simply to a presumption of prejudice based on the type of detriment that one may suffer through delay. In other words, the process of inferring can be seen as just spelling out the grounds which gave rise in the first place to the concept of "presumed prejudice". These things happen when there is excessive delay. The factor which militates against this, and which bears the hallmark of an actual inquiry, is the reference to the nature of the charge. Must it be shown, in addition to excessive delay, that the type of offence, or the circumstances of the offence, are such to have made prejudice likely? It is submitted that this is not the case. Potential difficulties due to delay with testimony and witnesses will be present in the vast majority of charges. Further, in *Bell v DPP of Jamaica*, the Privy Council, referring to the common law position, observed:

> [t]heir Lordships consider that, in a proper case without positive proof of prejudice, the courts of Jamaica would and could have insisted on setting a date for trial, and then, if necessary, dismissed the charges for want of prosecution. ([1985] AC 937, 950.)

In similar vein, Wylie J had noted in *Russell*, "[e]ven in the absence of proved fault or contribution to delay by either party, if the delay is so excessive as to raise presumption of prejudice or unfairness (and whether such presumption may arise will depend upon the nature of the case) then there is an abuse and the Court must act to prevent it." (p 32)

The starting point, then, for a claim of this nature is to establish "out of the ordinary delay", thereby generating a situation which is "presumptively prejudicial". This done, what other factors are significant?

The more obvious factors in the balancing process are the length of the delay and the reasons proffered by the prosecuting authority by way of explanation. Obviously, the longer the delay and the weaker the explanation, the more likely the exercise of the discretion. More uncertain, however, is the significance of (i) Court induced delay, (ii) personal prejudice to the accused, and (iii) acquiesence by the accused in any delay.

(b) Court induced delay

Both Canada and Australia have shown some hesitation in placing too much weight on delay caused by the criminal justice system as opposed to the prosecuting authority. In *Re Coghlin and the Queen* (1982) 70 CCC (2d) 455 the Ontario High Court noted that an overcrowded Court calendar was a factor "which should be weighed less heavily as it is a circumstance the responsibility for which lies with the government rather the prosecution of the accused." (p 460)

In Australia, the same considerations are relevant, although Byrne (supra, p 162) notes that the Courts have observed that "[b]ecause the unavailability of resources threatens to become a justification for unacceptable delay, there must be a limit to the extent it can be relied on. . .". In this regard, the decision of our Court of Appeal in *McMenamin* [1985] 2 NZLR 274 is also significant.

(c) Personal prejudice to the accused

The significance to be attached to whether delay has actually affected the defendant or the defence is unclear. It has been seen that proof of actual prejudice is not a precondition to the exercise of the discretion, and also that in the appropriate circumstances it is not required at all. But how significant is it in the ordinary situation?

The Lawlor decision in *Clarke* indicates that it will definitely be relevant. By definition, actual evidence of prejudice or otherwise will normally only arise in situations where service has been effected, otherwise there is unlikely to be any information available on the accused. Robertson J in *Clarke* made it clear that once a defendant is represented, there must be at least an opportunity for both sides to address the issue of delay. In this event, any prejudice that a defendant can display will obviously be to the good. But what if none can be shown? It is submitted that the discretion should still be exercised if the other factors merit it. The wider principle of a speedy trial should not be cast aside on the basis that, although there has been dilatoriness, no real harm has been done. To take that approach would be to ignore the educative function of a discretion such as this. Awareness that unreasonable delay will result in the loss of prosecutions can operate as a healthy inducement to improve systems within those agencies notorious for their laxness in this regard. Such inducement will only succeed if Courts are willing to take the wider view. Here the words of Robertson J are apposite:

> [t]he power to supervise and protect the processes of the Court must always be given a fair, wide and liberal meaning. The existence of a special limitation period must be a factor which will weigh in any possible exercise of this power. However all Courts not only have the power to prevent abuse of their own process where exercise of their statutory jurisdiction would lead to injustice and unfairness, they have a duty to do so.

(d) Acquiescence by the accused

Finally, the role of defence counsel must be considered. There is no uncertainty as to this being relevant. If the defendant is taken to have agreed to the delay, then a form of estoppel applies. The issue may well be, however, when someone can be said to have acquiesced and at what stage dissent must be registered. Byrne (supra, p 161) notes that "the failure of the accused person to object to adjournments sought by the prosecution has been regarded as an indication of acquiescence in delay." In Canada, useful guidance can be found in *R v Deloli & Fowler* (1985) 20 CCC (3d) 153. There the Court distinguishes between agreeing to prosecution requests and agreeing to those imposed by the Court. As regards the latter it is acknowledged that in reality a defendant has little option.

In this regard, counsel will need to exercise judgment. It does not become immediately necessary to oppose all adjournments. However, once it appears that a prosecution may be dragging, it may be appropriate to qualify one's consent, at least to the extent that it is not to be taken as agreement that the subsequent trial is timely.

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Law and Order

LAW AND ORDER. Often, this means "the rope". Lately we have seen much more law, and rather less order, so let us not have them linked together like love and marriage, or horse and carriage. Most of the states throughout history have bullied and repressed people, but only a few have been frank enough to do it in the name of bullying and repression. Most do it in the name of law and order.

Nigel Burke
from A Dictionary of Cant
in the *Spectator* 25.3.89

1989 Australian Legal Convention

The 26th Australian Legal Convention will be presented by the Law Council of Australia in Sydney from 13 – 18 August and is set to become the largest law conference ever held in the southern hemisphere.

The convention is being hosted and organised for the Law Council of Australia by the Law Society of New South Wales and the New South Wales Bar Association and will be held at the new Darling Harbour Convention Centre.

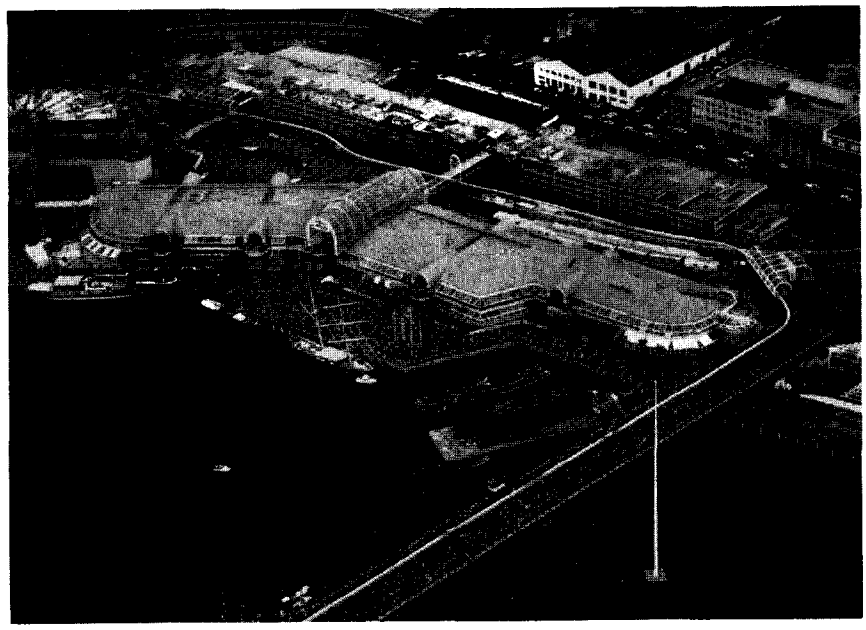
The Darling Harbour complex is set on 133 acres of Sydney harbour foreshore on the edge of "down town" Sydney, the area is not only a marvellous tourist attraction, but it is also a thriving recreation and business area for Sydney.

A number of distinguished speakers will be attending the convention including Lord Mackay of Clashfern, the Lord Chancellor of the United Kingdom, Justice Kennedy, the newest appointee to the Supreme Court of the United States and Sir Gordon Slynn, Advocate General, Court of Justice of the European Communities. Lawyers from Japan, Canada, Denmark, India, New Zealand and leading Australian lawyers have also been invited to address the convention.

The theme of the convention is "Building Bridges". This theme describes the aim of the convention to build bridges between the different legal systems around the world and between existing legal systems in Australia. This convention will bridge the professions as the business programme includes sessions for accountants, doctors, architects and journalists and it will also attempt to bridge the gaps between lawyers and the public they serve.

The first day of the business programme will feature two plenary sessions – "What Our Clients Want From Us" and a hypothetical on "The Multilateral Appeal of Multi-disciplinary Partnerships".

Lawyers attending the convention can choose to follow a stream or pick from a smorgsbord of topics. The six areas on day one include:



Darling Harbour Complex

Media Law
Aborigines and the Law
Medical/Legal
Accountants/Legal
Architects/Legal
Corporate Law

On day two the six areas for the day include:

International Law
Federal Practice and Litigation Section
Family Law
Product Liability
Technology

Wednesday is a free day with a special "Legal Race Day" organised at Randwick Racecourse, one of Australia's finest race tracks. For those not interested in racing there is sailing, tennis, sightseeing and a list of other activities.

The business programme resumes on Thursday including:

Business Law
General Practice
Criminal Law
Economics and the Law
Administrative Law
Professional Liability and Responsibilities

A third plenary session is scheduled for Friday on "Human Rights" which will be followed by a feature of every Australian legal convention, the State of the Judicature address given by the Chief Justice of the High Court of Australia.

This convention has been designed with everyone in mind. The Sydney Convention Committee has not only put together an extensive social programme, including everything from sporting activities to a gala event on Sydney's foreshores, but has also put together a very interesting "Accompanying Person's Programme".

Special post-convention tours are available and include a six-day package to see Australia's Red Centre and tropical north; five days on Queensland's Hamilton and Hayman Islands and various shorter tour packages of New South Wales.

Young lawyers who attend the convention will be treated to a first for Sydney. The *Lady Hawkesbury*, a luxurious cruise ship will be berthed at Darling Harbour, just a short walk to the Convention Centre, for the duration of the convention. The ship sleeps 138 people in extremely comfortable conditions and will be used for the

continued on p 121

Disciplinary Tribunal proceedings

By E W Thomas QC of Auckland

At the end of his term of five years as Chairperson of the New Zealand Law Practitioners Disciplinary Tribunal, E W Thomas, QC made a personal statement to the Tribunal on his experience and views on the work of the Tribunal. In the course of his remarks he dealt with several topics of considerable importance and interest to the profession. This article contains the main topics he discussed after leaving out the more formal introductory and concluding remarks and deals with the conduct of proceedings, lay members, the public interest, privilege or punishment, breach of trust, a lawyer round the clock and dishonesty.

The conduct of proceedings

I take some pride in the fact that the Tribunal's proceedings are conducted most efficiently. Apart from those charges which are adjourned awaiting the outcome of criminal proceedings where the Tribunal cannot control the pace of the progress made, the delay in hearing and determining charges is minimal. The time taken between the filing of charges and their disposition (excluding again those proceedings where there are collateral criminal charges) compares more than favourably with the speed with which business is dealt with in any Court or other tribunal.

My practice of holding conferences with counsel early in the proceedings has undoubtedly contributed to the efficiency and expedition with which the Tribunal has been able to deal with its business. I spoke of the advantages of these conferences in my Report last year, and repeat my suggestion that this informal procedure be given a statutory basis and be expressly provided for in the Tribunal's Rules.

The aim of obtaining the maximum expedition in the hearing and determination of charges against practitioners is itself in the public interest. For that reason the Tribunal endeavours to deal with applications for interim suspension immediately. Even where there is no question of interim suspension, however, the resolution of the issue of whether or not a practitioner is a fit and proper person to practise law should not be delayed longer than is absolutely necessary. To do so is or may be unfair to the practitioner's clients, the public at large and other practitioners. Early finality is an important imperative.

I add, however, that I do not believe for one moment that efficiency and expedition have been achieved at the expense of justice. In my experience the Tribunal has always been meticulous in ensuring that practitioners charged with disciplinary offences have every possible opportunity to prepare and present their cases. The principles of natural justice continue to have the highest priority.

Further, the Tribunal has endeavoured to be humane and considerate in the way its hearings are conducted. Facing serious charges and confronted with a Tribunal of at least five persons, and often more, must be a daunting experience, even for the most hardened practitioner. Consequently, the Tribunal has been concerned to ensure that practitioners are made to feel comfortable – or as comfortable as their circumstances can permit. For example, a degree of informality has been permitted that is not ordinarily found in other judicial or quasi-judicial forums.

Concern and consideration for the plight of the practitioner is not inimical to the discharge of the Tribunal's statutory responsibilities.

Lay members

I have previously observed that the appointment of lay persons to the principal disciplinary body of the profession has been an enormous success. Their presence has served to remind the Tribunal, if reminding were necessary, of the public interest in its affairs, and their perspective had undoubtedly enlarged the Tribunal's competence. Their

continued from p 120

exclusive accommodation for young lawyers. Facilities on board the ship include a heated swimming pool, sauna, lounge bar and dining room. All rooms open to outside decks where young lawyers will be able to take in spectacular views of Sydney and Darling Harbour.

This will be an exciting and very different legal convention with Australian and international law under the microscope.

The convention registration booklet has been circulated to all New Zealand lawyers and should you register prior to 1 May, 1989 you will receive a reduction of $100 off the registration fee.

For further information on the convention please contact:

Convention Secretariat,
GPO Box 2609, Sydney,
NSW 2001
AUSTRALIA

Telephone: 0011 61 2 241 1478
Facsimile: 0011 61 2 251 3552
Telex: AA74845.

contribution to the work of the Tribunal has been outstanding.

The Tribunal is indebted to its lay members and I publicly record the Tribunal's and my appreciation of their contribution.

The public interest

I remain committed to the view that the public interest is the overriding consideration in the administration of the disciplinary provisions of the Act. The rehabilitation of the offender takes second place — perhaps even a distant second place — to this paramount consideration. Such an approach is dictated by the terms of the Act and permits no relaxation or departure, however sorrowful the circumstances surrounding the practitioner's case might be.

There is the rub. In many cases, particularly where the charges allege negligence or incompetence, the background facts often attract a ready understanding and sympathy. The practitioners concerned may have become too busy, mostly through being unable to refuse the requests of their clients, they may have suffered serious illness or a family misfortune, they may have been involved in a painful matrimonial separation, or they may have been caught up in one or other of the many personal situations which give rise to real stress. They may not have had the opportunity to obtain the early guidance which participation in most partnerships brings, or they may have sacrificed more financially rewarding sectors of practice to work with those for whom they sympathise but who leave them financially hard up. Frequently, many of these factors can be found together in any unhappy combination.

The muddlement which results may be explicable, but in the public interest its seriousness cannot be overlooked or tolerated. Those practitioners who allow their affairs to drift into this unacceptable state of affairs or who, worse, ultimately resort to sharp or dishonest practices in an attempt to overcome their difficulties can no longer expect to remain in practice.

Nevertheless, unfortunate cases of this kind, which are invariably tragic for the practitioner and where, not infrequently, there is no element of personal gain, require members of the Tribunal to exert considerable resolve in reaching what is a difficult decision. I have found that these "hard" decisions exact their personal toll, both at the time they are made and in the inevitable moments of reflection that follow. I am certain that this is also the experience of other members. On such occasions service on the Tribunal is neither pleasant nor comfortable. Yet, this will inevitably be so if the public interest is to remain paramount.

Withdrawal of privilege or punishment?

Membership of the profession is a privilege, not a right. It is a privilege which carries with it responsibilities, and a duty to recognise high standards and ideals not encompassed by the general law. Integrity and competence are the due of both the profession and society. Consequently, the discipline of lawyers has as its ultimate purpose the protection of the public from those unworthy of the trust they accept when undertaking the privilege of practising law.

It is principally for this reason that I have consistently challenged the view that an order striking a practitioner's name from the roll represents a punishment. I believe that the privilege to practise law ceases once the practitioner has breached his or her fiduciary duty to the client and disregarded the wider trust reposed in the profession by the community at large. At that point the practitioner no longer exhibits the fitness to practise which was the initial requirement for his or her entry on the roll. In these circumstances the privilege is simply withdrawn.

The point was put succinctly by the American jurist, Judge Cardozo, in these words:

> To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment.

In the United Kingdom the same sentiments tend to be found in the Courts' decisions relating to applications to restore a practitioner's name to the roll. There is, however, no logical reason for not applying the same reasoning to a disciplinary offence.

In the result, while I accept that it can have harsh consequences and many deprive a practitioner of his or her immediate livelihood, a striking-off order is properly to be perceived as the formal cancellation of a forfeited privilege.

Breach of fiduciary duty

With the emphasis now placed on the public interest the fundamental criterion for making orders striking practitioners from the roll has shifted. In the past conduct involving the misappropriation of moneys and the personal enrichment of the practitioner undoubtedly resulted in an order striking him from the roll. Today, the fact that the practitioner does not personally benefit or gain from the misappropriation would not avoid, or be likely to avoid, the making of an order. Cases not involving any misappropriation or financial loss to the client at all can now result in practitioners being struck off.

In considering whether or not an order striking the practitioner from the roll should be made, the test today is whether or not the practitioner has committed a serious breach of his or her fundamental duty to the client. The relationship is a fiduciary one and its breach represents a breach of trust. Not infrequently the actual trust a client reposes in his or her lawyer in reality dwarfs the legal concept — but that only makes the legal principle and its application all the more important. It is therefore entirely appropriate that the practitioner's basic fiduciary duty to his or her client should be used as the essential benchmark is judging the practitioner's conduct.

Furthermore, it is to be borne in mind that when considering an applicant's entry into the profession the question asked is, in essence, whether the applicant is a fit and proper person to abide by that fundamental fiduciary duty and otherwise uphold the trust which the community vests in the legal profession. It is equally appropriate that the same standard be applied when the question of the

practitioner remaining in the profession is in question.

For these reasons I believe that the "no-man's land" that may once have existed between significant breaches of a solicitor's fiduciary duty to his or her client and the kind of misconduct which resulted in a striking off order has been eliminated. The one test stands instead; has the practitioner defaulted in his or her basic fiduciary obligation? If they have, they are at risk of the most serious order being made against them.

A lawyer around the clock

In the course of my term as Chairperson it fell to me to write the Tribunal's decision in a case involving the personal misconduct of a practitioner in the confines of his own home. The case put squarely in issue the extent to which activities of a private nature unrelated to a practitioner's professional function and competence, and which do not reflect upon or relate to the practice of the law, can come under the purview of the profession's disciplinary body.

Although the case was dealt with on its facts, the Tribunal's finding established that it will assume jurisdiction if the activities nevertheless constitute conduct unbecoming a barrister or solicitor. Considerations of privacy, although vitally important, may be required to give way if the practitioner's conduct reflects on the character and integrity of the practitioner and falls short of the standard of conduct which both the public and the profession expect of members of the legal profession.

The Tribunal is not, and has no wish to become, the arbiter of social and moral standards but it cannot hestitate to condemn conduct that is unbecoming in a barrister or solicitor. The public is better served by a profession whose members are required to observe a more rigorous standard of conduct than that imposed by the general law. And the profession benefits from the higher level of public confidence which it retains as a result.

I consider that this decision should put to rest the long-standing notion that practitioners are responsible to their peers for their conduct in their professional capacity only. A lawyer is a lawyer for 24 hours a day.

Dishonesty

Yet another traditional misconception has been put to rest.

