THE NEW ZEALAND
LAW JOURNAL
21 JANUARY 1990

The man behind the case

The case of *Wintle v Nye* [1959] 1 All ER 552 is a human interest story to read as it is reported. The emphasis of the narrative in the case however is understandably on the respondent rather than the appellant, who was the plaintiff in the original proceedings. Colonel A D Wintle would appear to have been what is commonly called, a character, a real live version of A P Herbert's Mr Haddock.

In 1937 an elderly lady, unversed in business, had her solicitor prepare a will. It was a somewhat complicated will which went through a number of drafts. Because of circumstances, the end result was that the solicitor who prepared the will became in effect the principal beneficiary of a substantial estate when the testatrix, Miss Kitty Wells, died in 1947.

Subsequently, in 1956 the appellant Colonel Wintle, brought an action. The proceedings are described by Viscount Simonds in his judgment at p 554 as follows:

> It is sufficient at this stage to say that he alleged (inter alia) that at the time when the will and codicil were respectively executed, the testatrix did not know and approve their contents. He claimed that the court should revoke the grant of probate, pronounce against the validity of the will and codicil and grant to him and his co-plaintiff letters of administration of the estate of the testatrix. The respondent denied the alleged want of knowledge and approval of the testatrix and counterclaimed that the court should pronounce for the will and codicil in solemn form of law. Here was the issue, and it is not in dispute that it was for the respondent to prove affirmatively the knowledge and approval of the testatrix.

Mr Wintle was no ordinary man. There is an article about him in the *Solicitors Journal* vol 133 no 39 of 29 September 1989, based on Mr Wintle's autobiography *The Last Englishman*. The author of the article, Mr S N Johnson, says it is possible to view Wintle as a great English eccentric but he himself prefers to think of him as one who spent a lifetime hiding the brain of a Jeeves behind the manner of a Bertie Wooster.

Colonel Wintle had seen service in both the First and Second World Wars. He was at one time under sentence of death in Vichy France as a spy, but escaped; and on another occasion he was court-martialled after having threatened to shoot an Undersecretary in the Ministry of Air. As Mr Johnson describes it Colonel Wintle also had the extraordinary fortune of having under his command at one time a living demi-god, the future Aga Khan.

It will be clear therefore that Colonel Wintle was no man to avoid a conflict. He had three cousins, one of whom was the lady whose will was at the centre of the Court case. The testatrix, Kitty Wells, is described as being somewhat child-like and unworldly in her ways and in her later years if not simple-minded then clearly eccentric. She was unmarried and in 1936 she consulted her solicitor about making a will. His name was Nye and he largely managed her affairs after her brother's death. What actually happened about the making of the will is complicated and can be learned from reading the report of the case.

Colonel Wintle's sister Marjorie had looked after the testatrix for many years. She was left very little in the will as recompense for the way in which she had devoted herself to the testatrix.

Colonel Wintle was incensed about the position when he learned of the situation. He sought to take legal action. He was advised however, that he had no standing to challenge the will. So he approached the Law Society, the Attorney-General and eventually Scotland Yard. All said there was nothing that could be done about the matter so he then tried writing libellous letters to newspapers and others. However Mr Nye would not be drawn into Court in defamation proceedings.

The stratagem that Colonel Wintle then devised is described by Mr Johnson in the following way

> Colonel Wintle's thoughts next turned to a cavalryman's solution — he would horsewhip Nye! He then had second thoughts and decided to substitute a debagging. Nye was lured to a flat in Hove where he was met by the Colonel who instructed him to remove his trousers and he then photographed the resulting spectacle. Wintle continued: "I thrust him trouserless into the public highway, went to London, exhibited the trousers in the trophy room of my club, telephoned the police, the press and Nye's partner . . . and then went home and sat back with a large whiskey to await results."

The end result however was not to bring the will before the Courts but to bring Colonel Wintle before the Courts on a charge of assault. He was sentenced to six months' imprisonment. He served his sentence stoically and in a typical comment referred to prison as being rather like the Army, but much less efficient.

Apparently as a result of the publicity surrounding what he had done some other relatives of the testatrix now came forward. One of them assigned whatever interest he might have in the estate to Colonel Wintle who now had standing and was able to start proceedings.

When the action went to trial however Colonel Wintle did not have very much success. The trial Judge was clearly not impressed with this eccentric Colonel who was before him, and after a damning summing up, the jury eventually upheld the will and the codicil to it. The Judge then ordered that the Colonel should pay his own costs which meant that he was financially ruined.

Not a man to admit defeat however, Colonel White then prepared an appeal without legal assistance but with the help of an old comrade-in-arms ex-Trooper Mays of the Royal Dragoons. In the Court of Appeal Colonel Wintle lost another battle by a split decision of two to one. Still undeterred and unrepentant he took the case to the House of Lords.

His own account of what he thought was the turning point in the House of Lords was when Lord Simonds interrupted him to say that it seemed quite clear that no one in any of the Courts had really understood the will and the complicated way it had the end result that it did. The Colonel thought later he won his case when he then asked

> "Would it be presumptuous, my Lord, to suggest that the somewhat simple Miss Wells may not have understood it either?"

The judgment of Lord Simonds was rather severe on the trial Judge, not for having misstated the law, but for having expressed it in such a way as to lead the jury to come to the decision that they did. In criticising the majority of the Court of Appeal, Lord Simonds said

> I think, with great respect, that they have paid too much attention to the fact that the learned judge correctly stated the law, too little to the fact that, having done so, he violated it over and over again in his examination of the evidence.

The case has subsequently been applied in *Re Stott (deceased)* [1980] 1 All ER 259, and was considered in *Estate of Fuld (deceased)* [1965] 3 All ER 776.

The end result was that the Colonel won the war. He had the additional satisfaction of having all his costs from the start of the case paid out of the estate. On the other hand the solicitor defendant was ordered to bear all of his costs in the Court of Appeal and the House of Lords. According to Mr Johnson in his article, Wintle then embarked on a new career as a celebrity, leading eventually to an appearance on "This Is Your Life".