In the past it has been customary to describe cases involving theft, the misappropriation of moneys, forgery or the like as cases involving dishonesty. They most certainly are. No doubt as a result other conduct, such as incompetent behaviour, has been described as "not dishonest" or as conduct "not involving dishonesty". These descriptions are misplaced.

Experience has shown that conduct resulting from extensive muddlement or gross inefficiency invariably involves elements of dishonesty. Clients are misled as to the state of their affairs, mistakes are not acknowledged or are even concealed, and positive responsibilities are disregarded in a context which would ordinarily call for their prompt acknowledgement and attention. In a real sense incompetent practitioners are acting dishonestly in failing to acknowledge to their clients that they are not discharging their fiduciary obligation to them.

Although the terms of my earlier oral decisions may have reflected the inappropriate terminology I acknowledge that I was mistaken. While degrees of dishonesty will undoubtedly be recognised, with some dishonest conduct being regarded as much more serious than other dishonest behaviour, it will almost invariably be the case that some element of dishonesty will be present in any conduct likely to attract the attention of the Law Society.

Conclusion

May I now be permitted this final observation. Service on the Tribunal exposes one to the unfortunate and disreputable side of the profession. Criminal and other practices which cannot be condoned are repeatedly established. Yet, these are the acts of the "bad apples". Such conduct does not reflect the integrity, competence and dedication of the profession as a whole. I am pleased to find, now my term on the Tribunal is done, that I am still as proud as I ever was to be a member of the legal profession. □

Books

The Guns of Lautoka

By Christopher Harder

Sunshine Press NZ Ltd, Remuera, Auckland, 1988

Reviewed by F M Brookfield, Faculty of Law, University of Auckland

An Auckland barrister, Christopher Harder, was briefed as counsel for the Rotuman chiefs charged in 1988 with seditious offences against the revolutionary republican government of Fiji and for some of the persons charged, under the same government, in connexion with the illegal shipment of arms into that country. First imprisoned and then put under house arrest before being deported from Fiji, he was prevented from appearing in the Fiji Courts in either of those cases. He continued to be involved in the latter of them, lending his aid to the defence of Mohammed Kahan, alleged instigator of the arms shipment, whose extradition from the United Kingdom has been sought by the republican government. Parenthetically sub-titled "The Defence of Kahan", the book is mainly Harder's account of the cases and his part in them up until late 1988 when the (ultimately unsuccessful) proceedings against

Kahan had just begun in the United Kingdom.

The account is an egotistical one. Nevertheless the real courage of the writer comes through. In a letter to the President of the Fiji Law Society supporting Harder's application to be temporarily admitted to practise as a barrister, which is quoted in the book, Sir Graham Speight wrote of him that

> [h]e practises his profession in the best traditions and is a determined advocate on behalf of those whose cause he espouses – which is of course the proper role of a conscientious lawyer, especially in times of oppression.

The tribute appears well deserved, though one could wish Mr Harder did not feel the need to echo – indeed to amplify – it himself quite as loudly, quite as often and in quite as many ways as he does in this book. Certainly he is a courageous "legal activist" (his own phrase); a "bonny fighter" in his paraphrase of Sir Graham's tribute. Harder must, however, have been writing tongue in cheek when he included the quotation, attributed to Einstein, that precedes the Foreword: "Great spirits have always encountered violent opposition from mediocre minds".

The book is described as a "thriller" and that too is a fair description. Mr Harder not inappropriately assumes the motto of the Fiji Police: "Who Dares to Challenge". Another suitable motto comes to mind: "Adventures are to the Adventurous". Contending, at various times and in various places, with an assortment of perils and antagonists that include some members of the Judiciary, barracuda, a poisonous sea snake, car bombers, a Canadian Pacific Railways train and the trade union movement, Harder seeks and finds adventures or they find him. He tells of them here in a vigorous and racy narrative. Much of it has little to do with Fiji, many of the adventures being brought in by barest threads of relevance. Style, syntax and expression (and some spellings of personal names) may be slapdash and imprecise; but somehow the author gets away with a great deal by sheer exuberance and self-confidence, tempered sometimes, if not by humility, then by a disarming frankness about himself, He is frank too in his acknowledgments to Judges, practitioners and others, who have helped him through what has so far been a somewhat stormy career in the law. As to people he has contended with, he settles some old scores with them but does so generally (there is one deplorable exception) without evident vindictiveness.

The exuberance, the self-confidence and the pugnacity – these fire his narrative of the Fiji cases in which he was briefed and of the wayside adventures that fill out the book. Those qualities are of less help in guiding his account of the legal issues in the former. Here more care and less haste were needed. One may indeed relish, as Harder did, the prospect (the reality has been so far denied him) of his cross-examining Brigadier Rabuka OBE to show that the Rotuman chiefs, in declaring loyalty to the Queen after the second coup, could not have shown a seditious intention. But the issue is a much more profound one: at the time of the alleged offences had the allegiance of Fiji citizens, and of Rotumans in particular, passed from the Queen to the revolutionary republic? Harder touches on the constitutional origins of Rotuma but otherwise seems little interested in the issue, all important though it obviously is.

In the gun-smuggling case, on the other hand, the issues are less fundamental. Even the de facto revolutionary regime, unable until it becomes legitimate to command full allegiance, might in the circumstances be entitled to enforce the laws against the smuggling and possession of arms. Harder indeed seems to assume this. The general reader will get some understanding of the significance of political offences in the law of extradition and fugitive offenders but little of the other important point in the present case: was Fiji, now in fact outside the Commonwealth, still nevertheless a "Commonwealth country", for the purpose of the Fugitive Offenders Act 1967 (UK)? (Since Mr Harder wrote, that question has been answered in the affirmative by an English Court: *R v Governor of Brixton Prison, ex parte Kahan* (2 Dec 1988; *The Times*, 19 Dec 1988). But the actual extradition proceedings have failed: *New Zealand Herald*, 22 March 1989.)

One constitutional and legal matter the author does deal with more fully: Rabuka's OBE. Seeing it as scandalous that the arch-rebel should retain that Royal honour, Harder has tried with some persistence to persuade the Queen to take it away. A letter from the Queen's secretary, which Harder usefully quotes at p 201, states in effect that "normally" honours would not be forfeited except on the advice of her Majesty's Representative or her Ministers in Fiji; but that since Fiji had been "declared a Republic", the matter had become one for the advice of her British Ministers, the OBE being a "British honour". Even if one accepts the explanation implicit in those last words (which Mr Harder did not: indeed he telephoned the Palace to argue about the matter), one is left wondering on whose advice the Queen acted during the crisis when most of the issues were not British but related purely to the Queen's realm of Fiji. On one matter at least – her refusal to receive her lawfully appointed Prime Minister, Dr Bavadra – she appears to this reviewer to have been ill-advised. Mr Harder did not find it necessary to consider wider questions of this sort though his narrative indirectly points to them.

Written by a lawyer, *The Guns of Lautoka* is, even as a very elementary introduction to the relevant legal and constitutional issues in the Rotuman and gun-smuggling cases, rather less lawyerly than it might be. The general as well as the legal reader may be critical on that score. Both, however, may enjoy the book for its dash and verve and the author's adventurousness whether in his clients' causes or in his own wide-ranging activity. □

Cheques

A case of caveat banker

By Stuart D Walker, a practitioner of Dunedin

The author obtained brochures from five banks dealing with the question of cheques. He considers some of the information given to be technically misleading from a legal point of view.

The last few years have seen a huge increase in the use of modern money transfer systems such as the automatic payment authority, the credit card, direct debit transfer and electronic funds transfer at point of sale. Yet the cheque is still widely used as an instrument of payment: this looks set to last for some time as banks continue to market the advantages of cheque accounts to their customers and would-be customers.

There is, of course, a considerable body of statute and case law which prescribes the duties of banks and customers in respect of cheques and cheque accounts. In what is undoubtedly an effort to assist their customers to understand such duties, many banks produce brochures and other explanatory material which purport to explain how cheque accounts work and how customers should write out cheques. The ANZ Bank heralds its brochure with the statement "Everything you'll ever need to know about an ANZ Cheque Account". A tall order indeed.

The writer obtained brochures from five banks to ascertain what advice was being given about cheques: the results proved interesting.

"Not Negotiable"

The effect of the "not negotiable" crossing is commonly misunderstood with it being thought that it operates to restrict the transferability of a cheque. Given the contents of one of the brochures, such misunderstanding is perhaps not unexpected. The brochure, entitled "The right way to write a cheque", states:

> Crossing a cheque with two parallel lines means that the cheque cannot be cashed but must be paid into a bank account. Inserting the words 'NOT NEGOTIABLE' between these lines restricts lodgment to the account of the named payee and ensures that the funds are received by the payee. [Extract from Brochure No 1]

This is incorrect as the "NOT NEGOTIABLE" crossing does not affect or restrict the transferability of a cheque, nor does it affect the rules of transferability as they relate to 'bearer' and 'order' cheques. The phrase is given an admittedly artificial definition in s 81 of the Bills of Exchange Act 1908:

> Where a person takes a crossed cheque bearing on it the words "Not Negotiable", he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Thus the crossing affects the title which may be obtained by a transferee: it destroys the "negotiable" character of the cheque but still leaves it transferable (see *Wilson and Meeson v Pickering* [1946] 1 KB 422). Given the difficulty of explaining, in simple terms, the legal effect of the "not negotiable" crossing, it is not surprising that in one brochure customers are instructed to use the crossing, merely being told that it is ". . . a further precaution against the consequences of your cheque falling into the wrong hands. . . ." [Extract from Brochure No 2]

Confusion also exists as to the legal protection which is afforded to the drawer of a "not negotiable" cheque. Consider the following extracts from two of the brochures:

> Do not strike out 'Bearer' nor draw cheques to 'Order' unless you have special reasons for doing so. In most cases adequate protection is afforded by placing the words "Not Negotiable" within a crossing consisting of two parallel transverse lines. [Extract from Brochure No 3]

> Crossing a cheque means that it cannot be cashed but should be paid through a bank account. However, in case the cheque should be lost or stolen, you should always write the words "Not Negotiable" between the two parallel lines to ensure *full protection* for yourself and the person you have made the cheque out to. [The writer's emphasis] [Extract from Brochure No 4]

The extract from Brochure No 3 does not state when "special reasons" might arise which would alert the drawer of the need to delete the word "bearer" or to draw the cheque to "order". Interestingly, the example of a supposedly properly completed cheque form contained in Brochure No 4 shows the cheque as being payable to a named payee *or bearer*. Certainly the term "not negotiable" does afford some protection but does it afford *full* protection? Consider the situation

where say A sends, in accordance with the form specified in Brochure No 4, a bearer cheque crossed "not negotiable" to a mail order distributor requesting to purchase some advertised goods. The cheque is stolen and the thief, as bearer of the cheque, gets it collected through a bank. If the money cannot be recovered from the thief, who bears the loss? In the normal circumstances, unless the distributor specifically requests payment by cheque, if the cheque is stolen before it is received by the distributor, A will bear any loss because there is no concluded contract between A and the distributor (*Pennington v Crossley and Son* (1897) 77 LT 43), whereas if the cheque is stolen after it is received by the distributor, the distributor will have to bear the loss (*Charles v Blackwell* (1877) 2 CPD 151). "Full protection for yourself and the person you have made the cheque out to"? It is thought not.

"Bearer" and "order" markings

It is interesting to observe that four of the brochures contain examples of completed cheque forms which do not have the words "or bearer" deleted. Only one of the brochures explains the effect of deleting these words and in fact recommends such action:

> If you cross these words ["or bearer"] out on a crossed cheque which your have made out to a person or company, your cheque become an "Order Cheque" and can be paid in only to a bank account in the name of the person or organisation you intend it for. This is the safest way to write your cheques. [Extract from Brochure No 5]

Two aspects of this extract require comment. First, the statement that an "order" cheque "can be paid in only to a bank account in the name of the person or organisation you intend it for" is not correct. Such a cheque can still be transferred in the normal way by the person to whom you have written it out, and of course be the subject of even further endorsements. As such, the cheque may well be paid into a bank account in the name of a person you did not intend when drawing the cheque. Second, an "order" cheque cannot really be regarded as "the safest way to write your cheques". Further precautions are available.

"Account Payee"

The inclusion of the words "account payee" or "account payee only" is now quite common, although they are not recognised by statute. In essence, cheques so marked are still transferable (*Universal Guarantee Pty Ltd v National Bank of Australasia Ltd* [1965] 1 Lloyds Rep 525, cf, *Dungarvin Trust (Pty) Ltd v Import Refrigeration Co (Pty) Ltd* [1971] 4 SALR 300). However if the collecting bank wishes to rely on the protection of s 5 of the Cheques Act 1960, it is cast with the onus of inquiring into all relevant circumstances if the cheque is to be collected for someone other than the named payee see, eg, *Bevan v National Bank (Limited)* (1906) 23 TLR 65; cf, *New Zealand Law Society v ANZ Banking Group Limited* [1985] 1 NZLR 280). In 1957 the Council of the Institute of Chartered Accountants in England and Wales issued a statement recommending the use of the "Non Negotiable, Account Payee" crossing.

In *Australian Guarantee Corporation (NZ) Ltd v The National Bank of New Zealand Limited* (unreported, reserved interim decision as to summary judgment of McGechan J, High Court, Wellington, CP 18/88 4 July 1988) the Court had to consider the legal effect of several "bearer" cheques crossed "Not Negotiable Credit Bank A/C Payee Only". The plaintiff finance company sought summary judgment against the defendant bank on the basis that the defendant had not credited the cheques to the accounts of the named payees. The plaintiff had given the cheques to one Thompson, on the understanding that he would hand them over to the named payees. The cheques were then ostensibly endorsed with signatures of the respective payees in favour of Thompson's business and lodged in and collected for the business account accordingly. Thompson was subsequently adjudicated bankrupt and so the plaintiff issued proceedings against the defendant based on conversion or alternatively money had and received. Despite the obvious inconsistency in marking a "bearer" cheque "a/c payee only" (cf, however, *House Property Co of London v London County and Westminster Bank* (1915) 84 LJKB 1846) McGechan J found that the defendant had not made the appropriate inquiries and therefore could not rely on a s 5 defence; had the appropriate inquiries been made, even if the fraud had not been detected, the defendant would have been able to rely on such a defence. Hence while an "account payee" cheque imposes a high level of care on a collecting bank, it is not an absolute duty of care—it is not one of "strict liability". Interestingly McGechan J considered ". . . the cheques were prepared in perhaps the safest fashion by way of a specific not negotiable bank account payee only crossing . . ." but did accept ". . . that even a crossing of that character is no complete safeguard against a rogue."

Non-Transferability

Arguably greater protection could be achieved by making a cheque non-transferable. Section 8(1) of the Bills of Exchange Act 1908 specifically provides for non-transferable instruments:

> Where a bill contains words prohibiting transfer, or indicating an intention that it is not transferable, it is valid as between the parties thereto, but is not negotiable.

The word "negotiable" here means "transferable" and should be contrasted with the s 81 definition.

What constitutes a "non-transferable" instrument? The extract from Brochure No 4 suggests that a non-transferable instrument can be created by drawing a cheque to "order". As noted earlier this is not correct. Bright in *Banking Law and Practice in New Zealand* comments:

> So far as can be ascertained, there is no judicial authority as to the legal effect of a cheque payable to "account of John Smith only" and crossed "account payee". Such a form of cheque would exclude all the characteristics of a cheque except that it would be payable by the drawer's bank to the payee's bank and it is considered that such a document would not be

> transferable or negotiable in any way and would be merely a mandate.

Arguably one can make a cheque non-transferable by deleting the words "or bearer" and "or order", and either writing "pay X only" or "pay X" "non-transferable".

With the exception of Brochure No 5, none of the brochures refers to or encourages customers to draw "account payee only" or non-transferable cheques. That reluctance is perhaps understandable from the banks' point of view: an "account payee only" cheque puts the bank on inquiry and requires additional work and subjects it to greater risks; whilst the exact legal duties which will be cast on a bank collecting a non-transferable cheque may be uncertain, it would seem, in terms of the mandate, to impose on the bank the strict duty to ensure that it does in fact pay that nominated payee *and no one else:* banks would argue that this exposes them to unacceptable risks. (For UK clearing banks the drawing of non-transferable cheques is unacceptable, although New Zealand banks do not appear to have formally declined to accept cheques drawn in this way.) But that reluctance aside, what about banks' duties to their customers?

The bank-customer relationship: the impact of the Fair Trading Act 1986

Banks are undoubtedly under a duty of care to their customers when they proffer advice as to the procedure to be adopted when writing out cheques; it would not be difficult for a customer of the bank which produces Brochure No 1 to sustain an action against that bank if, after following the recommended procedures in the brochure, the customer suffered loss through not in fact receiving the stated protection.

But in any event the provisions of ss 9 and 11 of the Fair Trading Act 1986 would have application. Section 9 provides:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 11 provides:

> No person shall, in trade, engage in conduct that is liable to mislead the public as to the *nature, characteristics, suitability for a purpose,* or quantity of services. [The writer's emphasis.]

"Services" is widely defined to catch bank brochures and literature.

The effort by banks to explain matters relating to cheques and cheque accounts to their customers is commendable, but care does need to be taken to ensure that bank brochures properly inform customers of the correct way to write out cheques, and that customers are not misled as to the "nature, characteristics [and] suitability for . . . purpose" of the many crossings and markings that can be put on a cheque. As noted by Casey J delivering the decision of the Court of Appeal in *Mills v United Building Society* 30 September 1988, CA 112/88, Richardson J, presiding, Somers and Casey JJ): "The simple language in . . . s 9 is clear and unambiguous and, at least for the resolution of a straightforward case . . . requires neither interpretation nor qualification. . ." At the moment it really does look like a case of caveat banker. □

Books

Australian Law of Cheques & Payment Orders.

By A L Tyree, Professor of Law, University of Sydney.

Butterworths (Australia) 1988. ISBN 04 09 495 417.

Reviewed by Johanna Vroegop, Department of Commercial Law, University of Auckland

EFTPOS has come and gone, but the cheque goes on forever. This may be overstating the case, but at the moment the position of the cheque as a major payment mechanism seems to be secure, in spite of prophecies in recent years of its imminent replacement by electronic forms of payment. It is that, considered as a payment mechanism, the cheque leaves much to be desired. Its character as a negotiable instrument means that there is always a risk, however slight, that its proceeds will not reach the intended payee, and it also means that cheques have to be physically presented to the paying bank, which, in view of the number of cheques written, causes considereable problems for banks and leads to considerable delays in processing. Both Australians and New Zealanders are prolific cheque writers. Dr Tyree (para 1.22) quotes a figure of 900 million cheques a year for Australia and Databank, which processes all cheques in New Zealand, handles 428 million a year. (Databank publication (1987) p 17) In view of their continuing and widespread importance, a text dealing specifically with cheques is to be welcomed.

Dr Tyree is also the author of the recently published book: *New Zealand Banking Law* and, as might be expected, a number of New Zealand cases are referred to in this work, although the major emphasis is, of course, on the Australian authorities. However, its usefulness to the New Zealand lawyers is limited by the existence of different legislation concerning cheques in the two countries. New Zealand has had a Cheques Act since 1960, which is a brief statute almost identical to the English Cheques Act 1957, while Australia has recently enacted a much longer and more comprehensive piece of legislation:

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Small business litigation: Prevention and the practitioner

By Eric Steinberg and Nancy Ellis, Senior Lecturer and Lecturer respectively in the Faculty of Commerce, University of Otago.

The authors recently conducted a study of small businesses that had become involved in certain types of civil litigation. Forty-four businesses were studied. The article is intended to assist legal advisers with small business clients.

I Introduction

Small businesses form a unique segment of the commercial community. From a legal practitioner's point of view several characteristics of small businesses are evident. They rarely retain full time counsel. Their exposure to the legal profession is often limited to start-up matters such as incorporation or preparation and execution of partnership agreements. A study has, in fact, shown that many small business managers are apprehensive of the legal profession for reasons which include perceptions of unreasonably high costs of legal advice.[1] Small businesses are probably more affected than larger organisations by economic limits imposed on the degree to which lawyers can be utilised.

We recently conducted a study of New Zealand small businesses that became involved in certain types of civil litigation. The primary goal was to assist small business owner/managers in avoiding protracted legal disputes. By studying a cross-section of small business disputes we hoped to be able to provide some general strategies for litigation avoidance. The results of the study, however, may well prove useful for legal practitioners in respect of their small business clientele.

For the purposes of the study, small businesses were defined as those which were owner-managed. These businesses generally have limited resources available for legal advice. Their legally related problems would be expected to be somewhat different from those of larger organisations.

There is a growing concern in legal circles with the area of "preventive law". Topics such as using lawyers preventively[2] and developing harmonious and efficient lawyer-client relations are evident in some of the recent literature.[3] Our study was concerned with these types of issues in the small business context.

II The Sample

The study examined Court cases involving New Zealand small businesses in civil disputes reported in 1986 in the following reporters:

New Zealand Law Reports
District Court Reports
New Zealand Recent Law

The study was limited in several respects. It only examined civil disputes of small businesses as going concerns, ie matters of bankruptcy and winding up were excluded. These might well merit separate study. Criminal problems of small business were also omitted.

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continued from p 127

the Cheques and Payment Orders Act 1986. Inevitably, therefore, a considerable part of the book is concerned with the Australian legislation.

It is unfortunate that this work is not more readily applicable in New Zealand, since it has taken a novel approach to the law concerning cheques, which greatly clarifies the many complex and difficult issues encountered in this field. Since a cheque is a form of bill of exchange, the traditional treatment is to discuss it as a special kind of bill of exchange and then to deal separately with the role of the banks involved in cheque transactions and their rights and liabilities vis-a-vis their customers, which brings in the use of the cheque as a payment mechanism. Dr Tyree has reversed this.

The first and largest part of his book deals with cheques as payment instruments, including a consideration of the relationships between the parties to the cheques and their banks. The second part deals with cheques as negotiable instruments, bringing in consideration, negotiation and the rights of the different kinds of holders. The third and final part discusses the problems caused by misappropriated cheques, which involves both aspects.

This division of the subject matter works well, allowing for identification and discussion of issues in the context in which they arise. The writing itself is concise and clear, while still containing sufficiently detailed expositions of important and doubtful points. It can thus readily be recommended as an Australian text, but the disparity in legislation means that it is, unfortunately, of limited use in addressing problems arising in New Zealand. □

Concepts of culpability and mens rea so central to criminal law render these problems equally deserving of separate examination. Perhaps the most limiting feature of the study was its restriction to cases which went to trial *and* were reported in a recognised law reporter.

While cases appearing in *New Zealand Recent Law* are officially considered as unreported decisions, there is no reason why they should be looked at any differently for the purposes of this study. Unfortunately, the *New Zealand Law Reports* were only available up to mid-1986 as of the time of the study. Since the goal was not to exhaust a particular year in respect of reported cases, but rather to obtain a reasonable sample, it was felt that this should cause no problem.

The study yielded 33 cases involving 44 small businesses as litigants. Obviously, the sample does not represent all small business legal problems. It does not, in fact, represent a significant percentage of cases which went to trial. It is biased towards cases involving what might be termed "grey-area law". Presumably, however, if avoidance strategies can be developed for these more difficult cases, they will be even more useful for disputes involving clearer legal principles. Some readers may feel that the results only provide a profile of small business legal problems likely to end up in reported cases. It should be remembered, however, that the criteria for reporting of cases turns largely on whether new legal ground has been broken or the law clarified or amplified in some way. These criteria ought to cut across subject matter lines fairly randomly. If one were to examine all cases which went to trial during the same period, one might not expect a radically different profile in terms of types of legal issues involved.

III Information used and its analysis

Full Court files were obtained on each case. Reported judgments provided perhaps the greatest utility. Pleadings, oral testimony and documentary evidence were also examined. This was done in an attempt to obtain an objective and comprehensive picture of each case with a view to extracting key causal factors. A lengthy analysis of each case led to a determination of the probable causes of the dispute. We were fortunate in being able to look at each case through the eyes of our different disciplines, (ie law and management). Twenty-five of the 33 cases studied culminated with decisions of the High Court. Five cases were decided by the Court of Appeal and three cases by the District Court.

IV Findings

Analysis of the cases yielded the following causal categories:

A *Failure to follow prudent operational policies*

Three of the 44 businesses studied showed the presence of incompetence in the sense of doing faulty work or failing to take reasonable care as required by law in conducting their business.

B *Failure to follow prudent management practices*

Ten of the 44 businesses encountered legal problems for this reason. The problem could have been avoided by using sound business judgment. In many cases this would only require common sense. A major management decision was not required. Little or no additional expenditure of funds would have been required.

For example, in one case, a property developer entered into a contract for the purchase of property. A term of the contract required payment of a deposit at a particular time. The deposit was not paid on time and the contract was rescinded by the seller. The vendor claimed that he always delayed paying deposits. A prudent businessman would not enter into a contract containing terms with which he never intended to comply. In this case, payment of the deposit 54 days earlier would have had minimal effect on his profit but would have secured the property.

C *Failure to obtain legal advice at the appropriate time*

This category might be viewed as a subset of the previous one. Prudent management practice includes knowing when to seek legal advice. Since this subset included ten of the 44 small businesses, it was afforded individual treatment. In most cases the relevant legal advice would not have required extensive research on the solicitor's part and therefore would not have been very costly. In one case, for example, a car to be sold on consignment by a car dealer was left in the showroom unlocked with the ignition keys in the sun visor. This was apparently a common practice in order to allow for prompt removal in the event of a fire. Unfortunately, the car was stolen. The Court found that the dealer failed to take the required care in order to prevent theft. Straightforward legal advice could likely have apprised the dealer of his legal duty as bailee in respect of the risk of both fire and theft. This probably would have merely required some fortification of existing security measures.

D *Failure to follow legal advice*

Three businesses fell into this category. They received legal advice but refused or neglected to follow it. For example, a stall proprietor proceeded with a legal action claiming a right to renew a lease. Previously, however, his solicitor had stated in writing that both he and his client acknowledged that there was no legal obligation on the lessor to renew. The stall proprietor presented his own case in Court. The case was instituted and conducted contrary to legal advice and based on emotion rather than objective legal grounds.

E *Acted with poor legal advice*

Judges commented in two of the 33 cases that a solicitor was somehow the cause of the problem. Actual misconduct of the solicitor was specifically mentioned by the Judge in one of these cases. At the time of the trial the solicitor's conduct was under inquiry by the New Zealand Law Society.

F *Accepted a business risk*

Seventeen small businesses could be said to have embarked on a course of conduct knowing full well that a major legal problem might arise because of it. Unlike in many of the other categories, here the possibility of future litigation formed a conscious part of the decision-making process. For example, a business was offered two alternative insurance coverage packages. It chose to accept the less

comprehensive one in order to minimise cost. When an excluded risk materialised, the insurer refused payment of the claim. Had the more comprehensive covereage been chosen, it was clear that no viable defence would have been available to the insurer. The litigation would have thereby been avoided. The decision, however, was likely based on a cost-benefit analysis that only hindsight can impeach.

G *Involved in grey-area law*

Six small businesses were involved in cases which were probably unavoidable. They involved areas of law that were basically unclear and previously untested. Early legal opinions may well have done no more than highlight the inherent uncertainty. This is the one category which is probably over-represented in this study. One would expect that a study based only on reported cases would contain a larger proportion of this type of case than would a study based on a broader sample of civil disputes. In one such case, the Court was called upon to determine the amount of compensation to be paid for a piece of land to be used as access to an adjoining property. The law was unclear as to whether the value of the compensation should be based on the detriment to the burdened land or on the benefit accruing to the benefited land. The difference between these two values was significant. It appeared, however, that neither party's solicitor could predict with any reliability which valuation basis would be implemented by the Court. The parties were unable to settle the matter out of Court largely due to the huge potential gain if successful at trial.

V Implications and suggestions for legal practitioners

The emerging area of preventive law has emphasised new and expanding roles for the legal profession. The results of our study, however, do not always easily admit of a positive role for lawyers. There are, however, a few general guidelines which might flow from our findings.

A *Maximise advice respecting potential legal liability*

It may appear that general business competence is totally divorced from any potential role for lawyers. While it is true that the small business manager ought to know what is expected of him by both his customers and society generally, a legal advisor can play a positive role in this context. A business manager may well take greater care in providing goods or services if he is fully aware of his potential legal liability for default. Consultation with a solicitor early in the life-cycle of the business may culminate in legal advice touching on such matters as expected standard of care, an overview of legislation relevant to the particular sphere of business and other related legal matters. Development of quality control systems is dependent on the risk aversion level of the business. This in turn is greatly affected by such matters as whether the business is to operate as a limited liability company, a partnership or a sole proprietorship. Lawyers may also be involved in advising on insurance matters, which are also dependent on the business's risk aversion level.

Helping to ensure that prudent management practices are followed is usually beyond the scope of a lawyer's involvement. Only where the solicitor and client have an ongoing and relatively intimate interrelationship will the lawyer's role have much impact on management policy. One area where the lawyer's potential role is significant is the area of business finance. Many businesses would benefit greatly from a clear opinion as to their potential legal liabilities in respect of different forms of financing. While this may be seen as purely legal advice, its interrelationship with prudent management strategy is significant. Another similarly relevant issue might be the firm's potential legal liability for acts or omissions of its employees or agents. An early legal opinion in this regard may well warn the manager of potential legal problems.

Almost forty percent of the businesses studied encountered legal problems because at some point they made a decision to accept a commercial risk. While never capable of complete elimination, commercial risk should be minimised to the extent that it is cost effective. The trade-off between profits and risk depends on factors which include the following:

- profits forgone to minimise or eliminate risk
- the probability of the event occurring
- expected loss if it were to occur

While most of this cost-benefit analysis is beyond the scope and competence of the legal advisor, he might still provide information very useful to the exercise. The real potential cost should a risk materialise is often quite different from that anticipated by the small business manager. This difference may be a result of the manager's failure to appreciate the business's full potential legal liability. For instance, losing the benefits under a contract entered into might well be contemplated by the manager. On the other hand, he may not appreciate the possibility or extent of liability in tort. Very few small business managers would be expected to have ever addressed the issue of who might be their "neighbour" in law. Potential, objectively determined legal liability may be far beyond the manager's subjective contemplation. Approximately fifteen percent of cases examined involved questions of tortious liability. This rather more peripheral area might be raised by the solicitor during meetings primarily designed for getting the business off the ground. The lawyer is usually in a better position than most managers to assess the extent to which a particular business might become involved in legal disputes.

B *Promote an environment of continuing availability*

The question of timely legal advice is a problem for both managers and lawyers. In the small business context, it is largely left to the manager to recognise when legal advice is required. The absence of in-house counsel or even a continuing relationship with an outside solicitor precludes much guidance from the legal profession in this respect. Yet, for the manager to make a prudent decision to seek legal advice requires at least some knowledge of the law and the legal system. Unfortunately, few small business managers are very knowledgeable in these matters. They have rarely formally studied law, and time and monetary

constraints prevent them from attending many legal seminars and the like. Solicitors might therefore conclude that the time of initial contact with the small business client is the most fruitful time to address the issue of when the client should return, (eg for preparation of any formal contracts or examination of contracts prepared by other parties).

It is important to maintain at least a loose continuing relationship with small business clients rather than just releasing them to "sink or swim" in a myriad of potential legal problems. Even a simple suggestion to return with any contract related problems could significantly reduce potential legal disputes. Our study indicated that 61% of the cases involved contractual disputes. Without inviting the client to call back on every minor matter, the solicitor ought to convey the impression of availability in respect of more major legally related business endeavours.

C *Emphasise the practical benefits of following legal advice*

The study confirms that not all legal advice is followed. In addition to rendering legal advice, a solicitor might also stress the possible ramifications of not following such advice. This really comes down to justifying the importance of the advice given. The lawyer might here be said to be entering the client's world in order to bring the legal advice to life; to give it practical meaning and importance. It is rather like the difference between the medical practitioner who merely prescribes pills and the one who tells his patient exactly why taking the pills is so important to future health. Of course, ethical considerations and limits on the lawyer's knowledge of the client's business put natural restrictions on just how far the legal advisor can go in this respect.

D *Involve other lawyers if necessary*

It is inevitable that some litigants have received poor legal advice. It is trite to advise solicitors to take care in giving advice. If for any reason relevant knowledge or experience is lacking, a second opinion is advisable. This second opinion might be obtained either by the client directly or by the solicitor seeking out someone more experienced in the particular area. This will obviously be easier for larger law firms since it may not entail going outside the practice for a second opinion. This really involves the lawyer's own quality control system.

Interestingly, our study included a few lawyers who had themselves become involved in litigation. As small business managers, lawyers would be advised to follow the same basic guidelines suggested for other small business managers in respect of potential legal problems. These include seeking timely and *objective* legal advice. Failure to involve another solicitor may well result in a lawyer acting upon what turns out to be his own poor legal advice. This may seem somewhat surprising, but cases studied appear to support it.

E *Ascertain the true level of legal uncertainty*

Invariably, some legal disutes will be destined to culminate in a Court hearing. Factual disputes stand a good chance of being clarified at the discovery stage. On the other hand, cases which turn on truly uncertain points of law may have to proceed to trial or appeal for ultimate resolution. Solicitors must always endeavour to be totally frank with regard to the inherent uncertainty of any litigation. Alternatives to facing this uncertainty ought to be fully presented, (eg compromise and settlement). In some cases, a second opinion may be justified in order to confirm that the law is really as uncertain as it appears to be. Six small businesses in our study were categorised as involved in "grey area" disputes. As mentioned, however, this is probably a significant over-representation. No legal practice will be limited to disputes which will ultimately end up going to trial and being reported. These rather unavoidable disputes are unlikely to form a very significant portion of a small business solicitor's practice. When they do arise, however, a second opinion might be worthwhile.

F *Suggest a legal audit*

The contact that small businesses have with their lawyers tends to be sporadic. Many potential legal problems can, therefore, go undetected. A legal audit, whereby the legal advisor regularly reviews the client's legal position, can help to identify such problems. The aim of this review should be to "determine the legal health of the enterprise and to keep it healthy".[4]

VI Conclusion

All 44 businesses studied have been placed into at least one of the above mentioned seven causal categories. The study was primarily conducted from the perspective of the small business manager. A follow-up study planned for 1989 will canvass the legal profession. The suggestions given herein are therefore rather general and some might appear trite. It can, however, safely be said that the study reveals that small businesses managers often fail to adhere to "the basics". As professional advisors, lawyers must do as much as possible to avoid ignoring basic guidelines themselves. Often that modicum of extra attention given to a particular client's business may result in much more useful advice. It should also help allay widely held apprehension towards the legal profession. Obviously, ending up in Court is less problematic for most lawyers than it is for their clients. Going to Court is, after all, what many lawyers do best. To most small business solicitors, however, doing the best job for their clients means keeping them away from the Courtroom. It is in both parties' interests to promote a harmonious, long-term and relatively problem-free relationship. While this will never occur in all cases, it is hoped that some of the points mentioned here will help to achieve this goal. □

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1 Davies, J O (1979), "Small Business and Legal Services", *American Bar Association Journal* (December) pp 1806-1807.

2 Brown, L B (1984), "Using Corporate Lawyers Preventively", *Preventive Law Reporter* (February) pp 91-96.

3 Davies, J O (1979), "Small Business and Legal and Services", *American Bar Association Journal* (December) pp 1806-1807; Ireland, R D, J W Fowler, and G D Nord (1985), "The Legal Profession: Views from Small Business Owner/Operators", *Journal of Small Business Management* (January) pp 56-64; Ketchum, B W (1982), "You and Your Attorney", *Inc* (June) pp 51-56.

4 Brown, L B (supra), p 96.

Executive lapdog or Parliamentary watchdog?
The Controller and Auditor-General

By Louise Longdin, Lecturer in Commercial Law, School of Commerce, University of Auckland

The Controller and Auditor-General is one of Parliament's three watchdogs, the others being the Ombudsman and the Commissioner for the Environment. This article demonstrates how the Controller and Auditor-General presently enjoys less statutory protection from executive retribution in the carrying out of his or her role than the other two Parliamentary Officers. The Finance and Expenditure Select Committee tabled a report on 21 March 1989 on Officers of Parliament. *This report dealt, among other matters with the need to recognise and ensure the independence of the Controller and Auditor-General. This report emphasises the points made in this article which was written before the Parliamentary Report was available.*

It has long been fundamental to our Westminster type of Constitution that Parliamentary consent is necessary before the executive can levy taxes, expend public money or borrow. (Article 4, Bill of Rights (1688) 1 Will and Mar Sess 2 C 2). It would, therefore, be perverse to conclude that the greater vulnerability of the Controller and Auditor-General to executive influence was deliberately contrived by Parliament rather than an historical accident. Legislative initiatives are not called for purely in the interests of statutory consistency, but in order to avoid the Officer becoming merely an "in-house" auditor for Treasury. They are also necessary to strengthen Parliament's control and powers of scrutiny over the financial activities of all executive bodies with access to public funds or the power to commit their expenditure.

Appointment and dismissal of the Controller and Auditor-General

A private member's Bill, the Public Finance (Appointment of the Controller and Auditor-General) Amendment Bill 1988 has recently been introduced to Parliament and is being considered by the Select Committee on Finance and Expenditure. It would change the mode of appointment from an executive or political recommendation to a parliamentary one. Instead of the Governor-General acting by convention on the advice of the Prime Minister to appoint the Controller and Auditor-General (as under s 16(1) Public Finance Act 1977) the Governor-General would make the appointment on the recommendation of the House of Representatives. This change is consistent with the appointment of Ombudsmen and the Commissioner for the Environment. By convention, both main political parties concur over the Ombudsman's appointment but it is conceded that this would be a difficult end to achieve through legislation.

By contrast, in the United Kingdom (under s 1(1) National Audit Act 1983 (UK)) the Comptroller and Auditor-General is appointed by the Queen after an address by the House of Commons, with no motion being able to be made for such an address except by the Prime Minister acting with the agreement of the Chairman of the Committee of Public Accounts (PAC) (the Select Committee equivalent of our Finance and Expenditure Committee). This mechanism might *prima facie* indicate that appointment there was more of an executive than a parliamentary one, unless it is appreciated that the Chairman of PAC is by convention an opposition member of Parliament. (In practice in New Zealand the Finance and Expenditure Committee has a majority of government members on it and is chaired by a government member, so the United Kingdom mode of appointment would not be a suitable alternative.)