When he died in 1966 Colonel Wintle had an obituary in *The Times* and the following day there was a leading article about him. All of which goes to show there is often a more interesting and exciting personal background to the cases that are reported in the *Law Reports* than a mere perusal of the judgments might lead one to expect.

P J Downey

Obituary

Gordon Cain
1910-1989

New Zealand lawyers have suffered, in the sudden death of Gordon Cain, who died quietly at his home on 11 October last, the loss of one of the most respected legal scholars of our generation. Gordon Cain was born in London, but came to New Zealand at the age of twelve, to remain living here for the rest of his life. He was educated in Wellington, and graduated Master of Laws with Honours from Victoria University of Wellington, then Victoria University College, in 1936. Early legal training in the Wellington firm of Duncan & Hanna was followed from 1934 by service on the legal staff of the State Advances Corporation (the forerunner of the Housing Corporation), where he rose to be Head Office Solicitor. Subsequently Sir Richard Wild, then Solicitor-General, realising his worth, recruited him for the Crown Law Office. Later he accepted a senior lectureship in the Law School of Victoria University of Wellington, teaching Land Law and Commercial Law.

Early in the 1970s, at the request of the Secretary for Justice, Cain produced, for the Public and Administrative Law Reform Committee, a scholarly compendium on the regulation-making powers and procedures of the Governor-General-in-Council. This work is still a landmark for legislators. The Legal Research Foundation of Auckland published the paper as one of its occasional pamphlets in 1973.

After going to the Crown Law Office Cain made numerous appearances in the High Court and in the Court of Appeal arguing points of law for the Crown. In 1975 he was sent to London – it was the first time that he had revisited the city of his birth since he had left it as a child – and appeared before the Judicial Committee with Mr I L M Richardson (now Sir Ivor Richardson) in support of the Solicitor-General (later Mr Justice Savage) in the final series of the Europa Oil litigation – [1976] 1 NZLR 546 (PC).

Cain was always ready to place his considerable experience and learning at the service of others. Never one to seek the limelight, he worked quietly and with complete concentration in almost any surroundings. He had the keenest sense of humour, which not infrequently surfaced in his legal writing. This may be seen in the frequent articles which he contributed to this *Journal* from 1959 to 1965, dealing with practical problems of the kind which constantly arise in a busy conveyancing practice.

From 1973 to 1979 Cain found time (it arose from a suggestion from Sir Richard Wild) to act as research assistant and draftsman (and for a time also as secretary) to the Rules Revision Committee, then engaged in revising the Code of Civil Procedure; his precise knowledge of the procedural law was invaluable to this committee. As the formulation of the new Rules neared completion Cain was induced by Butterworths, then seeking a new editor, after the death of Sir Wilfrid Sim, for their new edition of Sim's Code of Civil Procedure, to undertake the writing of the new *Sim & Cain*. From its place on the bookshelves of every legal firm in New Zealand this well-known volume will continue for generations to bring back to their memories the life and works of one of the most distinguished legal scholars of his day.

P A C, A K T

Case and Comment

Administration of estates — out of impasse

Re Plato; AMP Perpetual Trustee Co NZ Ltd v Shalders (High Court, Dunedin, 30 May 1989 (Tipping J)). This case raises an interesting and perhaps novel point in the law of administration and estates in New Zealand. It is apparently the first occasion in this country when the court has made use of the form of order, known as a Benjamin order, permitting the administrator to distribute an estate in accordance with the presumed and probable, but not absolutely proved, facts. The case is also significant in that it extends the application of the Benjamin principle beyond the original circumstances of the missing, and presumed dead, beneficiary, to a quite different situation.

What is a Benjamin Order?

A Benjamin order, so named after the order made by Joyce J in *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723, is an order of administrative convenience and expediency to avoid the expense or additional delay in distribution resulting from further and probably fruitless inquiry. It is a permissive not a declaratory order. It exonerates trustees and personal representatives by permitting distribution according to the probable reality. It does not destroy the rights of the missing claimants nor declare other rights positively. As Nourse J recently observed, (*Re Green's Will Trusts* [1985] 3 All ER 455, 462):

> The Benjamin order does not vary or destroy beneficial interests. It merely enables trust property to be distributed in accordance with the practical probabilities.

Similarly in *Hansell v Spink* ([1943] 1 Ch 396, 399), Morton J noted:

> The Court without making any positive order declaring rights, protects personal representatives or trustees by giving them liberty to distribute on a particular footing based on probable inferences.

This then is the basic general legal background to the order sought and made in *re Plato*, the facts of which may be stated relatively simply.

Re Plato

Cyril Plato died aged 76 in 1976 effectively intestate. His earlier will in which he left his entire property to his third wife lapsed when she predeceased him. He had had no children by any of his three wives or otherwise, and his estate was being held by the AMP Perpetual Trustee Co, an administrator on the statutory trusts for, in the absence of other surviving relatives, his uncles and aunts "being brothers and sisters (whether of full or half blood) of a parent of the intestate" (s 77(1)(d) Administration Act 1969).

However, in the course of tracing the possible beneficiaries of these statutory trusts, the administrator received information which suggested that, contrary to the believed facts, Cyril might not have been the natural son of the couple he called his parents, but rather their adopted son. The families were divided on this issue. His relatives on his mother's side thought him to have been adopted, those on his father's side believed him to be the natural son of his parents. Therefore, as Tipping J reflected:

> The essential issue in this case concerns whether Cyril was the natural child of those whom the plaintiff as administrator originally understood to be his parents.

This question, which in most cases might have been settled simply and quickly, proved in *Plato* almost impossible to answer, even after considerable genealogical research. Cyril Plato's birth was apparently not registered, nor was there any record of his having been adopted. Baptismal and hospital records were searched without avail. But if Cyril was the natural son of his parents, then the estate could be administered on the statutory trusts, if not then the Crown would be entitled to his property as bona vacantia.

In these circumstances, the administrator sought a Benjamin order authorising the distribution in accordance with the statutory trusts.

The judgment of Tipping J focuses on two sub-issues:

(i) whether the Benjamin order was available in New Zealand;
(ii) whether the available evidence led to a presumption which would justify the order in the manner sought.