The Controller and Auditor-General suffers no discrimination, however, in the mode of his removal from office. Parliament has been consistent, in its provisions for the dismissal of all its Officers. To protect them from government retribution, (should an Officer's report prove too controversial or unpopular) Parliament has ensured that none may be removed from office save by the Governor-General after an address by the House of Representatives, and then only for reasons of disability, bankruptcy, neglect of duty or misconduct.

Jurisdiction and powers of the Audit Office

The Audit Office is in effect the Controller and Auditor-General. His or her independence from the executive is presently secured by s 15(5) of the Public Finance Act 1977. Neither the Minister of Finance nor the Minister responsible for the Audit Department is responsible for the Audit Office. A comparable degree of independence is conferred in the United Kingdom on the Comptroller and Auditor-General who is, moreover, given "a complete discretion in the discharge of his functions". (s 1(3) National Audit Act 1983 UK). The Controller and Auditor-General (like his or her counterpart in the United Kingdom)

has no power or duty, whatsoever, to question the merits of executive policies in relation to public expenditure or borrowing strategies. Under s 25(3) of the Public Finance Act, however, the Audit Office does have a discretion to question whether Crown resources have been applied "effectively and efficiently" in a manner consistent with any given policy.

Exchequer control: The Controller function

The role of the Audit Office in the supply process is that of a monitor acting on behalf of Parliament in accordance with duties laid down in the Public Finance Act. Section 59 of the Public Finance Act precludes any issue of money from the Public Account "except in pursuance of a Warrant under the hand of the Governor-General". A "warrant" is the authorisation of the Governor-General, given to the Minister of Finance to issue money to meet executive obligations. (A J H R 1984, B 1 [Pt III] 42). Before any warrant can be submitted for the Governor-General's signature, the Audit Office is required to certify that the amount of the warrant may be lawfully issued. To give certification, the Audit Office must satisfy itself that there are in fact "sufficient exercisable legislative authorities in existence". (idem). It must also give due weight to any other relevant statutory provisions, such as s 53(1) of the Act and s 22 of the Constitution Act 1986 both of which forbid any expenditure of public money except pursuant to an appropriation by Act of Parliament. The Audit Office appears at this stage to have a discretion under s 59(2) whether or not to certify that the amount of a warrant may be lawfully issued. It also seems to have the power to decide definitively on the fact of lawful authority for any issue of public funds. Thus, if the government in power were to exhaust supply and further supply was blocked by Parliament, the Audit Office may decide whether there should be further issue of money out of the Public Account.

When Treasury wishes to make an issue of money out of the Public Account, s 60 requires it to prepare an account of the payments to be met (known as a "requisition") and a cheque for the total amount. The Audit Office is then required to countersign both the requisition and the cheque, after satisfying itself that the amount of the issue is covered by a warrant as already described, and that there are appropriations or other authorities available against which the payments comprised in the requisition may properly be charged. If the warrant had already been issued, and the Audit Office then became aware that the amount of the warrant had no lawful authority, the Audit Office may refuse to countersign the requisition and cheque prepared by Treasury. In such an event, the dispute is to be determined by the Governor-General in Council (discussed in detail infra).

The situation has sometimes arisen that the executive have lacked legal authority for expenditure but has given undertakings to the Audit Office that validating legislation will be passed. In his 1983 report, (A J H R 1983, B 1 [Pt II] 73) the former Controller and Auditor-General stated that, although of no longer known origin, it had been the practice of the office for more than fifty years to accept undertakings from a government to promote subsequent legislation which would validate expenditure that would or might otherwise be unlawful. The Controller then considered that he could exercise jurisdiction to prevent government expenditure only in situations where doubt existed over the question of supply.

In his 1984 Report the present (but then newly-appointed) Controller said that his predecessor's view was apparently based on the fact that s 60 of the Public Finance Act 1977 does not expressly mention the legality of proposed spending as a ground for the Audit Office refusing to countersign a cheque drawn on the Public Account to meet that expenditure. (A J H R 1984, B 1 [Pt III] 44). The Controller re-opened the question of his jurisdictional powers in relation to the unlawful expenditure of public money. He found untenable his predecessor's narrower interpretation of s 60 which meant that he could only refuse to countersign if the following two criteria specified in s 60(5) were not met. Section 60(6) states:

> (1) The Audit Office *shall* (emphasis supplied) countersign the requisition and cheque, and return the cheque to the Treasury, when it is satisfied that —
>
> (a) The issue is pursuant to a Warrant under section 59 of this Act; *and* (emphasis supplied)
>
> (b) There are appropriations or other authorities available against which the payments comprised in the requisition may properly be charged.

Although these two criteria are *prima facie* cumulative, it is not so clear whether they are intended to be exhaustive, and whether Parliament expects the Audit Office to refuse to countersign a cheque to meet proposed expenditure where the Controller believes its purpose lacks lawful authority. Should the following propositions be true:

> (1) That legal authority for any item of expenditure either exists or does not exist.
>
> (2) That an assurance by a government that it will promote legislation to validate expenditure that is or may otherwise be unlawful, does not in any way alter the legality of that expenditure

then any acceptance of undertakings by the executive to pass retrospective validating legislation represents an assumption by the Audit Office of a discretion on its part. Such a discretion appears to have neither legislative nor common law authority nor any limits to its exercise which are publicly known and commonly adhered to. Parliamentary sovereignty is compromised in that the authority of the House to govern supply by legislation is accorded lesser status than executive convenience. (A J H R 1984, B 1 Pt III, 44-46).

If Parliament does amend the Public Finance Act 1977 to clarify the above situation, it is strongly argued that it should not provide the Controller with a clear discretion (for reasons of administrative expediency) to countersign cheques to meet proposed expenditure where it may otherwise be unlawful. Such an amendment could only

jeopardise the Controller's traditional independence from the executive. He or she may well then become subject to more political pressure to exercise the discretion conferred upon him or her.

Post-expenditure control: The auditor function

The Auditor-General must ascertain whether money, once issued from the Public Account in accordance with statutory authority, has actually been spent as intended. Such *ex post facto* scrutiny comprises the audit function of Parliament which is presently carried out through its agency, the Audit Office. Generally the Audit Office is charged with being the auditor of all public money and stores, which includes all money and stores of government agencies and local authorities. Treasury is charged with transmitting annually to the Audit Office, all public accounts relating to the payment into and out of funds comprising the Public Account. It must also furnish a statement showing the sums appropriated to votes by the Appropriation Act or Acts for that year, the expenditure relating to each vote for that year and the amount over-expended or under-expended if any. The Audit Office, on receipt of an annual statement of public accounts from Treasury, must report whether or not in its opinion it properly reflects for that year, the financial transactions relating *inter alia* to parliamentary appropriations. The Audit Office carries out this examination and reports as the agent of Parliament, and as such is theoretically independent of any executive organ including Treasury. (For a fuller and historical account of the role, jurisdiction and powers of the Controller and Auditor-General, see the writer's M Jur thesis *Parliamentary Control of Public Expenditure* 1985).

Information gathering powers

To enable the Controller and Auditor-General to carry out both his roles as described above, he or she has been given formidable statutory powers of inquiry. Under s 28(1) of the Public Finance Act, he or she can by giving notice in writing, summon any person and/or require any person to produce any books or accounts in their custody or control which the Controller considers likely to contain certain information relating to the subject matter of inquiry. The Controller may furthermore compel evidence to be given on oath whether it be given in writing or orally. (s 28(2)). Curiously, the United Kingdom Parliament has not conferred such a wide right to obtain documents and information on its Comptroller and Auditor-General. Under s 8 of the National Audit Act 1983 (UK), a more objective test is imposed and he or she has the right of access only at "all reasonable times" to all such documents as "he may reasonably require" for carrying out his or her examination. The wide powers of the Controller and Auditor-General to elicit information are furthermore buttressed by the fact that once a person has appeared before him or her and had an oath administered that person can then be liable for perjury as provided for under the Crimes Act 1961. (s 28(3) Public Finance Act 1977).

Can the Executive invoke public interest immunity against the Controller?

Although s 3 of the Public Finance Act 1977 states baldly that it binds the Crown, the question may still be asked whether Crown privilege may be invoked in respect of any books, records or information which the Controller and Auditor-General is seeking under his s 28 powers. This situation could arise if a person is charged with a s 109 offence, for example, by refusing to produce any book or account in his possession or under his control when required to do so pursuant to the Public Finance Act. Since Crown privilege is a rule of law with as ancient a lineage as legal privilege, the question could conceivably arise of whether the general words of s 28 were intended by Parliament to abrogate Crown privilege. The fact that legislation was subsequently passed to remedy the decision in *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (to remove legal privilege in relation to solicitors' trust account records), does not alter the possible application (by analogy) of the reasoning of that case to a situation involving a claim of Crown privilege in the face of a request for information by the Auditor-General. In *West-Walker*, Gresson J in the Court of Appeal stated that if the general words of the relevant statute were construed literally, they would extinguish a privilege which had existed for centuries and which had been supported as being in the public interest. (ibid, p 211). The Court endorsed two long established and inter-related principles that general words in a statute do not abrogate the common law unless there is a general intention in the Act to deal with that special and particular matter and that general words are to be construed "to pursue the intent of the makers of statutes" (ibid, p 220). Although s 3 of the Public Finance Act 1977 generally binds the Crown to all provisions of the Act, and this undeniably diminishes the strength of the argument that Crown privilege may still be invoked, it is nevertheless not so clear that it altogether disposes of the claim. (Cf the Official Information Act 1982, s 3 (which binds the Crown) and s 11 (which expressly includes claims of public interest immunity)).

Since the Court now reserves to itself the right to decide whether or not Crown privilege can attach to certain evidence, (*Corbett v Social Security Commission* [1962] NZLR 878, *Conway v Rimmer* [1968] AC 910 (HL), *Konia v Morley* [1976] 1 NZLR 455) it may well be reluctant to come to the conclusion that the combined effect of ss 3 and 28 of the Public Finance Act 1977 is to abrogate the common law. On the other hand, if the Court were to consider that the general intention of the legislature had been to delegate to the Controller and Auditor-General the duty to act as guardian of the public purse, and to this end, to have full inquisitorial powers, it might well consider that only by abrogating Crown privilege could the words of the Act best enable the Controller and Auditor-General to perform his function. To place this problem in perspective, there has apparently been little or no resistance in fact to the Controller and Auditor-General in the exercise of his information gathering powers. Certainly no claim of Crown privilege has ever been invoked in particular cases or threatened in general. It is moreover established practice that copies of all Cabinet papers with implications for public expenditure are delivered

promptly to the Audit Office. The Controller and Auditor-General must, however, rely on Cabinet to decide whether Cabinet documents are relevant to the public spending activities of the executive. Were he to use his formal powers to acquire these very same papers, he might well be handicapped, by not knowing in advance what papers to ask for.

Privileges and immunities

Although the Controller and Auditor-General is a Parliamentary Officer, no parliamentary privilege attaches to his or her reports tabled in the House. If sued in defamation in connection with the content of a report to Parliament, the Auditor-General would have to invoke qualified privilege for the report under s 5 of the First Schedule (Part II) of the Defamation Act 1954. That means it would have to be shown that the report was "a fair and accurate report of the proceedings in any inquiry held under the authority of the Government or legislature of New Zealand. . . ." Ironically, Ombudsmen enjoy statutory qualified privilege for all their reports. Under s 26(4) of the Ombudsmen Act 1975 (as repealed and substituted by s 5 of 1982, No 164 and subsequently amended by s 57 of 1987, No 174) any report made by an Ombudsman (under that Act, the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987) is deemed to be an "official report" attracting qualified privilege under s 5 of the Defamation Act. There appears to be no rationale for Parliament not to grant to its other watchdogs, the Commissioner for the Environment and the Controller and Auditor-General the same qualified privilege as the Ombudsman.

Determination of disputes involving the Controller and Auditor-General

If an Ombudsman or Commissioner for the Environment (or the Comptroller and Auditor-General in the United Kingdom) is involved in a dispute with a member or body of the executive, the relevant statutes (the Ombudsmen Act 1975 and the Environment Act 1986) are completely silent as to the outcome. This, curiously, is not the case for the other "Parliamentary watchdog" in New Zealand. Should a dispute arise between the Controller and Auditor-General and any government department or agency over, *inter alia*, the legality of expenditure or proposed expenditure, either party can under s 35(1) of the Public Finance Act 1977 refer the matter for determination to the Governor-General in Council. It is mandatory, furthermore, under s 60(6) if the Auditor-General refuses to countersign a Treasury requisition or cheque, that the matter be referred for executive determination. By comparison, under one of the Public Finance Act's predecessors, the Public Revenues Act 1953 (NZ), the dispute could be further referred to the Attorney-General for his written opinion which was final. The Minister of Finance had to refer any dispute to the Attorney-General, if it involved matter of law in the opnion of the Audit Office. It is interesting that this additional avenue of legal recourse for the Controller and Auditor-General was omitted from the present Act. Section 35(3) of the 1977 Act further stipulates that after the Governor-General in Council has resolved the matter in dispute, that determination, together with the opinion of the Audit Office, must be laid before the House of Representatives not later than the sixteenth sitting day of the House after the date of the determination.

Whether or not the determination of the Executive Council under s 35 is reviewable by a Court is an, as yet, untried question. Recent events aired widely in the media concerning the scope and content of the Controller and the Auditor-General's reports would appear to indicate that the problem is far from being an academic one. An application for judicial review of the determination could well succeed in the light of *CREEDNZ Inc v G-G* [1981] 1 NZLR 172 and the decision of the High Court of Australia in *FAI Insurances Ltd v Winneke* (1982) 41 ALR 1 (although, that case would seem to require a breach of natural justice). The Canadian position would also seem to allow judicial review of Orders in Council which involve a *lis* between the parties. (*Attorney-General of Canada v Inuit Tapirsat of Canada* (1981) 115 DLR (3d) 1, *Re Surrey Memorial Hospital Society v A-G* (BC) (1982) 142 DLR (3d) 697). Notions too of what may constitute *locus standi* for judicial review have expanded considerably in New Zealand in recent years. Since *The Society for the Promotion of Community Standards v Everard* (High Court, unreported, Wellington Registry, CP 616186, 9 April 1987) the Court is likely to concentrate more on the merits of a particular claim than on the standing of a person to make a claim.

Conclusion

The Controller and Auditor-General has on several occasions in his reports invited Parliament to clarify his powers and to enlarge his jurisdiction. Amendments to the Public Finance Act 1977 are clearly called for if Parliament is not to allow further erosion of its firmly established power to control the public purse.

This article has deliberately not dwelt on the merits of increasing accountability to the Audit Office by departments operating revolving funds, Crown-owned companies excluded from the accountability provisions of the State-Owned Enterprises Act 1986, Trust Boards and subsidiaries of Crown-owned companies. Arguments that the Controller and Auditor-General's jurisdiction should be expanded in these and other areas have already been advanced in a recent report to the House by the Controller and Auditor-General (A J H R 1988 B 29A). Instead the aim here has been to show that in relation to the Controller and Auditor-General, Parliament has transferred much more of its authority over him or her to the executive than it has done for its other officers.

In order to demonstrate that the Controller and Auditor-General is indubitably Parliament's watchdog and not the executive's lapdog, it is suggested that Parliament amend the Public Finance Act:

(i) to ensure that it is the House of Representatives not the Prime Minister (as at present) who recommends the appointment of the Controller and Auditor-General.

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Offer and acceptance in the Privy Council

By D W McLauchlan, Professor of Law, Victoria University of Wellington

In this article Professor McLauchlan is critical of the judgment of the Privy Council in the Scancarriers *case. He argues that while the correct result was reached the reasoning of the Court is incomplete and misleading. He suggests that the explanation for the decision lies in the evidence of shipping practices analysed in the first instance judgment of Wallace J.*

If the volume of reported and unreported cases in New Zealand over recent years is a reliable guide, the most troublesome issues of contract law continue to be in the area of formation of contracts. The Courts are constantly being faced with the task of deciding whether particular dealings or negotiations between the parties resulted in the conclusion of a legally binding contract. Although the principles relating to offer and acceptance and other aspects of formation would commonly be regarded as relatively well-settled, their application can cause considerable difficulty and divergence of opinion. There is no better example of this than *Aotearoa International Ltd v Scancarriers A/S* [1985] 1 NZLR 513 where Wallace J in the New Zealand High Court found that there was no contract, the Court of Appeal unanimously disagreed, but the Privy Council restored the judgment of Wallace J. The case is a few years old now but given that it has only been briefly noted elsewhere and also that, in the writer's view, the reasoning in the advice of the Privy Council should not be allowed to pass without comment, this belated note will perhaps be of interest.

The facts of *Scancarriers* were complicated but, for the purpose of discussion of the formation issues, they can be summarised as follows. The plaintiff (Aotearoa) was an Auckland exporting company owned by a Mr Cash. The defendant (Scancarriers) was a Norwegian shipping company engaged in the cargo trade. Their Auckland agents were the East Asiatic Company. In 1981 Scancarriers decided to introduce a new service. Their ships returning to Europe via the Suez Canal had not been attracting enough cargo. The new service involved northbound ships calling at Arabian Gulf ports from which cargo could be transhipped by an associated shipping company to Indian ports. The new service was good news for Mr Cash and Aotearoa. The company's business involved the purchase and exporting of waste paper and it was seeking to develop a potentially lucrative market for New Zealand waste paper in India. Negotiations between the company and Scancarriers commenced towards the end of 1981 and culminated in two meetings in Auckland on 29 January 1982. One of these meetings was mainly about the freight rate Scancarriers would charge for quantities of waste paper up to 1000 tonnes per voyage. Aotearoa were concerned to get the cheapest rate possible. Scancarriers' representative was unable to give any firm indication on freight rates but did say he would investigate the matter. The other meeting was with a representative of the East Asiatic Company, Scancarriers' agents, and mainly concerned the question of space availability on the projected voyages. Aotearoa wanted to make sure that Scancarriers would have room for up to 1000 tonnes of paper on each voyage. The representative of East Asiatic indicated that there would be ample space available. (In the course of giving evidence, however, he was somewhat ambivalent on the question whether a firm assurance had been given. He testified that in the context of the discussions – in particular the fact that ships going northbound were then only half full – and bearing in mind that Scancarriers were keen to secure more cargo, he was sure that "some sort of assurance would have been given" although "that would be normal practice".) Five days later, on 3 February 1982, Scancarriers sent a telex to Aotearoa which said, inter alia, "we agree to a promotional rate of US$120" and "this rate will be held until

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(ii) to ensure that disputes between the Controller and Auditor-General and any executive body can at least be reviewed judicially instead of being determined finally by the executive.

(iii) to confer qualified privilege on reports of the Controller and Auditor-General (such as Ombudsmen enjoy) provided of course that he or she acts without malice.

(iv) to clarify whether or not Crown privilege can be invoked by any executive body to resist production of information required by the Controller and Auditor-General.

(v) to ensure all Cabinet minutes and memoranda with public expenditure implications are passed on to the Audit Office.