Clearly it was an unvoiced possibility, that even if a New Zealand Court could make such an order, the order could be made alternatively in favour of the Crown, or even the kin of the as yet unknown birth parents of an adopted Cyril.

Whether a Benjamin Order could be made by a New Zealand Court

The first question to be considered is whether the Benjamin order is one which a New Zealand Court could make. There was apparently no reported case of one having been made here, but the Court found that there were passing references to the order in a couple of previous New Zealand cases, and that a Benjamin order, had been made in Australia. Therefore Tipping J concluded:

> I can see no jurisdictional difficulty in making a *Benjamin* order in this case assuming the facts warrant it. Reference need only be made to s 16 of the Judicature Act 1908 giving this Court all judicial jurisdiction which may be necessary to administer the laws of New Zealand and to Rule 447(i) which applies Part IV of the High

> Court Rules to the determination of any question which it may be necessary or desirable to determine for the protection of executors, administrators or trustees.

However there are some facets of this question which do not seem to have been specifically pursued in the *Plato* judgment: whether the order has now been superseded by s 76 of the Trustee Act 1956; and whether the principle may be extended beyond the circumstances of *Re Benjamin* and many other cases although His Honour did in the course of the judgment refer to a number of cases in which the Benjamin principle was applied in different ways.

(a) Section 76 and Benjamin Orders

The usual circumstances which lead to the making of a Benjamin order seem to concern the probable inference of the presumed death of a legatee or beneficiary whose whereabouts are otherwise unknown. So in *Re Benjamin* the issue was whether a son of a testator had survived his father. A year or so before the testator's death the son had gone abroad and has not been heard from subsequently. Joyce J felt able to presume the death of the son as the most probable explanation of his continued absence, and an order permitting the estate to be distributed on that footing, but reserving the right of the son to trace his entitlement should he in fact later return.

Similarly in *Re Green's Estate* (supra); where the presumption was of death of a beneficiary (the son of the testatrix) who had been reported missing in action. These are in fact the possibly typical circumstances in which a Benjamin order has been made by the Courts of England (see also *Re Eleanor Taylor* [1969] 2 Ch 245); Australia (*Re Hickey* [1925] VLR 270, *Re Dolling* [1956] VLR 535); and Canada *(Re McLea Estate* [1948] 2 WWR 12, *Re Green Estate* (1951) 2 WWR(NS) 590).

Although the Benjamin order appears to derive from the inherent jurisdiction of the Court, it might nonetheless seem, in so far as it relates to missing beneficiaries (with or without an accompanying presumption of death) to have been substantially superseded by the not dissimilar provisions of s 76. As Cleary J observed, referring inter alia to the *Re Benjamin* procedures:

> The relevant legislation on these matters is now contained in ss 35, 75 at 76 of the Trustee Act 1956, and the provisions are, in fact, much wider than the provisions they replaced. (*Re Sheridan (Deceased)* [1959] NZLR 1069 1076).

In this case, however, the Court was not directly concerned with or in the event required to apply the principle in *Re Benjamin*, and the decision turned in the interpretation of the Act itself, and led to s 76 being amended in 1960.

On the other hand, although an order under s 76 might overlap with, and have a similar effect to a Benjamin order (eg s 76(6)) it is arguable that s 76(10) preserves the possibility of a Benjamin order being made, especially where that principle can be extended beyond the missing beneficiary circumstances of s 76.

(b) Benjamin Order — a wide principle?

While the majority of cases following *Re Benjamin* have concerned the beneficiary who is missing, and can be presumed dead, a few cases seem to have extended the principle slightly by analogy as for example, in *Re Gess* [1942] 1 Ch 37. In this case Morton J applied the Benjamin principle to assist administrators of an estate who were unable to advertise for creditors in the deceased's homeland, which was then under enemy occupation, and the evidence suggested, but did not conclusively show, that the deceased had no liabilities in that country.

However there are two cases where the principle has been extended in quite different circumstances: for example *Hansell v Spink* (supra) and *Perch v Robertson* ((1945) 87 Sol Jo 66). Although concerned with slightly different matters of detail, the essential features of these two cases were similar, and appropriate for an order of the Benjamin type. In both cases the original trust documents had been lost or destroyed, and the Court was faced with the task of determining some details of the trust from available secondary evidence — in one case the Chief Clerk's notes, in the other the existing investments. In each case a Benjamin order was made exonerating the trustees if they continued to administer the trusts on the footing of that evidence as expressing the probable terms of the trusts.

So it would seem that the principle of *Re Benjamin* has proved quite versatile and capable of extension to other situations where it is desirable to facilitate the distribution or administration of an estate where essential matters are not or cannot be known, and the evidence justifies the making of the order to protect the trustees or personal representatives without privately declaring rights or barring any future claim by any possible contrary claimant.

However, each case must depend on the state of the evidence and the balance of probabilities. Thus, in the possibly extreme case of *Re Green Estate* (supra) Campbell J in the Kings Bench of Manitoba made an order presuming that two of the children of the deceased intestate had predeceased their half brother, the other beneficiary, without leaving issue of other descendants, despite the suggestion in some evidence that the two people may each in fact, have married and had children. However, the evidence was insufficient to make any positive finding either way, and a process of advertisement and inquiry over nearly 20 years had not traced the missing beneficiaries.

The evidence for the presumption

With this background, it would appear that the circumstances of *Re Plato* were appropriate for a Benjamin order, if the evidence showed a probability that Cyril Plato was the natural son of those who were believed to be his parents.

As has already been noted, the views of the two sides of his family were divided on this question. However, this evidence, in effect rather tended to cancel itself out, and Tipping J was required to consider both the admissibility and the weight to be afforded to the limited amount of documentary evidence available, in the absence of birth and adoption records: the death and marriage certificates available, in the absence of birth and adoption records: the death and

marriage certificates of Cyril Plato, and some earlier wills in which he referred to his family and parentage. The only public records which said anything of his parentage were the death certificates, and the first two of his marriage certificates. Following the Court of Appeal's decision in *Re Simpson* [1984] 1 NZLR 738 that the hearsay evidence of public documents was admissible as proof of genealogy, and the terms of the relevant legislation Tipping J held that these constituted prima facie evidence of Cyril's parentage and birth status.

Similarly, following *Re Simpson*, Tipping J held that, "Declarations by persons concerning their own parentage or pedigree are admissible." In *Plato* Cyril had made at least three earlier wills in which he referred often to his parents or to other relatives; in one he described his apparent mother as his mother and in two other wills to a person as his cousin:

> which could only be biologically correct if Alice were his mother.

Tipping J commented on this point:

> These declarations by Cyril, particularly his reference to Alice as his mother, constitute declarations by him as to his pedigree and are some evidence reinforcing the entries in the marriage and death certificates.

Therefore the prima facie presumption tended in favour of Cyril being the natural and not the adopted son of his apparent parents, and that this was not displaced by the inconsistent evidence of members of the maternal and paternal branches of the family. Clearly the evidence was not found strong enough to make a positive declaration of parentage. But such is not required for a Benjamin order. In the end Tipping J concluded:

> The evidence is such that the Court cannot say that the prima facie position as evidenced by the official documents has been displaced. The evidence apart from the official documents is inconsistent. Some of it points towards a natural relationship; some of it points towards an adoptive relationship but with no evidence that such relationship was ever legally constituted. In my judgment the prima facie position, at least for the purposes of a Benjamin order, should prevail.

Conclusion

The case of *Re Plato*, while its circumstances are not like those of the usual run of Benjamin cases, would seem to be a particularly appropriate case for an order of the Benjamin type. The administrator was in a dilemma. A distribution of Cyril Plato's estate had to be made, if not now, then at some time, and yet given the absence of strong evidence proving either possibility beyond a doubt, the absence of birth or adoption records, and the unlikelihood of more certain evidence emerging, then the Benjamin order was the best solution to the impasse. Where the evidence is not strong enough to make a positive declaration, the Benjamin order is permissible to allow distribution in accordance with the probabilities and as Tipping J noted:

> is made without prejudice to the rights of whoever may be entitled, if it can later be clearly established that Cyril was neither the natural nor the adopted child of Philip and Alice, to seek to trace the funds into the hands of the recipients.

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Contractual mistake

Paulger v Butland Industries Limited [1989] BCL 1889

This case provided a welcome opportunity for the Court of Appeal to comment on and clarify the law following the controversial decision in *Conlon v Ozolins* [1984] 1 NZLR 489 which concerned (inter alia) the application of s 6(1)(a)(iii) of the Contractual Mistakes Act 1977.

The decision in *Paulger* is an appeal from a decision of Master Hansen in the High Court at Christchurch.

The appellant had been Managing Director of a company in financial difficulty. Following a contract for the sale of the business the appellant was confident that sufficient would be realised to pay off the creditors of the company. He sent a letter to the creditors which contained these words:

> We ask your tolerance whilst we execute this matter and advise we will make good all outstanding matters within 90 days.
>
> The writer personally guarantees that all due payments will be made.

The plaintiff forbore from suing for the 90 days sought. Before settlement the company was put into receivership, and the unsecured creditors were not paid out.

The grounds of appeal were that the defence raised factual issues which should not have been decided on the summary judgment application, and as an additional ground (not previously argued), relief was sought under s 6 of the Contractual Mistakes Act 1977. It is this ground of appeal which raises significant issues worthy of closer scrutiny.

The decision of the Court of Appeal was delivered by Hardie Boys J.

Section 6(1)(a) of the Contractual Mistakes Act provides:

(1) A Court may in the course of any proceedings or on an application made for the purpose grant relief under Section 7 of this Act to any party to a contract:

(a) If in entering into that contract:

(i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or

(ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or

(iii) That party and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were influenced in their respective decisions to enter into the contract by a

> different mistake about the same matter of fact or law.

It was argued a common mistake arose being the effect of Mr Paulger's letter, or alternatively a different mistake about the same matter of fact or law, the common subject matter being the source of funds for payment of creditors, the appellant thinking it would be only from proceeds of sale, the respondent that it could come from the appellant's personal resources.

His Honour held that submissions on subparagraph (ii) or (iii) of s 6(1)(a) had to be considered in the light of s 6(2)(a) which states that a mistake for relevant purposes does not include a mistake in the interpretation of the contract.

His Honour held that the case did not fall within paragraph (ii) of subs (1)(a) (parties to the contract being influenced in their respective decision to enter into it by the same mistake). The common mistake that was alleged was the effect of Mr Paulger's letter "guaranteeing" payment. Hardie Boys J held that the mistake each party made may have been as to the same subject matter, but was not the same mistake. The respondent thought Mr Paulger was giving an unconditional guarantee. Mr Paulger thought he was giving something less than that. His Honour went on to hold that if it were correct to say that the mistake was as to the *effect* of the letter then this was a mistake in the interpretation of the contract and so subs (2)(a) of s 6 precluded relief.

In support of arguments on paragraph (ii) of s 6(1)(a) the appellant relied on the judgments of Woodhouse P and McMullin J in *Conlon v Ozolins*.

Mrs Ozolins was an elderly woman who intended to sell some land adjacent to her house and garden. She entered into a written agreement for the sale and purchase of four lots which mistakenly included her garden. The purchaser was not aware of Mrs Ozolin's mistake in the contract.

Both judgments found the same matter of fact about which the parties made different mistakes to be the extent of the subject matter of the contract. At p 498 per Woodhouse P:

> . . . each had a mistaken impression about the boundaries of the tract of land being bought and sold.

And McMullin J said at p 505:

> The appellant's mistake was in thinking . . . that she was selling only Lots 1 to 3; the respondent's in thinking the appellant intended to sell Lots 1 to 4.

Hardie Boys J held that McMullin J in *Conlon v Ozolins* was not referring to each party's belief about the other's intention, because then the parties' respective mistakes would have been about different things: his about her intention, hers about his.