(vi) to make it clear that the Controller and Auditor-General does not have any power to accept executive undertakings that retrospective legislation will be passed to validate the issue of funds out of the Public Account. □

29/7/82". Aotearoa were pleased with this response and immediately set about making arrangements to buy supplies in New Zealand and sell them to Indian merchants. Later Aotearoa advised Scancarriers that it wished to make a first shipment of approximately 1000 tonnes on board the *Barranduna* in March 1982. 920 tonnes were delivered for shipment but 280 tonnes were left behind. Scancarriers' next ship to sail was the *Tarago* in May 1982. Aotearoa advised that it wished to make a further shipment of approximately 1000 tonnes but Scancarriers refused to carry any more cargo for Aotearoa, other than the paper which had earlier been left behind by the *Barranduna*. Requests for space on ships which were due to sail in June and July were also turned down. The primary reason for this was that Scancarriers were able to obtain other better paying cargo. The head office in Oslo considered the quoted freight rate far too low. Eventually Aotearoa issued proceedings claiming very substantial damages for breach of contract.

High Court

In the High Court the plaintiff's main contention was that, as a result of the meetings in January and the February telex, the parties had concluded a partly oral and partly written contract whereby the defendant was bound to hold space available to fulfil the probable requirements of the plaintiff to ship up to 1000 tonnes of waste paper on each sailing of the defendant's northbound vessels during the period to 29 July 1982. This argument was rejected by Wallace J. His Honour held (inter alia) that, applying the usual objective test of intention, the plaintiff could not reasonably have inferred that the defendant had committed itself "to hold available such a large tonnage for one shipper who had no obligation to ship or pay dead freight if cargo did not eventuate" ([1985] 1 NZLR 513, 529). It is interesting to note, however, that if offer and acceptance had been present His Honour was prepared to find that "one way or another" the plaintiff would have been able to establish consideration. He suggested that consideration might be found in the detriment incurred by the plaintiff in "expending effort and money in obtaining the orders which the plaintiff was likely to ship with the defendant" (at 530). The Judge's decision in this respect (later accepted by the Court of Appeal but doubted by the Privy Council) continues a trend in New Zealand contract cases of general impatience with technical arguments concerning want of consideration; see, for example, *Moyes & Groves Ltd v Radiation New Zealand Ltd* [1982] 1 NZLR 368. For an interesting contrast see the judgment of Kirby P in *Beaton v McDivitt* (1987) 13 NSWLR 162.

Wallace J also rejected the plaintiff's alternative contention that (a) the telex brought into existence a *freight rate* contract, a contract fixing a freight rate of US$120 per tonne, and that (b) this contract was induced by a misrepresentation concerning space availability for 1000 tonnes on each sailing. Counsel had argued that, on this analysis, the plaintiff was entitled to recover under s 6 of the Contractual Remedies Act 1979 which allows damages for misrepresentation inducing a contract on the same basis as if the representation were a broken term of the contract. The Judge held that there had been no actionable misrepresentation and, more importantly in the present context, that the telex did not give rise to a freight rate contract; it was simply an indication that if in due course the parties entered into a contract to ship waste paper the stipulated freight rate would apply.

Court of Appeal

In the Court of Appeal, however, it was held that a binding freight rate contract had been concluded. The Court was convinced that "the law would fail to give effect to legitimate commercial expectations" if the position were otherwise (at 548). The telex amounted either to acceptance of an implicit offer by the plaintiff to use reasonable endeavours to find cargo (the preferred view) or an offer accepted by the plaintiff's subsequent conduct. Further, in order to give business efficacy to the contract, it was necessary to imply a term that "during the period for which the promotional rate was expressly agreed to be held, the shipping company would not arbitrarily refuse the customer space at that rate" (at 548). This term was breached when, after the first *Barranduna* voyage, the defendant refused to carry the plaintiff's waste paper because it was able to obtain other better paying cargo.

Privy Council

On appeal by the defendant to the Privy Council, counsel for the plaintiff adopted the unusual course of putting forward the Court of Appeal's analysis as an alternative submission only. It seems that the primary submission was that the telex amounted to an offer to keep space available for the plaintiff which was accepted upon the first tender of cargo by the plaintiff, with the defendant being thereafter bound to hold space available on the remaining voyages until 29 July 1982. However, the Privy Council found it "quite impossible . . . to put this construction upon the telex" (at 556). Their Lordships concluded that the telex:

> was no more than a quotation of a freight rate which was to prevail down to 29 July 1982 as the rate which the [defendant] would charge for any cargo of waste paper which might subsequently be sold by the [plaintiff] and be accepted by the [defendant] for shipment from New Zealand to India. Put colloquially the telex was "a quote" and no more.

As regards the Court of Appeal's finding of a freight rate contract containing an implied term against arbitrary refusal, the Privy Council held that this analysis was misconceived. Their Lordships said:

> Following this approach the Court of Appeal felt able, by adding implied terms to the few express terms already mentioned, to create a contractual relationship which certainly the parties had not expressed for themselves. Their Lordships sympathise with a wish not to allow parties who have made a firm but uneconomic bargain too readily to escape from its bonds when it subsequently proves financially disadvantageous. But the first question must always be whether any legally binding contract has been made, for until that issue is decided a Court cannot properly decide what extra terms, if any, must be

> implied into what is ex hypothesi a legally binding bargain, as being both necessary and reasonable to make that legally binding bargain work. It is not correct in principle, in order to determine whether there is a legally binding bargain, to add to those terms which alone the parties have expressed, further implied terms upon which they have not expressly agreed and then by adding the express terms and the implied terms together thereby create what would not otherwise be a legally binding bargain.

The eventual conclusion of their Lordships that the defendant's appeal must be allowed was probably, for reasons to be canvassed later in this note, the correct one. But it is submitted that the supporting reasoning is extremely disappointing and far from a satisfactory rebuttal of the Court of Appeal's approach. The central propositions in the reasoning are incomplete and potentially misleading.

Quotes and offers

First, the assertion that the telex was merely "a quote" is unconvincing because a quote can in fact be an offer. It is true that a quote will often not be an offer; see, for example, *Restatement (Second) of Contracts*, para 26, Comment *(c)*. It may simply be a statement of a price at which a commodity can be bought or a service supplied; it may not express or imply a willingness to actually provide the commodity or service in question. A quote may also leave unstated a number of matters usually agreed upon before a commitment is made, for example, the amount to be sold, the time and place of delivery, the terms of payment. But clearly a quote may be an offer in some circumstances. The basic question in each case must be whether the objective test of intention is satisfied. In other words, could the buyer reasonably infer that the seller was manifesting an intention to be bound upon the buyer's acceptance. Relevant factors will include the nature of any previous inquiry by the buyer and the completeness of the terms of the alleged contract. (For a useful discussion of the circumstances in which a quote may constitute an offer, see the American case of *Southworth v Oliver* 587 P 2d 994 (1978), Supreme Court of Oregon.) Consider the following example. Baker writes to Merchant: "I need 100 barrels of flour for delivery end of April. Can you help?" Merchant replies: "We quote you 100 barrels at $50 each." Baker replies: "I accept." How likely is it that a Court would find that there is no contract in these circumstances? Further, there are probably not too many contract lawyers nowadays who would defend the result in *Harvey v Facey* [1893] AC 552, the "classic" example of a mere statement of price or quote. Instead of the Privy Council's strict construction of the defendant's letter in that case, a modern Court would surely focus its attention on the question whether a reasonable person in the position of the plaintiff was entitled to infer that the defendant was offering to sell "Bumper Hall Pen".

It must be emphasised that nothing in the above discussion is intended to suggest that the Privy Council was wrong to characterise the telex as a mere quote as opposed to an offer. The point simply is that the conclusion required amplification and explanation. The reasoning as it stands is devoid of factual analysis and not as helpful or convincing as it might have been.

Implied term analysis

The other, and more important, difficulty with the Privy Council's judgment concerns its reason for rejecting the Court of Appeal's implied term analysis. It is simply not true to say that it is contrary to principle to imply terms in order to determine whether there is a legally binding bargain. Indeed it is elementary law that the Courts can do precisely that; see, for example, *Hillas and Co Ltd v Arcos Ltd* (1931) 147 LT 503 and *Foley v Classique Coaches Ltd* [1934] 2 KB 1. Thus, the Courts will imply terms in order to create and enforce what would not otherwise be a legally binding bargain where the parties appear to have formed a contractual intention but they have failed to agree upon some essential term or terms. This principle "runs throughout the whole of modern English law in relation to business contracts" (*Hillas v Arcos* at 517, per Lord Wright). Let us take one obvious example. Parties agree upon the sale of land for a particular price but they fail to specify the time for performance. In such an "open contract" the Courts will imply a term that settlement is to be within a reasonable time; see, for example, *Willetts v Ryan* [1968] NZLR 863, 867-868 (CA). Or suppose parties enter into an executory agreement for the sale of goods but fail to specify the price. This omission will, of course, be a fairly strong indicator that the parties have not reached the necessary consensus to give rise to a contract but, assuming that a mutual intention to be bound is otherwise established, the Courts may, under both common law and statute, imply a term that the price shall be the reasonable price; *Hoadly v M'Laine* (1834) 10 Bing 482, Sale of Goods Act 1908 s 10(2), but cf *Hall v Busst* (1960) 104 CLR 206. This is clearly a situation where, in the absence of such an implication there would be no legally binding contract – the parties have not agreed on one of the most basic terms, price.

There is, of course, a difference between the above examples and the situation in *Scancarriers*. And it is probable that it was this difference that the Privy Council actually had in mind. The above examples are cases where there is assumed to be a clear contractual intention but there is also a stumbling block to enforcement in that certain important terms are not settled. The parties have agreed upon what was intended to constitute a complete contract but the contract is not in fact complete. Here the Courts will resort to implied terms to fill in gaps in the arrangement which might otherwise thwart the parties' intention. *Scancarriers*, on the other hand, was a case where the Privy Council was not satisfied that the necessary initial intention to contract was present. Their Lordships were concerned that implying a term would create a contract which the parties could not reasonably be taken to have intended. They were concerned that the implication of a term was being made to spell out a contractual intention which simply did not exist.

However, unfortunately, this is not what the judgment actually says. Their Lordships speak in terms of it being "always" necessary to decide whether there is a "legally binding bargain" before broaching

the question of implied terms. They assert that it is contrary to principle "in order to decide whether there is a legally binding bargain" to fill in the gaps in expressed terms by resorting to implied terms. These statements could only be correct if the phrase "contractual intention" were substituted for "legally binding bargain".

It might be thought that the writer is being rather too literal in his interpretation of the language used by the Privy Council. But it needs to be remembered that we are talking about a judgment of New Zealand's highest appellate Court reversing a unanimous decision of the Court of Appeal which, after careful consideration, concluded that a finding for the plaintiff was necessary in order to give effect to "legitimate commercial expectations". If the Court of Appeal got it so fundamentally wrong, one could reasonably expect the relevant principles to be clearly and accurately stated. One could also expect some reasoned analysis of why in the circumstances the requisite contractual intention could not be attributed to the parties. Instead their Lordships were content to assert (and this was in a later part of the judgment dealing with the plaintiff's alternative submission) that "no contractual relationship was in truth ever intended to be created when the telex was transmitted to the [plaintiff]" (at 556).

A further reason for taking issue with their Lordships' reasoning is its potential to mislead. Not surprisingly, statements of principle by the Privy Council tend to be taken at face value, at least by lower court Judges. And there are already signs in this instance that the Courts in New Zealand are being misled. In the case of *Money v Ven-Lu-Ree Ltd* [1988] 1 NZLR 685, one of a number of cases in which the principle under discussion here was cited unquestioningly, the plaintiff entered into an agreement (which was later partly executed) for the sale of his shares to the majority shareholders. The parties agreed on a date for share valuation purposes but failed to specify any machinery for valuation. Chilwell J held that it was impermissible to imply a term that any difference between the parties' accountants would be resolved by arbitration. Such an implication would have had the effect of creating a bargain which otherwise did not exist due to a lack of consensus upon the consideration element. His Honour said:

> A Court may imply a term if there is a concluded bargain between the parties, but it may not imply a term to create a bargain.

It does not appear to have been argued that, in view of the clear manifestations of intention to be bound to sell and buy the shares, it was appropriate to imply a term that the price was to be the reasonable value of the shares at the specified date. (Chilwell J's decision has, since the time of writing, been reversed by the Court of Appeal: see *Playle, Lakin and Fale v Money* CA 68/88, judgment 7 October 1988. However, disappointingly, the Court did not take the opportunity to explain the Privy Council's remarks in *Scancarriers*. Indeed, Cooke P was content to cite that case as authority for the proposition that it is "elementary law that the Court cannot add implied terms to make a contract for the parties".)

Court of Appeal's analysis

What then of the Court of Appeal's resolution of the *Scancarriers* case? That decision was certainly deserving of better than the rather cavalier treatment it received at the hands of the Privy Council. Nevertheless, there are some very real objections to the Court of Appeal's analysis which were raised in counsel's submissions but not taken up by the Privy Council. It will be recalled that, according to the Court of Appeal, the telex gave rise to a freight rate agreement which had binding contractual force. The principal *express* term of this contract was that waste paper accepted for shipment during the specified period would be charged at a special freight rate of US $120 per tonne. The contract did not involve any express promise or commitment on the defendant's part that cargo delivered to the wharf would be carried or that space would be kept available for up to 1000 tonnes of cargo. However, the Court held that, in order to give business efficacy to the contract, it was necessary to imply a term that the defendant would not arbitrarily refuse space at the agreed rate.

It is difficult to see how this analysis can be justified in light of the usual requirements for implication of terms. Those requirements are, of course, that (a) the term must be reasonable and equitable (b) it must be truly necessary to give business efficacy to the contract and (c) it must be so obvious that "it goes without saying". In the writer's view, the implied term in question did not even satisfy the initial requirement of being reasonable and equitable. Indeed, one could go so far as to suggest that the effect of the term would be quite unreasonable and inequitable. This is because, while the defendant could not arbitrarily refuse space (for example, where a higher freight rate was available for other cargo), the plaintiff was apparently left free to act arbitrarily and place its cargo with any shipowner who offered better terms. How could it be reasonable to imply a term resulting in such a lack of mutuality of obligation? The Court of Appeal impliedly criticised the defendant's stance of "single-minded pursuit of economic self-interest" but the solution it arrived at left the plaintiff free to adopt the very same attitude.

Arbitrary conduct

In attempting to justify its analysis the Court of Appeal went on to say (at 549):

> This limited implied term against arbitrary refusal imposes no unduly burdensome restrictions on the shipping company's freedom to manage its own business. It is far from tantamount to an absolute warranty or an unqualified commitment to carry 1000 tonnes of waste paper or thereabouts on each of the four voyages.

Although much depends on one's perception of what would be "arbitrary" conduct, it is arguable that for most practical purposes the implied term was in fact very close to a commitment to carry. Let us consider the likely operation in practice of the implied term. It seems that the Court envisaged that the defendant could not simply go ahead and commit the space for a particular voyage to other shippers without reference to the plaintiff. So the defendant would probably have to hold space available until it could

reasonably be said that the plaintiff was too late. In the meantime other shippers might have to be turned away or kept waiting. This is surely a commercially unreasonable obligation to impose on the defendant. Furthermore, is it not likely that when the time arrived that the defendant could reasonably judge that the plaintiff was too late it would often be too late to secure cargo from other shippers? The Court of Appeal accepted that there could be no commitment in relation to space but, as the defendant argued in its case on appeal, it then endeavoured to tread a middle ground which realistically did not exist. If this is a valid point then, bearing in mind the plaintiff's apparent freedom to act in its own interests by going elsewhere for shipping space, it is difficult to accept that the implied term came near to being reasonable and equitable let alone satisfied the other stricter requirements for the implication of terms.

There remains a further objection to the implied term which the Privy Council did briefly advert to – the difficulty in defining the circumstances in which a refusal to carry would be "arbitrary". The Court of Appeal attempted to give some guidance (at 548) but as the Privy Council pointed out "what is arbitrary in the eyes of one party may well be a matter of ordinary business prudence in the eyes of the other" (at 556). Typically their Lordships did not amplify this comment, but perhaps the following example highlights the difficulty. Suppose that prior to a particular voyage another shipper approached the defendant and sought space for 6000 tonnes of cargo, the full available capacity of the ship. Suppose also that the defendant reasonably judged that little other cargo was likely to be available except 1000 tonnes from the plaintiff. The defendant was therefore faced with the choice of accepting the plaintiff's cargo and sailing with a cargo at one-sixth of capacity or rejecting the plaintiff's cargo and sailing with a full load. Would the defendant be acting arbitrarily if it chose the latter alternative?

Correct analysis

Given that neither of the appellate Courts' judgments is convincing, what then is the correct analysis and conclusion in *Scancarriers*? What is the answer which, in the words of the Court of Appeal, would "give effect to legitimate commercial expectations"? It can be safely assumed that all three Courts were searching for this answer. Thus, the Court of Appeal said in effect that Wallace J had reached a decision which was contrary to legitimate commercial expectations, yet it is plain from a reading of the latter's judgment that he could not be accused of adopting a narrow or overly technical approach. His Honour emphasised that "this is a commercial matter and that the Court should take note of commercial realities and should endeavour to give effect to any arrangement made between parties" (at 528).

The crucial issue is whether a contract was formed in which the defendant undertook to keep space available for the plaintiff and to carry its cargo at the quoted rate. More particularly, was the plaintiff reasonably entitled to believe after the January meetings and the February telex that the defendant had committed itself to keep space available? In the writer's view the answer to this question, which of course essentially asks the Court to decide where the balance of convenience and justice lies, is to be found in the evidence of shipping practices, booking procedures and other circumstances outlined in the judgment of Wallace J. The overwhelming impression given by this evidence is that the relevant communications between the parties were in the nature of preliminary or exploratory exchanges conducted with a view to establishing a basis for doing business in the future and not involving, when viewed against the background of shipping practices well known to both parties, firm commitments on either side. It might be, as the Court of Appeal suggested at one point, that a layman would readily have sensed a commitment on the part of the defendant after the sending of the telex but the critical point is that it seems that those experienced in the export shipping trade would not.

Evidence

The following features of the evidence appear to explain and fully justify the decision of Wallace J to reject the plaintiff's claim. First, the plaintiff's principal shareholder, Mr Cash, openly acknowledged in cross-examination that under the arrangement with the defendant the company could not only vary tonnage to suit itself but also could ship with someone else if it wanted to. Secondly, Mr Cash, an exporter with considerable experience of normal shipping arrangements, accepted that "he was aware, as a matter of ordinary shipping practice, that the making of a firm booking is not a guarantee of space on the vessel and that, in the absence of a special arrangement, a contract ordinarily arises only on acceptance of the cargo for loading (or acceptance of the cargo at the wharf)" (at 521).

Thirdly, there were standard kinds of special arrangement available to shippers anxious to secure a commitment from the shipowner. A formal contract of affreightment might be negotiated which obliged the shipowner to accept a specified quantity of cargo and the shipper to pay dead freight if the cargo did not eventuate. Alternatively, the shipper could seek to take advantage of a system of cover bookings operated by the defendant and other carriers. Under this system shippers could indicate their requirements some months in advance of a particular voyage and, if a cover booking was accepted, ensure a space allocation provided the booking was "firmed up" within a few weeks of the ship's arrival.