His Honour then went on to confine *Conlon v Ozolins* to its particular facts and further held:

> It is not authority for invoking the Act when one party misunderstood the clearly expressed intention of the other, or where one party meant something different from the plain meaning of his own words. For then the mistake is one in the interpretation of the contract, and the party making it cannot avail himself of the Act.

It is necessary to examine the effect of the decision in *Paulger* to see if the law in this area has been clarified by the decision. In order to do so it is necessary to re-examine the three judgments in *Conlon v Ozolins* and discuss the issues that each decision raises.

The decision of Woodhouse P reveals that the defendant's mistake was in that she thought the plaintiff intended to buy Lots 1 to 3, the plaintiff's mistake was that he thought the defendant intended to sell Lots 1 to 4. His Honour then held that they were different mistakes about the size of the land involved.

With respect, there are two problems with this approach. First, the size of land does not appear to be a "matter of fact". To be a matter of fact the true position needs to be ascertainable, therefore requiring some common intention which was lacking in *Conlon*. If one looks at the written contract to provide the answer it is clear the plaintiff made no mistake at all. Secondly, if one looks at the mistake as being a mistake of each other's intention (the defendant being mistaken as to the plaintiff's intention and the plaintiff being mistaken as to the defendant's intention), it is submitted that these are different mistakes as to *different* matters of fact so do not satisfy para (iii) of subs (1)(a).

McMullin J held the defendant's mistake was that she thought she was selling Lots 1 to 3, and the plaintiff's mistake was in thinking that she intended to sell Lots 1 to 4. It is submitted these are different mistakes but not about the same matter of fact. The defendant's mistake was as to what the contract said and the plaintiff's mistake was as to her intention.

Greig J in the High Court in *Conlon* and Hardie Boys J in *Paulger* followed the reasoning of Mahon J in *McCullough v McGraths Stock & Poultry* [1981] 2 NZLR 428 in which he held that the common law principle of the objective construction of contracts (often referred to as the principle in *Smith v Hughes*) is not excluded by s 5 of the Contractual Mistakes Act. At this point McMullin J in *Conlon* disagreed. He held that if the *Smith v Hughes* principle was still operative it would deprive the Contractual Mistakes Act of much of its force and would ignore s (5)(1) which says that the Act is to have effect in place of the Rules of Common Law and Equity and as far as it held the principle in *Smith v Hughes* still operative His Honour concluded that *McCullough* was wrongly decided.

With respect McMullin J's analysis which excluded this common law principle disregards two important matters. First, there is specific mention in s 4(2) of the Contractual Mistakes Act of the importance of commercial expectation of security of contract. It is submitted that by stating this in the Act Parliament intended the *Smith v Hughes* rule to be a continuing principle. Further s 6 specifies conditions under which *relief* from a mistake may be granted rather than determining whether there is a contract in existence.

This was the view taken by Somers J in his dissenting judgment in *Conlon*. His Honour was of the view that aside from the provisions of s 5, sub (1) and s 2(3) (which suggested that Parliament intended

s 6 to include all cases in which a common law mistake would prevent a contract coming into existence at all) the normal principles determining the existence of a contract were not affected by the Act.

One of these principles is that a party may not be allowed, by reason of his conduct, to deny his assent to a contract or a term thereof. Somers J was of the opinion that the contract in *Conlon* exhibited no ambiguity and before the Act the vendor would have had no relief in mistake. Her intention was to be ascertained from the words of the contract. The error was truly "unilateral" in that it was unknown to the purchaser thereby precluding relief under s 6(1)(a)(i).

As to the argument that the parties had made different mistakes about the same matter of fact, Somers J held that the vendor's mistake concerned the subject matter of the contract whereas the purchaser's mistake was about the vendor's state of mind. His Honour saw as a more fundamental difficulty that according to the objective phenomenon of the agreement, the purchaser made no mistake at all. He intended to buy the four lots of land and according to the agreement that is exactly what he did.

The decision in *Paulger* is of assistance concerning the common law principle that contracts are to be construed objectively. At p 8 of Hardie Boys J's judgment he said:

> Parliament plainly intended to maintain the well-established principle that contracts are to be construed objectively and to avoid the great uncertainty that will arise were a party to be permitted to plead as a mistake that he understood the contract to mean something different from its plain and ordinary meaning.

However, it is respectfully submitted that by not overruling *Conlon* the remainder of the judgment provides a less than satisfactory resolution to the law in this area. Given the categories of mistake in paras (i) to (iii) of s 6(1)(a) and their application in *Conlon* the basis of the majority judgment has been eroded. Hardie Boys J held the decision in *Conlon* was *not* authority for invoking the Act where one party misunderstood the clearly expressed intention of the other or where one party meant something different from the plain meaning of his own words. His Honour held that the mistake would then be one of interpretation, and referred to the decision of Wylie J in *Shotter v Westpac Banking Corporation* [1988] 2 NZLR 316 at 332, where the distinction was made and applied. For present purposes the decision in *Shotter* is not of great assistance as that case concerned the interpretation of a guarantee and the extent thereof, whereas, in *Conlon* there was no ambiguity whatsoever in the contract.

Given the reasoning underlying the majority judgment in *Conlon* was eroded, one would expect a definitive statement from the Court in this case disapproving of that decision and restating the law in this particular area. However Hardie Boys J saw fit to only confine *Conlon v Ozolins* to a decision on its particular facts. This leaves open for relief precisely the fact situation which the Court presumably sought to exclude, ie, if party A agrees to buy something x and party B agrees to sell something he thinks is y and the subject matter of the contract is in fact x, then party A has made no mistake at all, yet the vendor is still entitled to relief notwithstanding the objective clarity of the contract.

The anomalous state of the law is that the *Conlon v Ozolins* situation still affords grounds for relief under s 6 of the Contractual Mistakes Act, yet given the decision in *Paulger* the rationale for that relief being available has been judicially disapproved of. It is, perhaps unfortunate that as the mistake issue was raised for the first time in argument, the Court of Appeal was not given the opportunity to settle the law in this area by sitting in *Paulger* with a Full Bench and therefore making a definitive statement as to the precise circumstances in which relief is available under s 6 of the Contractual Mistakes Act. The only result one can see from the decision in *Paulger* is continuing uncertainty as to the view to be taken by a Court when faced with a situation analogous to that in *Conlon*.