Fourthly, the plaintiff's own expert witness on common shipping practices (a Mr Hutchings) gave evidence that, in the absence of cover bookings, preliminary discussions between shippers and carriers involved no commitment on either side. Indeed, the understanding in the trade was that an obligation to carry arose only upon delivery of the cargo to the wharf and the signing of a delivery docket by the carrier. Fifthly, the defendant's expert witness on shipping practices (a Mr Hobbs) gave similar evidence, although he contended that it was commonly understood that the carrier's obligation arose, not on delivery to the wharf, but even later when the stevedore was instructed to begin loading the cargo.

The latter witness made an

continued on p 145

Company Pot-pourri

By S Dukeson, an Auckland practitioner

This pot-pourri comprises three unrelated notes. The first two relate to possible defects or inadequacies in ss 209 and 345B of the Companies Act 1955. The author made submissions to the Law Commission on the sections and would be interested in what academics and practitioners have to say on the sections. The note on receivers and repudiation of contracts is more in the nature of wanting to deal with an issue which Mr Dukeson says he has felt, for a long time, has often been misunderstood by some receivers and lawyers.

Derivative actions and s 209

It seems to me that it has been universally accepted that s 209 encompasses the derivative action though no one has explained why this is thought to be so. While this might be because some of the commentators consider the point to be obvious, I am not sure that it can be taken for granted.

Section 209(1) refers to conduct which is oppressive, unfairly discriminatory, or unfairly prejudicial to *the member*. It is therefore difficult to see how s 209(1) can be said to encompass the derivative action as it is commonly understood.

The commentators would presumably argue that s 209(2) holds the key because it enables the Court to make such orders as it thinks fit, inter alia, authorising a member to institute Court proceedings *in the name and on behalf of the company*. However, in the face of the clear wording of s 209(1), the situation is surely unsatisfactory. I believe that if s 209(1) is intended to encompass the derivative action, it should be amended to make this clear beyond doubt.

Receivers and guarantors s 345B

Section 345B(1) stipulates that a receiver of the property of a company who sells any of that property shall exercise all reasonable care to obtain the best price reasonably obtainable as at the time of sale. Section 345B(2) stipulates that the receiver's duty is owed to the company.

All company lawyers will be aware of the fact that in *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410, Lord Denning held that, in the purely common law context, a receiver had a similar duty to guarantors. The question is whether there is room, in New Zealand, for a common law duty to guarantors when s 345B(2) states that the statutory duty is owed to the company. I am not aware of any New Zealand case that has considered the point.

I do not claim to be an expert on statutory interpretation, particularly in times where the principles of statutory interpretation seem, to some extent, to be in a state of flux. (Note, for example, the increasingly fashionable use of *Hansard*.) However, it seems to me that the question is whether s 345B was intended to be a code on what type of duty is owed by a receiver and to whom.

There is presumably no doubt that the section was intended to embody the common law as it was then (ie 1980). It would not be unreasonable to assume that the section was therefore intended to be a code. If so, it would be difficult to see how the statute could now be asserted not to be a code despite the subsequent developments which have taken place at common law. Even if it is possible to argue that the section is not a code, it would surely be an untidy situation to have the statutory duty and a common law duty to guarantors co-existing.

One way or another, I believe that the situation should be tidied up and the s 345B(2) should be amended to state that the statutory duty is also owed to guarantors.

Receivers and repudiation of contracts

Lawyers and accountants often say that "a receiver is in a better position than the company to repudiate contracts" and that "a receiver can disclaim onerous contracts". I feel that these statements are somewhat misleading.

In one sense it is correct to assert that the receiver is in a better position than the company to repudiate contracts. As is well known, most times, a receiver is appointed as the company's agent. Like all agents, if the receiver repudiates a contract on behalf of his principal, he will not be personally liable provided that he has acted in accordance with his principal's instructions. In that sense, the receiver/agent is in a better position than the company. (It is recognised that the receiver's agency is different from the normal type of agency. The receiver does not receive instructions from his principal, ie the company. Nevertheless, the company will not be able to deny the receiver's authority though it might have an action against the receiver for fraud or negligence.)

However, particularly in the receivership context, this position should not be emphasised too strongly. In practical terms, it will generally be found that the company could have just as readily repudiated the contract as could the receiver. For obvious reasons, any action for damages that the other party to the contract may have against the company will often prove to be illusory.

Further, a repudiation by the receiver of a contract which is

specifically enforceable against the company will generally be as ineffective as a repudiation by the company outside of the receivership context. (It has been suggested that a decree of specific performance cannot bind the receiver. However, there appears to be English authority for the view that if specific performance is decreed against the company, the receiver will be bound also — *Freevale Ltd v Metrostone (Holdings) Ltd* [1984] BCLC 72). Similarly where the other contracting party can obtain an injunction against the company. So also where, pursuant to the contract, the other contracting party has already acquired superior property rights (which may well be enforced by a decree of specific performance or the grant of an injunction). The case that would seem to have given rise to the most difficulty in this area is *Airlines Airspares Limited v Handley Page Limited* [1970] 1 All ER 29. The essential facts in that case were that H agreed to pay K a commission in respect of every aircraft sold by H. K assigned its interest in the agreement to A. H ran into financial difficulties and a debenture holder appointed a receiver and manager. The receiver indicated that he was not prepared to "adopt" the contract made by H to pay the commission. The receiver caused H to form a subsidiary company to which H then assigned vital parts of H's undertaking. The plaintiffs sought a continuation of an interim injunction restraining the receiver from transferring shares in the subsidiary to a third party.

It seems to have been accepted by Graham J that H was under an obligation (either implied or equitable) not to frustrate the agreement with K or to put it out of its power to implement the agreement. The main issue for our purposes was whether the receiver was in a better position than the company from the point of view of avoiding contractual obligations.

The plaintiff "conceded" that the receiver could not personally be compelled to perform the agreement. (As has already been indicated, there appears to be authority for the view that a decree of specific performance against the company will effectively bind the receiver. Accordingly, this concession perhaps should not have been made or at least not in that form. It is possible that the plaintiff was simply conceding that specific performance could not have been decreed against the company itself on the facts, but that does not appear to have been the basis of the concession.) Nevertheless, the plaintiff contended that the receiver could not legitimately frustrate the agreement by a transfer to a subsidiary. It was contended that there is a clear distinction between declining to perform a contract and "frustrating" the contract.

Counsel for the receiver argued that where, as in the present case, there was no question of a sham transaction and that the receiver was doing his best to realise the best price for the assets in question, the receiver should be in a better position than the company would have been had it repudiated the contract outside of the receivership context. This would be in the best interest of all creditors both secured and unsecured. According to counsel for H, the plaintiffs were really trying to be placed in a preferential position over all other unsecured creditors in regard to an ordinary trading contract which the receiver should be able to "adopt" or decline.

Graham J considered that a receiver is in a better position than the company to repudiate a contract provided that the repudiation would not adversely affect the realisation of assets or seriously affect the trading prospects of the company in question. Otherwise, almost any unsecured creditor would be able to improve his position and prevent the receiver from carrying out (sensibly) the purpose for which he was appointed. Accordingly, continuation of the injunction was refused.

It is difficult to see why the interests of general creditors should be taken into account. Under current law, a receiver owes no duty of care to general creditors. Accordingly, in considering the actions of a receiver, the interests of general creditors are surely irrelevant. Further, it may be asked what business it is of the general creditors if one of their number can establish an "entitlement" to a decree of specific performance or an injunction? (*Airlines* (supra) was explained in *Freevale Ltd v Metrostore (Holdings) Limited* (supra) as simply being the case where specific performance could not have been decreed against the company outside the receivership context and in *Schering Pty Limited v Forrest Pharmaceutical Co Pty Limited* [1982] NSWLR 286 as being a case where an injunction could not be granted.)

There are circumstances where the Court should take into account the interests of third parties when considering whether to grant an injunction or to decree specific performance ie the Court should at least consider the effect of specific performance or an injunction on third parties: see *Maythorn v Palmer* (1864) 11 LT 261; *Hartlepool Gas & Water Co v West Hartlepool Harbour & Rail Co* (1865) 12 LT 336; *Miller v Jackson* [1977] QB 966. However, it is difficult to see why general creditors should come within the ambit of this proposition when, on the one hand, a receiver owes no duty to them and, on the other hand, if one of their number can sustain a case for specific performance or an injunction ie has a particular right or interest, over and above that of merely being a general creditor, which should be enforced.

Airlines (supra) has generally been distinguished in subsequent cases and has received some degree of adverse academic comment. Though some might find the reasoning of Graham J in the case to be agreeable, particularly with a view to insolvency law reform, the case should not be taken as standing for the proposition that a receiver can repudiate contracts with impunity. There are times, at least in practical terms, when it does no harm to say that a receiver is in a better position than a company to repudiate contracts. However, the use of such terminology is not helpful in the sense that it is clear that the receiver cannot repudiate all unwanted contracts at will with impunity. In some cases the receiver can, and in others he cannot.

Postscript

It would appear that the Law Commission is looking at receiverships (both in relation to company receiverships and mortgages generally). It seems likely that it will be spelt out in statutory form that a receiver owes a duty of care to guarantors. □

Restrictions on Commissions of Inquiry

Report by the Public Issues Committee of the Auckland District Law Society.

Because Commissions of Inquiry are inquisitorial in nature they carry the risk of detrimentally affecting individuals who have only restricted rights of redress. This paper considers some of the implications of this problem in the wider context of the function of Commissions of Inquiry. The report sets out the personal views of the Committee.

Many will have been concerned in recent times as events unfolded over the Mason Committee Report into Psychiatric Services. Delays continued to occur while the report was the subject of repeated intervention and finally a consent Court Order.

The public expects that when a Commission of Inquiry is set up to report upon a matter it should be free to do so without apparent censuring or restraint from interested parties, the public or politicians. It expects that, as the matter was of sufficient concern to establish a Commission in the first place, that Commission should be free to report frankly and openly on matters which arise in the course of the inquiry. There is the inevitable suspicion that, if an initial report is the subject of restraint and suppression in whole or in part, the final result is not the balanced picture that the Commission originally intended, but rather a residue of matters which are considered not to be personally or politically sensitive or embarrassing.

It is perhaps timely to consider the functions of and restrictions upon Commissions of Inquiry of this kind and whether any changes should be considered.

Commissions of Inquiry

Commissions of Inquiry are established under the Commissions of Inquiry Act 1908. The appointment is by the Government and there are six categories of matters upon which a Commission may be appointed to report, including "any other matter of public importance" (added by an amendment in 1970). Membership of any such Commission is by no means restricted to Judges or lawyers, although it is often the case that the Chairperson will be a District Court Judge or a Judge of the High Court. If a High Court Judge is the Commissioner or one of the Commissioners, the Judge and the Commission have the same powers, privileges and immunities possessed by a Judge in the High Court in the exercise of his/her civil jurisdiction. By implication, these powers are excluded where there is no High Court Judge on the Commission.

The powers of a Commission generally were extended by a 1980 amendment in matters of evidence, persons entitled to be heard, and powers of investigation and summonsing of witnesses. Any person is entitled to be heard who is a party to the inquiry or has an interest therein apart from "any interest in common with the public". Section 4A(2) provides:

> Any person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.

That specific provision was not in the Act until the 1980 amendment.

Natural justice

This question came to a head in the litigation involving the Royal Commission of Inquiry into the Mt Erebus Air Disaster. In the Privy Council reference was made to a rule of natural justice which had earlier been promulgated in *R v Deputy Industrial Injuries Commissioner, ex parte Moore*, [1961] 1 QB 456, namely that a person making a finding

> must listen fairly to any relevant evidence conflicting with the finding, and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made. (*Re Erebus Royal Commission; Air New Zealand Limited v Mahon*, [1983] NZLR 662, 671).

The Privy Council then held at p 685 that

> in the various respects to which [they had] referred, the [Commissioner] failed to adhere to those rules of natural justice that are appropriate to an inquiry of the kind that he was conducting

and this was a reference to adverse findings against certain employees of Air New Zealand Limited categorised in the much publicised phrase as "an orchestrated litany of lies".

Although the appointment on 11 June 1980 of Mr Justice Mahon as the Erebus Commissioner preceded by 23 days the passage on 4 July 1980 of the amendment Act which included s 4A(2) set out above, that sub-section was nevertheless binding on him. The principle on which the Privy Council finally decided this matter at issue has its base partly on the Common Law rules to which we have referred and partly on that sub-section (although it will be noted that while the Common Law rule imposes the obligation on the

Commission, the sub-section throws this onus on the person affected). That principle prevents a finding adverse to a person's interests unless that person has been given the opportunity during the inquiry to be heard. It has been upheld in different cases over the years in respect of various areas of legal practice, including Commissions of Inquiry.

This is a principle of natural justice with which our committee has no quarrel.

The Mason Committee Report

It must be accepted at the outset that neither the content of the report as originally proposed nor the full sequence of events are available to the public.

It is clear, however, that following the drafting of the report, copies were supplied to senior Hospital Board employees; that concern was expressed about comments in it which were adverse to some of the parties affected; that an application was made to the High Court by interested parties to prevent the publication of the report with those adverse matters; that before the High Court an acknowledgment was made on behalf of the Committee and the Minister that some parts of the report were inappropriate and should be excluded; that certain other parts of the report were excluded by the Minister or his office after having taken advice from the Crown Law Office (apparently from concern that these might prejudice another matter before the Courts); and that the report as finally published was different from that initially proposed.

There is no doubt that what was done was rightly done. The sub-section and the principles of natural justice had not been complied with. Individuals had not been given the opportunity during the inquiry to be heard on matters which may have adversely affected their interests.

The Mason Committee and the Minister were faced with two alternatives; either to delete the offending portions (which they did) or to take further time to give those individuals that opportunity. After all, it must be remembered that the requirement of the rule of natural justice (and sub-section 4A(2)) is *not* that matters adverse to a person should not be said as the result of an inquiry; but rather that, before they are said, the person adversely affected had the opportunity to be heard on those matters and reply; and, if any modification or deletions are then considered by the Commission of Inquiry to be required, these are made. In the various cases that the Courts have dealt with concerning applications for review of reports of Commissions of Inquiry it has been stressed time and again that the Court is not concerned with the content of the report or the rightness or wrongness of the conclusions reached. It is concerned to ensure that, in reaching those conclusions, the proper procedures have been followed and fairness has been extended to parties affected.

Public interest

There is a balance to be achieved in the public interest.

That balance is between the importance and urgency of publication of a report of a Commission of Inquiry on the one hand, and adequate protection of the rights of persons affected on the other. Very often, the matters on which a Commission of Inquiry is asked to report are matters of significant public concern.

We have three concerns about what may have happened in reality in this case. The first is that, because the matter was of significant public interest and urgency, the Mason Committee and the Minister of Health may both have opted to delete those parts which were controversial and consent to the Court order for deletion, rather than take the extra time that may have been needed to put those controversial matters to the persons affected and give them the opportunity to respond to them. Had this been done, one can only speculate as to whether the parts of the report which were challenged would have been amended or deleted in whole or in part. The Minister of Health is reported as having "been more interested in improving conditions for psychiatric patients, than conducting a witchhunt" (*New Zealand Herald* 12.10.88). Certainly it is a matter for the Committee and the Minister to weigh the competing public interests, whether to have the report published as amended and move on to the resultant improvements in the psychiatric services or to look more into the matters of controversy and seek to resolve and disclose these. Our first concern is that, as things stand at present, the difficulties surrounding the latter inquiry tend to make it a daunting prospect and expediency may prevail.

Our second concern is that the Mason Committee took the course of supplying its draft report as such to the interested parties. This course ran the risk of playing into the hands of persons who may wish to claim adverse effect and so stifle the publication of the whole report. On the other hand, it runs the risk of claims of predetermination or bias. There is a fine line beteen a draft report being only tentative findings which are subject to re-assessment after re-hearing, and representing final views which are really not capable of change. We would advocate rather that only those parts, whether issues or evidence, which specifically relate to the adverse effect be put; and only to those persons affected to give them the opportunity to be heard further. We understand this was the case with some matters in the Cartright Commission inquiry.

Our third concern lies in the pre-emptive effect that an interim injunction has in situations such as the present.

Interim injunctions

Present procedures allow a substantive Application for Judicial Review of various matters, including the report of a Commission of Inquiry. They also allow for the application for an interim injunction to preserve the status quo until the substantive matter is heard and determined. Whenever an application is made for interim relief of this kind, the Court is mindful of the fact (and often expressly states) that in granting the interim relief the Court is not to be understood as making a final finding on the substantive matter. At the same time, despite phrases often used in common parlance concerning these matters, the grant of an interim injunction by the Court is not a "rubber-stamping" exercise, but always involves as careful a consideration of the issues as the Court is able to give in the

restraints of limited information and time. This is what occurred in the case of the Mason Committee report.

The reality is that, if a person can establish that he or she has an arguable case of alleged infringement of rights in these matters, an interim injunction can be obtained, which prevents publication of the whole of the report until the Court can consider the case more fully. This may be quite contrary to the public interest in so far as there are many other matters in the report which do not so infringe and which deserve publication and action.

Recommendations

Our committee would recommend that steps be taken to avoid a repetition of what has apparently occurred in respect of the Mason Committee report. In our view the aim should be to minimise the possibility of the report of a Commission of Inquiry being the subject of an interim injunction application and thus suppressed in whole or in part (whether by the Commission or as the result of the interim injunction) while the complaints of persons claiming to be adversely affected are considered.

The first step to be taken, we believe, lies within the law as it stands at present. The sub-section and the rule of natural justice are both limited to ensuring that any person adversely affected is given the right to be heard on those adverse matters. Once that has been done, the Commission is entitled to come to its findings, albeit adverse. Those persons are still entitled to seek redress through the Court, and we would not advocate taking away that right on a substantive basis. However, from the viewpoint of an interim injunction, we are of the view that provided the Commission has fairly given those persons their rights to be heard contained in the statute and the principles of natural justice, the Court should decline to make orders for interim injunction. The answer, we believe, lies with the Commission in each case; first to take the time to put any matters that may affect any individual to that person and secondly to give him/her the opportunity to be heard thereon. Of course, circumstances may preclude this and this may mean the removal of those parts from the original report. For example, the time that it would take for a person properly to be heard on these matters may be too long within the terms of reference. We would advocate that Commissions should not place draft reports or the whole of interim findings before such persons or any others for the reasons already given.

A further step may lie in statutory amendment, and it seems that this is being considered by the Minister of Justice. There needs to be the proper balance between the public interest in having the substantive part of the Commission's report published promptly and as fully as possible, and preservation of the rights of individuals to "clear their name" on matters with which they do not agree. We believe that that balance can properly be maintained by allowing a report to be published as originally written, subject only to an individual's recourse to the Court for an interim injunction limited solely to the question whether he or she has been given the opportunity to be heard on matters which may adversely affect him or her. The Commission is under the statutory obligation to give that opportunity and we believe a responsible Commission can be relied upon to do so; but if any individual has evidence that this has not been done, then he or she can have recourse to the Court for the interim deletion of those parts which may adversely affect him or her and on which he or she has not had the opportunity to be heard.