Fiona Stenhouse
University of Canterbury

Recent Admissions

Barristers and Solicitors

Black J H	Christchurch	17 November 1989
Blair D A	Nelson	6 November 1989
Carolan G D	Christchurch	17 November 1989
Dunn L	Christchurch	17 November 1989
Freeman W F	Nelson	6 November 1989
Gaik K T P	Christchurch	17 November 1989
Gifford R J P	Christchurch	17 November 1989
Gregory-Hunt R M	Christchurch	17 November 1989
Hayman F M	Christchurch	17 November 1989
Hix Q C S	Christchurch	17 November 1989
Ladds J K	Christchurch	17 November 1989
Leeming N P	Christchurch	17 November 1989
MacIntyre D A	Christchurch	17 November 1989
Marshall C J	Christchurch	6 November 1989
Monk P K	Christchurch	17 November 1989
Palmer K J	Christchurch	17 November 1989
Parry L M	Christchurch	17 November 1989
Power S R	Christchurch	17 November 1989
Purdie F A	Christchurch	17 November 1989
Smallholme D K	Christchurch	17 November 1989
Steel G J	Christchurch	17 November 1989
Stephens D A	Christchurch	17 November 1989
Terris D A	Palmerston North	28 September 1989
Thomson K A	Palmerston North	28 September 1989
Vivian A J	Christchurch	17 November 1989
Webb D A	Christchurch	17 November 1989
Whelan J W K	Christchurch	17 November 1989
White M C N	Christchurch	17 November 1989
Williams J E	Christchurch	6 November 1989

The experience of an LLM student at Harvard Law School

By Mai Chen, Lecturer, Law School, Victoria University of Wellington

This article is a report done by Mai Chen as the recipient of the Butterworths Travelling Scholarship for 1987. She spent 1988 at Harvard and worked for a period at the United Nations Human Rights Commission at Geneva.

1 Harvard Law School: Legend or Myth

Reflecting on my time spent at Harvard Law School obtaining a Master of Laws (LLM) in the class of 1988, it is difficult not to view that time as the best year of my life. My legal horizons were widened and I was able to achieve the academic goals I had set myself. I was inspired by countless big-name speakers and professors as to the difference I could make with my law training. I met people from many countries round the world, my LLM class comprising 100 lawyers from 64 different nations, many of whom were undertaking all sorts of ambitious and exotic endeavours. And I gained a further scholarship from the Harvard Human Rights Program to undertake an internship at a United Nations specialized agency, the International Labour Office, in Geneva, which was the fulfilment of a childhood dream. In short, I tasted the full richness of being at one of the world's best law schools. Thus, the Harvard myth endures in my mind to an extent. However, I also discovered during my time at Harvard that the star-studded faculty and top students which make Harvard great can also give rise to the school's major weaknesses. The greatest challenge to my view of Harvard was the revelation that many of the students at the Law School hated being there.

Harvard has many excellent qualities which explain its enduring place as one of the world's best law schools. First, the faculty line-up and their credentials are awe-inspiring. Harvard does not provide surrogates, but has the money and the name to provide the top people in many subject areas such as L H Tribe on Constitutional Law, Roger Fisher on Negotiation, M Horowitz on American Legal History, A T Von Mehren on Comparative Law, and R Unger on Jurisprudence. Their visiting professors are of a similar calibre; when I asked who would be teaching about the Israeli unwritten constitution in the comparative legal seminar on "Written and Unwritten Constitutions", I was not surprised to find out that it was Justice A Barak of the Israeli Supreme Court.

Harvard also attracts large number of employers and famous personalities who come through the school, the former recruiting students for high-level positions, and the latter inspiring students to take up some such positions. Talks by Geraldine Ferraro, Ralph Nader and Oscar Arias especially inspired me as to the impact dedicated lawyers can have on society.

Secondly, Harvard provides an extremely interesting and diverse curriculum which would be the dream of any law student. There are substantive courses which have parallels with courses taught in New Zealand law schools – Property, Anti-Trust, Sex and Race Discrimination, Tax, Corporate Finance, Human Rights and Labor Law – as well as courses which have no parallels such as Immigration and Asylum Law, Poverty Law, and even Terrorism. There are courses relating law to other disciplines such as literature, psychiatry, anthropology, regional politics and computer systems. Clinical courses are also available, for instance, Trial Advocacy in the Civil and Criminal Law, Legal Services for the Poor, Welfare Law, and a Negotiation Workshop. If these subjects are not sufficiently interesting or specialized, students can also cross-credit and take courses at Harvard's John F Kennedy School of Government. Their courses again are interesting and varied.

Altogether there are some 160 elective courses in addition to the compulsory basic courses for those studying for the Harvard law degree and some forty seminars whose subjects vary from "Ethnic Tensions in Plural Societies" to "Judicial Management of Large Institutions and Complex Litigation". There are also twelve student-run journals and law reviews and countless special programs and fellowships such as the International Tax Program, and the East Asian Legal Studies. Harvard's Human Rights Program allows students to develop practical as well as theoretical expertise in specific areas by providing scholarships for work in the field. There are also some seventy-five intellectual, social, and service organisations which students can get involved in ranging from children's rights advocacy to drama, and income tax assistance for the poor. These are a few examples of the huge supply of resources Harvard has to generate a myriad of opportunities for its students.

Thirdly, the Harvard Legend is perpetuated by its talented students – some expectionally so. Attending Harvard is like being in a class full of the best one or two students from the best colleges and universities in the United States, and all around the world. In the academic year 1988-89, 7000 people applied for the 540 places in the basic law degree at the Harvard law school and approximately 600 applications were received to fill the 100 places in the LLM course.

In choosing students, the Selection Committee not only looks for academic prowess but also leadership ability, and "intellectually curious and thoughtful candidates"! My LLM class was comprised of national sporting champions, lawyers in political exile, and even a former French tank commander. Many were deeply involved in politics in their countries. After Harvard, they left to take up a

dazzling array of top-level positions, including one colleague whose Government had requested her to negotiate the country's foreign debt with anxious overseas creditors. Thus it is not surprising that Harvard has a long list of successful alumni in politics and law. For example, fourteen justices of the United States Supreme Court have been Harvard Law School graduates.

Alumni/ae of the LLM program[2]

> have held senior positions in many international and regional organisations; have served as Ambassadors to the United Nations, Ministers of Foreign Affairs, Attorney-Generals, Chief Justices and Associate Justices of national supreme courts, and as president and general counsel of central banks of over 20 foreign countries. In legal education, alumni/ae have served as Deans of 19 law schools in 13 different countries. Presently there are over 275 overseas alumni/ae who are members of 127 different faculties of law in over 40 countries. Graduate alumni/ae also hold prominent positions in many of the most outstanding law firms in the capital cities of the world and as general counsel to many of the most prestigious international companies and financial institutions. They have also played leading roles in the forefront of efforts to advance the cause of human rights and legal services to the needy in many countries around the world as well.

Being around such talented, hardworking individuals with such great initiative, drive and determination was an inspiration. It made you realise that you could dream dreams and make them come true. The sky was the limit in deciding what you could achieve, and the level to which you could perform.

Making the most of all that Harvard Law School had to offer meant that my year was crammed full; I had to keep up with my coursework and make progress on my LLM thesis while auditing all the courses I found interesting (but had not the time to enrol in) attending forums and conferences, hearing speakers and spending time to make friends with fellow LLMs and those studying the basic law degree at Harvard (or JDs as they were commonly called). You literally go into overload as every one of these activities "should not be missed".

With such a great legal education being offered at a price tag of approximately $US45,000 for the three year law degree, I expected students to be enthusiastic about attending class and about Harvard Law School itself. Thus I was puzzled by the high level of absenteeism I witnessed in some of my elective courses and startled to talk with many JDs who admitted that although they needed the Harvard name to get the best jobs, they hated being there. Why were these students biting the hand that fed them?

The reason is partly the professors' attitudes towards the students. The problem with having a star-studded faculty is that professors spend most of their time doing star-type things. To be fair, being a Harvard professor does provide enormous opportunities for taking on high-profile and nation-changing responsibilities. However, the result is that even professors with an interest in students have little time to give them between wine and cheese evenings to promote their new book, spots on the NBC news to chat about testifying to the Senate at the Bork hearings, advising the President on the Iran Contra Scandal and being Dukakis' campaign manager. Students generally felt that most professors did not care, found teaching a distasteful necessity which allowed them to pursue their first love of research, and wanted as little student contact as possible. Graduate students had it even worse since some professors were quite myopic, culturally speaking, and simply were not interested in the perspective of an overseas student from another legal system even where it would have been relevant to the topic being studied. The predominantly white and male membership of the faculty also tends to make women and minority students feel excluded.

This gap between students and staff is exacerbated by the rather brutal use of the Socratic method, especially in the first year of the law degree. Stressed-out first-years have told me of the unnecessarily interrogatory and condescending manner in which the Socratic method is used by some professors. This unfortunately has particularly adverse effects on women and minorities and encourages the cockiest and the most tough-skinned to do well.[3] It also creates a tense and alienating environment further exacerbated by the intense competitiveness and individualism which arise as students strive for a place in the *Harvard Law Review* and the next round of the Ames Moot Court Competition. Harvard law librarians have a hard time ensuring that relevant books are not hidden, stolen or the relevant parts excised with a razor blade – yes it happens! Students complain that their classmates are too career-opportunity orientated. As one remarked; "When you talk with a Harvard student, you always feel as if any minute they will open up their bag and try to sell you an insurance policy".

Upon the completion of first year, Harvard law students act as if their formal degree training has ended. Absenteeism amongst second and third years is high and there is a flourishing trade in lecture notes sold at the legal copy centre. These lecture notes were originally compiled by students on the *Harvard Law Review* who, due to their busy schedule, could not attend all the lectures. *Law Review* members would divide up the lectures between them and then summaries would be compiled so that they had notes for the whole course. These notes are now used by all students wanting to avoid attending classes and the reason appears to be that first year grades fairly much determine where you are on the legal ladder and the type of job you are likely to get. Thereafter, having already been recruited by the various head-hunters for legal firms, many are just waiting out their time before they can start working in the real world.[4]

2 The LLM Course

The Masters course at Harvard Law School is comprised of course work and a thesis. I took courses in Constitutional Law, an Advanced Constitutional Law course in Supreme Court Decision-making, Environmental Law, Poverty Law: Policy, Politics and Practice,

Comparative Legal Education, Introduction to American Law, and my thesis (written in conjunction with a seminar on Civil Rights at the Crossroads) dealt with the use of the law to subjugate the Maori people to the status of a racial underclass in New Zealand and the potential of the law to "restore" the Maoris to an equal place in society. I also audited the course on Sex Discrimination and some lectures in Human Rights.

(a) Course work

Course work was fun but challenging. Coming to grips with a whole new legal system, with its unfamiliar legal terms and concepts is a challenge common to all students studying overseas. At least I did not come from a civil law country where there is no concept of binding precedent and where law is taught by straight lecturing rather than by the Socratic method; familiarising myself with the problems of federalism and a written Constitution were challenging enough. Also coming to the United States legal system cold, as do most of the LLMs, I did not have the broader knowledge of the legal, as well as the political, social and economic, systems necessary to place my learning on a specific law subject into its context. Furthermore, Harvard Law School provides no special classes for LLMs who just join in with JD classes. Unfortunately, the JD classes were taught, and exams were set, on the presumption that all students had done the rest of the JD course, which of course the Masters students had not.

The approach of Harvard professors to legal education is also different. Although individual professors have their own idiosyncracies, there was a general tendency to provide a wide coverage of the course, overview-style, where New Zealand legal education often tends to cover less ground but in much greater depth. Thus, although the JDs were more articulate than New Zealand students, the substance of what they said tended to be rather shallow when analysed. This is understandable since one simply cannot pore over each page of the up to two hundred pages reading which might be assigned per lecture in every course, and I quickly learned to skim-read like the rest of the JDs.