We would hope that legislative amendment could be avoided, and as a matter of general principle we would prefer that there be no restriction on the discretionary powers of the Court to do justice. But if the problems which beset the Mason Committee report are to occur again, then there should be legislative intervention to prevent this in the public interest. □

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continued from p 140

interesting observation which seems to encapsulate neatly the background trade setting to the negotiations:

> He said that once the freight rate was struck it was regarded as binding on the shipper for the period involved, but that the only significance of the freight rate was that if goods were subsequently accepted by the shipowner for shipment the agreed freight rate was the one which would be charged. *He said it was common for freight rates to be agreed but for the shipper to bring no goods forward for shipment, and that this pertains in possibly 30% of all inquiries* (at 526, emphasis added).

Now, this is to say in effect that shippers of goods (much like second-hand car buyers!) are notorious non-starters; they often express a firm interest, even obtain a price, but then fail to front up at the business end of the deal. In this environment, the shipowner expects (and reasonably expects) to be able to preserve its freedom to accept or reject cargo delivered to the wharf in the absence of very firm and clear commitments from both sides. In other words, assurances of space availability can only be reasonably construed as invitations to shippers to offer cargo for carriage. They lack that essential characteristic of an offer, namely, a promise of *continued availability*. To treat assurances of space availability as a promise of continued availability would be contrary to the usual expectations in the trade and therefore commercially inconvenient.

Conclusion

In the judgment of the Court of Appeal the view was expressed (at 544) that

> the volume of evidence of dubious relevance to which [Wallace J] was subjected and the range of the arguments in the whole case may well have made it difficult to keep the essential issue . . . in focus.

It is submitted, with respect, that the Judge did not lose sight of the essential issue and that, having sifted the highly relevant evidence of trade practices, he formed the correct view that this difficult case boiled down in the end to a relatively straightforward example of an invitation to treat. □

Applications under s 129B of the Property Law Act

By Kathleen Grant, Lecturer in Law, University of Otago

Section 129B of the Property Law Act provides a means for ensuring access to land that is otherwise surrounded by other freehold land — or landlocked to use the technical term. The author concludes that the public interest in making land accessible and therefore readily saleable may be a factor to be considered by the Courts, but so far the case law indicates an emphasis on the competing private interests of adjoining landowners.

1 Introduction

Access to and from any piece of land is a fundamental use and enjoyment of that land, benefiting not only the owner of that land but also ensuring maximum utilisation and ready alienability of the land. Acceptance of this precept then requires consideration of whether access should be provided for land which through "inadvertance or historical accident"[1] lacks such access and is therefore landlocked. The undesirability of landlocked land is primarily reflected at common law in the existence of the easement of necessity.[2] In New Zealand however the operation of that concept has been substantially curtailed by successive Land Transfer Acts.[3] Remedial legislation was recommended by the Property Law and Equity Reform Committee in 1973, the issue having been referred to the Committee at the instigation of the Department of Maori Affairs.

Section 129B as inserted by s 12(2) of the Property Law Amendment Act 1975 empowers the High Court to grant reasonable access in respect of landlocked land. Applications under the section have generally been considered in two steps or stages; for example in *Cooke v Ramsay*[4] Savage J stated:

> 1. It must be determined whether the applicant's land is in fact landlocked within the terms of the section. If it is not, that is the end of the matter.
>
> 2. If it is landlocked, then the Court must decide, after taking into consideration the matters specified in the section, whether it is of the opinion that the applicant should be granted reasonable access to the landlocked land, and, if it does so decide, then it must determine the way in which that access is to be granted and the terms and conditions on which it is to be granted.

2 Determining whether the applicant's land is landlocked: "Reasonable access"

(a) Definitions

Section 129B(1) provides that

> For the purposes of this section —
> (a) . . . A piece of land is landlocked if there is no reasonable access to it;
> (c) "Reasonable . . . access" means physical access of such nature and quality as may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land for any purpose for which the land may be used in accordance with the provisions of any right, permission, authority, consent, approval or dispensation enjoyed or granted under the provisions of the Town and Country Planning Act 1977.

It is submitted that this definition is concerned with physical access rather than with legal access. While legal access may exist, that access must reach a standard of relative merit as may be reasonably required for the land's use. In *Cook*[5] the first respondents argued that the applicants' land had legal access capable of being used for the rural and residential purposes of applicants intended in the form of the Leith Walk, a legal road which passed the boundary of the applicants' land. This road, about 1000m in length from the termination of the formed public road was however steep and substantially unformed, being negotiable only by tractor, in some circumstances by four-wheel drive vehicle, but not by motorcar. The respondents argued that the only factor restricting use of the Leith Walk was the cost of upgrading it, and that the condition of that access from time to time should not be confused with the fact of its existence.

That argument was rejected by Savage J who held that whether land has reasonable access is to be determined by considering the nature and quality of the physical access that exists for the then occupier at the time the application is heard. Other matters, such as the existence and quality of the legal access and the costs associated with its maintenance became relevant at the second stage of determining whether the Court should grant relief.

In the analysis of Savage J, the first

step or stage, focusing on the present reality of access, is therefore a threshold question[6] requiring a positive response before the Court can proceed to consider any of the factors contained in s 129B(6) including such questions as relative cost, upgrading and the existence of alternatives. Some aspects of an applicant's conduct may however be relevant in this context. For example in *Mowat v Federated Farmers of New Zealand (Waikato Provincial District) Inc* [1980] 2 NZLR 585 Greig J in concluding that the land was not landlocked, held that the property had reasonable access but for the applicant's own actions in diminishing access to the rear of the section.

(The applicant had built across all but 2ft of the street frontage of a commercial property. A registered right of way securing access to the rear of the property had been negotiated for the balance of the 21 year term of the respective leasehold interests. On the expiration of that registered interest the applicant sought to rely on s 129B to achieve either a right of way in perpetuity or the attachment of a right of way to the fee simple estate of the second respondent.)

In other cases the separation between the two steps or stages has not been so clearly drawn. For example, in *Williams v Joslin* (1981) 1 NZCPR 273 Thorp J considered both the cost and the merit of the alternative accessways that could be constructed on the applicant's land at the first step or stage of the inquiry. Further in *Mitchell v Rands* (1982) 1 NZCPR 430 at 433 it is submitted that Cook J gave weight to factors outside the statutory definition of "reasonable access" in concluding that the land was landlocked, having regard to the desirability of off-street parking, the nature of the particular piece of land, the general nature of the terrain, the access that was accepted as necessary in that area and the practicality of providing access of the type sought. *Mitchell* may therefore be interpreted as rejecting the two stage inquiry applied in *Cooke:* both the question of whether the land is landlocked and the nature of any relief that may be granted will in this analysis be determined in the exercise of the Court's discretion by reference to the factors set out in subs (6) together with the definition of reasonable access.

However, interpreting paragraph (c) as a threshold requirement has obvious advantages where, as in *Cooke* Savage J was able to answer the two stages differently, concluding that the land was landlocked but declining to grant relief by reference to the factors set out in subs (6). Further, it is submitted that there is merit in Savage J's approach of interpreting paragraph (c) widely in an applicant's favour, by focusing on the presently existing physical access, given the width of the Court's inquiry at the second stage. The factors listed in subs (6) are not expressly limited to the exercise of the Court's discretion, once land is held to be landlocked; the effect of Savage J's judgment in *Cooke* is to imply such a limitation. It is submitted that the approach of both Cooke P and Somers J in *Jacobsen Holdings Ltd v Drexel* (fn 4) rejecting consideration of the possibility of negotiating alternative access in determining whether the land was landlocked, supports the threshold approach of Savage J.

(b) *Pedestrian access*

In *Wilson v Rush* [1980] 2NZLR 577 at 583 Jeffries J identified "two main categories" requiring access to property — people and motor vehicles, the former having the higher priority. It is clear however that s 129B cannot be used primarily to upgrade existing pedestrian access. The section cannot be used to secure the optimum pedestrian access whether to the boundaries of the property or to the residence itself. (In *Hutchison* fn 6, a public accessway consisting largely of steps ran the full length of one side of the applicants' property, providing access to a road useable by motor vehicles; In *Evison* supra n 6, the applicants had adequate pedestrian and vehicular access on to the property. The application was to permit vehicular access at house level, some distance below the road and the street-level garage.) However, in *White v Barnett,*[7] Eichelbaum J held that

> A series of paths and steps to some extent makeshift, winding through the properties of neighbours and dependent for their availability on the courtesy and goodwill of those people, . . . does not constitute reasonable access.

The Whites' successful application did result in an upgrading of the pedestrian access available at the time of the hearing but the access that was thereby provided[8] was essentially that which the respondent had denied them subsequent to their purchase of the property and to the upgrading of which the applicants had devoted considerable effort and expenditure. In *Evison,* the applicants had had for twenty-two years the benefit of an informal agreement between the respective predecessors in title of the adjoining properties, namely the use of the neighbouring property to form a turning circle for vehicles at the bottom of the applicants' drive, permitting pedestrian and vehicular access at house level. While the applicants found it difficult to give up such a "long-standing convenience", (fn 6 at p 15 per Davison CJ) it is submitted that the revocation of the benefit of that agreement can be distinguished from *White* because reasonable access to the boundaries of the property was held to exist without the use of the turning circle, and the respondents were unaware of the informal arrangement at the time they purchased the adjoining property.

In *Wilson v Rush* (supra) the successful application of s 129B resulted in an upgrading of the pedestrian access in circumstances in which an alternative remedy was not available as in *White,* but Jeffries J gave weight to the fact that the access thereby provided was no more than that intended by the applicant and the Council, the transferor of the applicant's and the adjoining sections. Judged in this context, the applicant in *Murray v Devonport Borough Council* (fn 1) was indeed fortunate to succeed under s 129B without any apparent analysis of the quality of the existing pedestrian access. The property, which fronted the beach, had pedestrian access only by a three ft wide right of way but in contrast with *White* there had been no change[9] in the nature of the access and Speight J did not consider such factors as steepness and difficulty of access which weighed in the applicant's favour in *Wilson*[10].

In *Cooke* the applicants argued that a walk of one km, exposed to wind and rain and in winter difficult to traverse was not reasonable. Savage J accepted that such access was more difficult than that held to be unreasonable by Jeffries J in *Wilson.* But His Honour questioned the extent to which *Wilson* and other cases decided in the context of purely residential properties could be relied on in a rural context and concluded "pedestrian access is not sufficient to enable the present occupiers to use and enjoy the land for residential purposes". (fn 4 at 694) Savage J therefore appeared to accept a lower quality of pedestrian access given the rural context. It is submitted that there is merit in this approach which

gives weight to the context rather than to the purpose per se (The applicants' argument that their use of the land was primarily residential appears to have been accepted by Savage J.)

(c) *Vehicular access*

In determining whether a residential property without vehicular access is landlocked in the statutory sense, a range of approaches has been taken.[11] But if s 129B cannot be used to secure the optimum pedestrian access then generally a fortiori in the case of vehicular access (although see below). In *Gardner v Howie*[12] the applicants argued that reasonable access must include vehicular access which allowed a motor vehicle to be driven to a point in close proximity to a dwelling, at or about the same level. That argument was however rejected by Ongley J who interpreted Savage J's test in *Hutchison* (fn 6) to mean that vehicles should be able to get within such distance of a residential property as may be reasonably necessary for the use and enjoyment of the land for any permitted purpose, reasonableness being related to the nature of the land and its surroundings. That such access as existed in *Gardner* was accepted throughout the country[13] as a reasonable concomitant of suburban living meant that

> [s]uch access cannot of itself then be taken to be less than reasonable — there must be present some other feature which makes it appear unreasonable in the circumstances of the particular case for direct access to the land to be limited to a footway. (fn 6, at p 10)

In *Gardner* neither the fact that other properties in the immediate vicinity had the quality of access sought by the applicants, nor the existence of the right of way at the rear qualified as "other features" which made the applicants' existing access appear unreasonable in the circumstances. This was so notwithstanding the existence of the right of way[14] which passed across part of the applicants' rear boundary, providing access for five other properties. (The owners/occupiers of those properties which had the benefit of the right of way opposed the application on the grounds that the addition of another user would result in undue congestion and for the owners of lower sections the earthworks required on the applicants' property might result in a substantially increased storm water run off which could not be absorbed by the existing drainage system.) In Ongley J's analysis, the existing access, in contrast with *Wilson*, was the access intended at the time of subdivision, some forty years earlier and the amelioration of "such ordinary situations" was not the object of the section.

Similarly it is submitted that mistake as to the nature and quality of the access will not constitute "some other feature" which makes the absence of vehicular access unreasonable in the circumstances. In *Hutchison v Milne* (fn 6) the applicants at the time of purchasing the property were given the impression that the property had vehicular access because a concreted right of way constructed on the adjoining property had been continued on to the applicants' property. Savage J however rejected the applicants' argument that without that access the land was landlocked — the applicants had adequate if not very convenient pedestrian access and vehicles could get reasonably close. As in *Wilson* the applicants were seeking the access apparently intended at the time of subdivision but in His Honour's analysis the applicants were limited to remedies arising from the contract of sale. (Vehicular access had not been intended by the developer at the time of subdivision but the scheme plan submitted to the local authority was not approved.) In *Wilson* Jeffries J distinguished *Hutchison* on the ground that in the latter case there had been "no sudden revelation of the true legal position" [1980] 2 NZLR 577 at 583. It is submitted however that the "true legal position" was equally discoverable in both cases although the applicant in *Wilson* had perhaps less reason to search his own title in respect of an easement which the Council had undertaken to create.

In *Gardner* Ongley J considered vehicular access as part of the threshold question (see also *Hutchison, Murray, Wilson, Mitchell, Williams,* supra) concluding that the land was not landlocked without any express consideration of the factors listed in subs (6). In contrast, in *White v Barnett* Eichelbaum J, holding that the land was landlocked, quite apart from any requirement for vehicular access, considered that requirement in the context of subs (6) and the exercise of the discretionary power to grant relief. It is submitted that this led to no different result in *White* but in *Gardner* the consequences of considering vehicular access as part of the threshold question meant that the application was dismissed without any consideration of the wider range of factors enumerated in subs (6). The nature and quality of access in the immediate vicinity and the existence of the right of way could have been considered in the context of at least para (e) and possibly (d). Whether this approach in *Gardner* would have led to any different result is unclear. Ongley J categorised the applicants' claim as "mere amelioration" to which the section was not intended to apply, but it is submitted that this approach gives insufficient recognition to the two factors identified above.

(d) *"The occupier for the time being"*

Section 129B(1)(c) requires that the reasonableness of any access be determined by reference to the needs of the "occupier for the time being". In *Evison* (fn 6 at p 8) Davison C J stressed that "whether access is 'reasonable' . . . is very much a subjective matter to be decided on the facts of the particular case". That this is the test has been the subject of adverse comment. (Williams (1985) 3 BCB at 88)

> Why should land have the chameleonic quality of being landlocked or not as may be dictated by the reasonable needs of different occupiers, or the changing circumstances of a continuing occupier? . . . The stress, . . . on the needs of the occupier for the time being is surely misplaced.

It could be argued that the needs of "the occupier for the time being" are subsumed within the concept of hardship to which the Court is in any event required to have regard in para (d) of subs (6) (see *Evison* fn 6). A statutory definition of "reasonable access" silent as to the needs of the occupier for the time being may result in such needs not being considered if para (c) is interpreted as a threshold requirement. If the particular needs of the applicant are to be considered at the threshold stage, should such consideration be extended to all occupiers irrespective of the likely length of their occupation? It may be that the range of conditions contained in subs (8)[15] subject to which an order may be made, may act as a sufficient deterrent to potential applicants the duration of whose occupation is either short or uncertain.

It is submitted however that notwithstanding the terms of para (c),

where land has been held not to have reasonable access, that determination has been made without any express reference to the particular needs of the applicant.[16] In some cases the particular needs of the applicant have subsequently been considered as qualifying factors. For example in *Evison,* Davison C J considered whether access which was otherwise reasonable, ceased to be so because of the condition of one applicant's knee. (see also *Gardner,* fn 6). Such arguments have however to date been unsuccessful and the category of qualifying factors accepted in principle has been substantially confined. (*Hutchison,* fn 6 at 571 per Savage J.)

> For example, if the owner was injured and as a result lost the use of his legs it might well be that he did not have reasonable access to the land if he did not have vehicular access to it.

Such a narrow interpretation of the category of qualifying factors, it is submitted, may reflect in part the nature of the order that a Court may make having concluded that the land is landlocked and that the applicant should be granted reasonable access. In contrast with the equivalent Australian legislation where "the statutory right of user" ordered by the Court may take the form of "an easement, licence or other right that may be created by act of the owners of the dominant land and the servient land", (Property Law Act 1974-1978 (Qld) s 180; Conveyancing and Law of Property Act 1884 (Tas) s 84J) subs (7)[17] authorises only the vesting of the fee simple estate in any other land in the owner of the landlocked land and the attaching of an easement over any other land to the landlocked land. Further, whether orders restricted as to persons or time are presently authorised by the machinery provisions of s 129B appears uncertain although in *Jacobsen Holdings Ltd* (fn 4 at 325 per Cooke P; at 333 per Somers J) the Court of Appeal appeared to assume that an order under subs (7) could be made personal to an applicant.

3 The exercise of the Court's discretion to grant relief in respect of landlocked land

(a) *Scope of the discretion*
Section 129B(6) provides that

> In considering an application under this section the Court shall have regard to —
>
> (a) The nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land;
>
> (b) The circumstances in which the landlocked land became landlocked;
>
> (c) The conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land;
>
> (d) The hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and
>
> (e) Such other matters as the Court considers relevant.

The width of the discretion conferred by subs (6) is reinforced by subs (7) (see fn 17) which requires the Court to take into account the matters specified in subs (6) "and all other matters that the Court considers relevant" before granting access to landlocked land. In some cases the Court has interpreted subs (6) as containing a mandatory list of paragraphs to be considered individually, (*White* fn 6 at p 22 per Eichelbaum J; *Mitchell* supra, at 434 per Cook J; *Wilson* supra, at 584 per Jeffries J.) even if in the context of any particular paragraph competing considerations are evenly balanced (*White* ibid at p 24) or the content of the paragraph has no particular bearing on the outcome of the case (*Mitchell* supra, at 435.) In *Cooke* however, Savage J did not canvass each paragraph of subs (6) separately but considered the question of whether the access sought by the applicants should be granted "broadly". (fn 4 at 695) That this is the correct approach was confirmed by the Court of Appeal in *Jacobsen Holdings Ltd* (fn 4 at 326);

> In dealing with an application under the section a Judge is not required to refer specifically in his judgment to aspects of no importance in the particular case. He is entitled to focus on such of the listed considerations as are of particular relevance.

(b) *Knowledge of the applicant and of other parties*
Although knowledge by the applicant or the respondent of the nature and quality of access at the time of purchase is not expressly mentioned in subs (6), it is arguably an aspect of at least paras (a), (c) and (e) and is a factor to which Courts have had regard in exercising the discretion to grant or withhold relief. The knowledge considered in this context however is actual knowledge, rather that the knowledge ascribed to any purchaser of land held under the Land Transfer Act 1952. (See *Fels v Knowles* (1906) 26 NZLR 604 at 620 per Edwards J.) For example in *Cooke* Savage J declined relief primarily because the applicants had been fully informed as to the nature of the accessway at the time of purchase. In proceeding with the purchase the applicants had taken a calculated risk that access could be secured by negotiation. The respondents' attitude, while described as "harsh" was nevertheless held to be neither "unfair nor unreasonable" and their reasons for not wishing others to use the accessway understandable. His Honour continued: (fn 4 at 695)

> Generally speaking, I think that the Court will view unsympathetically an application for relief when the applicants know of the position in relation to access when they purchase and know that the neighbours through whose land they wish to get access will not agree.

However, para (a) of subs (6) expressly contemplates the possibility that a property may not have any access at the time of purchase. That possibility is, in terms of the subsection, simply one factor relevant to the exercise of the Court's discretion, rather than a disqualifying factor per se. Savage J did not have to consider this issue, however, because of the presence of the alternative but inferior access, Leith Walk. Even in the absence of that alternative it is submitted that any application under s 129B by a party with full knowledge at the time of purchase would have been unsuccessful and the land would have remained landlocked to anyone other than the respondents.

Does this approach then place a premium on insufficient inquiries? An applicant may not have considered the likelihood of an adjoining landowner granting or refusing access because the property being purchased appears to

have the benefit of an accessway, as for example in *White* and *Hutchison*. In *White*, the property had visible pedestrian access and vehicular access of an inferior quality, but in respect of this access no formal easements had been registered. Eichelbaum J held that the applicants were not to be penalised for their failure to inquire fully at the time of purchase as to the status of the right of way. An order, if made under s 129B "would result in confirmation of the position as it was when the applicants acquired the land." (*White* fn 6 at p 22). At that time, however, the accessway existed merely as an equitable interest, albeit one that had been created with the approval of the affected owners. It is submitted that an order made under subsection (7) is more likely to be for the attachment of a legal easement to the landlocked land. More importantly however, if regard is to be had to the existing access at the time of purchase, the applicants in at least *Hutchison* and perhaps *Evison* would have fared more favourably, assuming that the land was otherwise held to be landlocked.

Savage J's test is however supported by the judgment of the Court of Appeal in *Jacobsen Holdings Ltd v Drexel.* (fn 4) While the applicants were fully aware at the time of purchase that the property had no legal road access, *Cooke* was distinguished on the ground that the applicants in that case had been informed prior to purchasing that they would have no right of access. As interpreted by the Court of Appeal therefore, Savage J's test is two-fold and knowledge of the true position regarding access may be less fatal to an application under s 129B than knowledge of the respondent's attitude.

(c) *Hardship to the applicant and to other parties*

Paragraph (d) requires the balancing of relative hardship achieved in some cases by reference to financial considerations. For example in *White* Eichelbaum J viewed as decisive the fact that if the application were refused the expense and effort of the applicants over a ten year period would be wasted. (Similarly *Wilson*, supra where the applicant had been unable to lease the property at a market rental or sell it for a period of 7 years.) But the financial hardship to which a Court may have regard under para (d) is to be distinguished from any question of damage such as loss of property value, in the making of an order, for which compensation may be ordered under subsection (8) (see below).

In *Cooke*, the difference between upgrading the Leith Walk to the standard of a farm road and the costs associated with upgrading the accessway over the Ramsays' land, including the installation of cattlestops and gates was approximately $10,000. While there was some evidence of hardship to the Ramsays in the making of an order — difficulties associated with gates being left open, straying **with gates being left open, straying stock and a diminution in privacy, it is submitted that that hardship was not of such a nature as to outweigh the hardship to the applicants by the refusal to make an order. His Honour rather gave weight to the fact that between the acquisition of the land and the hearing of the application, one of the applicants had built a "not inconsiderable dwelling" on the property. It is submitted that the applicants in *Cooke* were penalised by their own conduct.**

While hardship is most commonly and readily measured by reference to financial considerations, other components of the concept have been considered. The attempt in *Evison* and *Mowat* to bring the inconvenience of restricted vehicular access within the scope of para (d) was unsuccessful. (*Evison* fn 6 at p 16 per Davison C J; "The inconvenience that the applicants suffer is the price they pay for living on a site in a hilly suburb of Wellington.") Similar arguments however were more successful in *Murray v Devonport Borough Council* and *Mitchell v Rands.* In the latter case the hardship caused by the applicants' inability to take their car onto the property outweighed any hardship to the respondent in the making of the order, primarily because the applicants' property already had the benefit of the legal right of way, although the terms of its use were restricted. In *Evison* the respondents were able to establish sufficient hardship from their lack of knowledge of the use of the turning circle at the time of purchase and from the fact that future subdivision of the property might be prevented if access were granted. (Also *Mitchell v Rands*, supra at 435).

But in balancing such claims of hardship, the Court's inquiry is limited to hardship that would be caused "by the making of the order". In *White* therefore, consideration of the respondent's experience of unpleasant drive conditions for ten years, legal and other professional costs and delays in the construction of his own garage, was rejected. It is submitted however that the hardship to the applicants if the order were refused was directly attributable to the applicants' past expenditure and effort. Approval, even if merely tacit, particularly over a period of time, may also weigh against a respondent's claim of hardship, whether the applicant is in respect of public (*Murray*, fn 1) or private (*Jacobsen Holdings Ltd*, fn 4) land.

(d) *Compensation of other parties*

An order, if made under subs (7) may be made "upon such terms and subject to such conditions as the Court thinks fit", including the payment of compensation by an applicant to any other person (s 129B(8)). In *Jacobsen Holdings Ltd* (fn 4 at 329) Cooke P commented that while the Court was not bound to award compensation, it would usually be equitable between the parties to do so. What then is the basis for the assessment of compensation given that s 129B (8) neither restricts (See Public Works Act 1981 s 62(1)(d)) nor amplifies (Property Law Act 1974-1978 (Qld) s 180; *Re Seaforth Land Sales Pty Ltd's Land* (No 2) [1977] Qd R 317) the meaning of the term "compensation"? In *Jacobsen Holdings Ltd* at first instance, (*Drexel v Jacobsen Holdings Ltd* unreported, High Court, Auckland, 16 March 1984, A 1163/82) Prichard J rejected the argument that compensation was to be measured in relation to the betterment derived by the person acquiring access under s 129B. His Honour confined the compensation to which subs (8)(a) referred to "loss or detriment to the Defendant's property". (Ibid at p 6; see also *Mitchell* supra, 436-437). In this case however there was little established detriment[18] other than the loss of the exclusive use and enjoyment of the bare land comprised in the right of way. Prichard J nevertheless awarded compensation of $2,000, four times the value of the bare land.

That approach was however rejected by the Court of Appeal. Although

> the measure of compensation [could] in general be described, not as the gain to the person who takes the property, but as the loss to the person from whom property is taken or, in other words, the value to the owner dispossessed . . . (see fn 4 at 328 per Cooke P; at 333 per Somers J; at 335 per Casey J.)

that could not be equated with the

detriment to the dispossessed owner's remaining property. Compensation was therefore to be assessed by reference to the value of the land in question, not excluding from that assessment the extent to which the value of the applicant's land was enhanced. (See also *White* fn 6 at p 29 per Eichelbaum J.) More particularly however, the value of the land was to be calculated by

> what a willing vendor might reasonably expect to obtain from a willing purchaser for the land in that particular position and with those particular potentialities. (*Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302, 313 per Lord Romer; cited by Cooke P fn 4 at 328.)

That the land was especially suitable for a purpose for which there was no market apart from the particular applicant did not detract from the principle to be applied. (Consideration of potential however results in compensation being assessed as the sum which an applicant in a "friendly negotiation" would be willing to pay before there is any betterment to the land; see *Jacobsen Holdings Ltd* ibid at 335 per Casey J; *Vizagapatam* ibid at 330 per Lord Romer.)

Cooke P accepted however that while all problems of principle could be solved by the faithful application of the "willing seller — willing buyer test", (ibid at 329), the real difficulty lay in applying the test in any particular fact situation. The Court of Appeal adopted, in principle, a wide-ranging inquiry[19] excluding only "sentimental matters" and "questions of personal impecuniosity or affluence".[20] But the final assessment of compensation was remitted to the High Court (*Drexel v Jacobsen Holdings Ltd* [1987] 2 NZLR 52) where Prichard J expressed difficulty in translating the willing seller — willing buyer concept to a situation where there was only one possible buyer, compelled by dire necessity, and a seller who had the opportunity to capitalise on the buyer's predicament. (ibid at 53) Without referring to the Court of Appeal's dicta (fn 4 at 329 per Cooke P; at 334 per Somers J.) as to the appropriate level of compensation, His Honour ultimately accepted a compromise figure of $6,000 (between the Drexels' offer of $2,000 and Jacobsen Holdings Ltd's request for $45,000) which does not appear to be based on any specific formula or evidence. (See also *Vizagapatam,* supra at 330-331.)

Haig ((1986) 4 BCB 117 at 118) comments that the "obvious lesson" of *Jacobsen Holdings Ltd* is that

> the landlocked owner must face the likelihood that if he succeeds the amount of compensation he will be ordered to pay will approximate what he could have expected to pay under the terms of a bargain that he might have been able to induce the servient owner to enter into privately.

While this may hold true in the general run of cases, regard should be had to the fact that an order for compensation is primarily intended to achieve equity between the parties, achieved in some circumstances without an order for compensation. In *White v Barnett* (fn 6 at p 30) Eichelbaum J held that the making of an order for compensation was inappropriate given that "the parties [had] implicitly stated their own opinion on . . . compensation". (While vehicular access would increase the value of both properties, the applicants' contribution in bearing the burden of construction at least matched the detriment to the respondent in allowing the easement.) While the application of the willing seller — willing buyer principle may have led to no different result in *White,* Jeffries J declined to make an order for compensation in *Wilson v Rush* (supra at 584) primarily, it is submitted, because of the respondents' disqualifying conduct.

4 Conclusion

Applications under s 129B have generally been considered in two steps or stages, the first step or threshold requirement being to consider whether the land is landlocked in the statutory sense. It is submitted that interpreting s 129B(1)(c) widely in an applicant's favour reveals an appreciation of the width of the Court's inquiry at the second stage, an appreciation which was arguably absent in both *Gardner* and *Hutchison* (fn 6) where the threshold requirement was interpreted narrowly. In respect of the second stage — the substance of an application — the Court then exercises a wide discretionary power and it is submitted appropriately so. (*Cooke v Ramsay* fn 4, remains to date the only case in which the threshold requirement having been satisfied, an order has been declined in the exercise of the Court's discretion.) The subs (6) factors to which a Court appears most likely to have regard are paras (a) and (d). Bradbrook (fn 1 at 52) argues that the terms of subs (6) are directed to the activities of the parties to the application but it is submitted that subs (6) and (7) are in fact sufficiently wide to allow a Court to have regard to the public interest (see eg *Mitchell* supra at 434-436) which is fundamental in the equivalent Australian legislation. (Property Law Act 1974-1978 (Qld) s 180; Conveyancing and Law of Property Act 1884 (Tas) s 84J.)

Most applications have however been determined without any express consideration of the object of s 129B. In *Wilson v Rush* (supra at 583) Jeffries J described the application as "the paradigm of the way the [section] was meant to be applied" and it is submitted that in respect of such administrative blunders an order may appropriately be made under s 129B(7).

Bradbrook (fn 1 at 56) however argues that the provision of access serves not only the private interests of the landowner or occupier for the time being, but also the public interest in ensuring the maximum utilisation and ready alienability of land. Does Bradbrook's analysis then identify the object of s 129B? It is submitted that in *Cooke v Ramsay* (fn 4), because of the conduct of both parties, the only argument that could be put in favour of making the order the applicants sought, would be based on the public interest in ensuring the maximum utilisation and ready alienability of the land. (The object of s 129B was raised but not resolved by the judgment of Savage J because of the existence of the alternative but inferior Leith Walk.) Such an argument it is submitted, would not have provided an appropriate[21] basis for the granting of relief in *Cooke,* in so far as it would give in sufficient regard to the conflicting interests of the adjoining landowners, who had informed both the previous owners and the applicants that consent to use the accessway would terminate on sale of the land to a third party. Similarly in *Gardner v Howie* (fn 6, at p 14) Ongley J appeared to reject consideration of the public interest, stating that the "amelioration of . . . ordinary situations" was not one of the objects of s 129B, which in His Honour's analysis was not intended to secure the "optimum access" to any particular property. (It is submitted however that *Evison* fn 6 may better illustrate the application of Ongley J's principle: see supra fn 14 and text.)

It is submitted that while the public interest may be considered in

determining an application under s 129B (*Mitchell v Rands* (1982) 1 NZCPR at 434-436), the Court to date has focused on the competing private interests of adjoining landowners. How these competing interests will be reconciled in future cases can only be determined on a case by case application of the principles discussed above, given the variety of circumstances in which land may become landlocked. □

1 *Murray v Devonport Borough Council* [1980] 2 NZLR 572n at 573 (judgment 20 Sept 1977) per Speight J. Bradbrook, "Access to Landlocked Land: A Comparative Study of Legal Solutions" (1983) 10 Syd L R 39 at 39-42, identifies a variety of circumstances in which land may become landlocked. See also *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* [1971] 2 NSWLR 150. In New Zealand a subdividing owner has been required to provide legal access to a public road since 1900; see Public Works Amendment Act 1900 s 20; currently Local Government Act 1974 s 321.

2 See Bodkin, "Easements of Necessity and Public Policy" (1973) 89 LQR 87; Grundy, "Rights of Way: Ways of Necessity" (1939) 3 Conv & Prop Lawyer (NS) 425; *Gale on Easements* (14 ed) 117-122.

3 See Adams, "Easements: Arising by Implication from a Grant of Land" [1952] NZLJ 8 at 10; Note, (1934) 10 NZLJ 234; *Smith v Christie* (1904) 24 NZLR 561.

4 [1984] 2 NZLR 689 at 690. See also *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 at 326 per Cooke P "The finding that the plaintiffs' land is landlocked was virtually inevitable. Jurisdiction then existed under the section"; also 330-331 per Somers J.

5 Ibid. The applicants, purchasers of rural land, had been advised that consent to use a formed, metalled accessway over the relatively flat and low-lying land of the respondents, could be obtained by negotiation notwithstanding that the respondents had informed both the previous owners and the applicants that consent to use the accessway would terminate on sale of the land to a third party. Such consent was not in the event forthcoming and the applicants sought an order under s 129B granting access over the respondents' land.

6 See also *Evison v Johnson* unreported, High Court, Wellington, 9 July 1984, M 591/83, Davison C J at p 3; *White v Barnett* unreported, High Court, Wellington, 20 February 1985, M 565/83, Eichelbaum J at p 20; *Gardner v Howie* unreported, High Court, Auckland, 23 March 1983, M 327/77, Ongley, J at p 9; *Hutchison v Milne* [1980] 2 NZLR 568 at 570 per Savage J.

7 Supra fn 6. The adjoining properties were situated on top of a bank which rose steeply from a formed road. The applicants resolved to upgrade the accessway formed by predecessors in title and which passed across three adjoining properties, thereby providing vehicular access to their house. Progress was slow and often imperceptible during the next nine years but their access was eventually blocked when the owner of the adjoining property applied for a permit to construct a garage on his property. The application was rejected partly on the ground that the Whites had not satisfied the Council's original requirements in respect of the driveway.

8 Two applications were heard together, the first seeking a declaration that the applicants were entitled to use the right of way by reference to the doctrine of proprietary estoppel. That application being successful, no formal order was made under s 129B the application being adjourned to be brought on on 14 days, notice.

9 This was apparently the access that existed at the time of purchase, the s 129B application being prompted by an application for a building permit.

10 At the time of purchase the applicant's property had pedestrian access only, by means of a flight of steps and a steep path down a "panhandle" to a formed road. It was intended however that the applicant would have additional access initially via a "paper" road, which remained unformed, and subsequently by way of an easement, intended to be registered, over adjoining sections to an existing road.

11 In *Murray* fn 1 at 573, Speight J held that a residential property without vehicular access did not have reasonable access "in the vehicular context of 1977"; cf *Hutchison* fn 6 at 571 per Savage J: "it is no doubt necessary that vehicles should be able to get within reasonable distance, having regard to the nature of the land of a residential property. I do not think that every residential property must be given vehicular access on to it."

12 Fn 6. The applicants' property fronted Titirangi Road some distance below the house, but had at the rear a common boundary with a right of way providing vehicular access to five other properties. Vehicular access on to the applicants' property did exist at road level, access to the house being provided by a steep zig-zagging path of some 50m.

13 See also *Evison* and *Hutchison* fn 6 in which evidence of the access available for properties in the immediate vicinity and Wellington City generally was considered.

14 It is submitted that criticism of s 129B as detracting from "the certainty of title supposedly conferred by the Land Transfer system" (Williams, (1985) 3 BCB 87 and 88) has little weight in the context of *Gardner* given the existence and use of the right of way.

15 "(8) Any order under this section may be made upon such terms and subject to such conditions as the Court thinks fit in respect of —
(a) The payment of compensation by the applicant to any other person; and
(b) The exchange of any land by the applicant and any other person; and
(c) The fencing of any land, and the upkeep and maintenance of any fence; and
(d) The upkeep and maintenance of any land over which an easement is to be granted; and
(e) The carrying out of any survey that may be required by the District Land Registrar before he will issue, in respect of any piece of land affected by the order, a certificate of title free of any limitations as to title or parcels within the meaning of Part XII of the Land Transfer Act 1952; and
(f) The time in which any work necessary to give effect to the order is to be carried out; and
(g) The execution, stamping and delivery of any instrument; and
(h) Such other matters as the Court considers relevant."

16 See *Cooke* fn 4; *White* fn 6; *Mitchell* supra, *Wilson* supra. In the last mentioned case Jeffries J did consider objectively a range of reasons for which access to a residential property may be required — the transportation of household items and young occupants, deliveries by service and commercial personnel, visits by the aged and infirm.

17 "(7) If, after taking into consideration the matters specified in subsection (6) of this section and all other matters that the Court considers relevant, the Court is of the opinion that the applicant should be granted reasonable access to the landlocked land, it may make an order for that purpose —
(a) Vesting in the owner of the legal estate in fee simple in the landlocked land the legal estate in fee simple in any other piece of land (whether or not that piece of land adjoins the landlocked land):
(b) Attaching and making appurtenant to the landlocked land an easement over any other piece of land (whether or not that piece of land adjoins the landlocked land)."

18 Ibid at pp 6-7 for the matters of alleged detriment to which the respondent alluded. Costs associated with the making of the order will generally be borne by the applicant (s 129B(9)); but see *Wilson* supra, at 584.

19 See eg the nature of the burden imposed on the servient land (at 333 per Somers J); whether the applicant's land is being put to profitable use; inconvenience; disturbance or advantage to the owner of the servient land (at 329 per Cooke P).

20 Idem; the concept of an "imaginary auction" was similarly rejected by Lord Romer, *Vizagapatam*, supra at 314-316.

21 In the context of the common law easement of necessity the actual or presumed intentions of the parties now appear to be the determining factor: cf *Brown v Burdett* (1882) 21 Ch D 667; *Nickerson v Barraclough* [1981] Ch 426.

Absolute sovereignty

One may take as the first of these metaphysical assumptions of Hobbes the conception of absolute and unlimited sovereignty. When anything absolute is set up, we may know that we are running into metaphysics; for precise observation of life does not give anything absolute. The only thing that approaches the absolute in man is his ignorance, and even that is not quite absolute.

Irving Babbitt
Democracy and Leadership