The course work at Harvard has inspired me to develop areas of law not previously given much attention in New Zealand such as Discrimination Law. I would also like to see the development of clinical programmes in New Zealand law schools to allow students to have hands-on experience in an appropriate learning environment while benefiting the community around them by providing free legal services. Finally, my experience at Harvard has challenged me to develop a teaching style and approach more conducive to student learning and growth in the law since I have taken up a lectureship at the Victoria University of Wellington's Law Faculty upon returning to New Zealand.

(b) Thesis research

Researching my thesis also proved challenging as I had to learn the US system of case and legal writing classification. Moreover, while the Harvard Law Library might be superb with respect to other jurisdictions, the New Zealand section was small, out of date and missing some crucial material such as Volume 14 of the New Zealand Reprinted Statutes I really needed. Nevertheless, my thesis did emerge and even managed to win the Harvard Law School prize for best paper in Human Rights.

(c) My Thesis

"*The Law's Ability to Create and Then to Restore an Indigenous Underclass*" focuses on the two-step process by which law was used to subjugate the Maoris to an inferior status in New Zealand society. First, laws such as the 1865 Native Lands Act, and the 1863 Native Settlements Bill took away the basis of Maori economic independence – land. Secondly, by undermining values central to Maori culture, (especially communal ownership of land and chiefly and tribal authority), the pakeha government assimilated Maoris into their system while at the same time excluding them from participating in any institutions of power which would have allowed the Maoris to have some control over their destiny.

I then go on to assess the law's ability to "restore" the Maori people by first establishing whether Maoridom still has the potential to recover after such prolonged adverse treatment by the pakehas, and what the Maoris' vision of "restoration" might be. I assess the reasonableness of Maori demands and then determine the extent to which the law can fulfil those demands. I look at the government's response to date and consider what further measures are needed, especially in terms of equal opportunities and affirmative action, increased biculturalism and land rights to restore the Maoris to an equal position in New Zealand society. Comparative analysis with the Australian Aborigines is made throughout.

During my internship at the ILO, I gained an international perspective on indigenous people's issues by working on the revision of ILO Convention No 107 on Indigenous Peoples, and talking with those involved in the Working Group on Indigenous Peoples in Geneva. Thus, although much of my LLM thesis is now out of date, writing it, along with my experiences at the ILO, have given me a basis from which to do further research on Treaty of Waitangi issues, such as the status of the Treaty in national and international law. I am also writing a book on "The International Convention on the Elimination of All Forms of Discrimination Against Women and Sex Discrimination in New Zealand", and hope to continue working in the areas of discrimination and human rights jurisprudence in New Zealand, among others. □

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1 *Graduate Studies at Harvard Law School*, 2. Under the heading "Qualifications for Admission".

2 The Harvard Law School Fund Newsletter, January 1989, p 1.

3 See James R Elkins, ed, "Worlds of Silence: Women in Law School," 8 American Law School Association Forum, vol viii, No 1 1984. This includes contributions by women students at Harvard Law School.

4 In the class of 1987 who graduated with a basic law degree from Harvard Law School, 67% went into law firms, 23% into judicial clerkships, 4% into government, legal services, management and consulting and academic institutions and 2.5% into the Federal Government. See the *Harvard Law Bulletin*, Autumn 1987, 29.

Modern sentencing developments

By Paul East LL.B (Auck), LL.M, Member of Parliament

This article looks at the question of sentencing policy in relation to offences. It notes that in New Zealand there is a degree of disparity in sentences imposed. It looks at overseas experience and developments in the United States, Canada and the Scandinavian countries. The article raises questions rather than seeks to advocate any simple solution.

Notwithstanding the fact that next year New Zealand will be celebrating the 150th year of the signing of the Treaty of Waitangi, we still have a system of sentencing which has its origins in 19th century Britain.

Role of Judge

While the emphasis of our penal system may have fluctuated depending on the particular theories and fashions in the United States and Great Britain, the role of the sentencing Judge has remained essentially the same.

The President of the Court of Appeal told a Judicial Sentencing Conference several years ago:

> The criminal law in general and sentencing in particular is not a field where innovation on the part of individual judicial officers is usually successful. In tort, contract and equity, and in administrative law, judge made law is constantly developing. On the criminal side the equal application of settled principles is of the first importance. None of us is an expert criminologist or penologist and it is doubtful whether our sentences would be any more successful or acceptable if we were. A sentencing judge *does* need to work within parameters established by statute or collective judicial practice.

Sentencing of law breakers is clearly one of the most difficult parts of a Judge's duty. A Judge must consider the penalties laid down by Parliament, the nature of the particular offence, and the usual penalty for that offence. Yet as legislators Members of Parliament have failed to provide any significant guidance to the Courts. Instead we have relied upon the existence of an appellate Court system to smooth out any disparities in sentencing practice. In doing so, Parliament has implicitly determined that Judges are the best qualified to determine sentencing policies. Accordingly, judicial discretion has been jealously guarded both by the politicians and the legal profession itself.

It is now time to ask whether the current practice is working. Statistics would tend to say no. The level of crime continues to rise; violent crime alone has risen 26% over the past three years and there is no foreseeable respite from this trend.

Yet it is questionable whether a change to sentencing policy would alter these figures. In that regard we would be better to look at issues such as unemployment, youth and family support programmes, parental responsibility and education.

This paper leaves aside such difficult questions as what objective we seek to achieve through imprisonment. It also avoids discussion on the role that legal, social and economic factors should play in determining who goes to prison and how long they stay there. Rather this paper asks whether in New Zealand we have a consistent, coherent sentencing philosophy. Does a lack of direction to sentencing Judges give rise to undue disparity and injustice; and if so, is there a better way?

Morality, tradition and politics

Sentencing policy is not an inherently legal matter and therefore there is no logical reason to leave to a Judge an unfettered discretion within the often wide boundaries drawn by Parliament. It has accurately been said that sentencing is an amalgam of morality, tradition and politics. Sentencing itself is not a rational mechanical process. It is a human process and is subject to all the frailties of human nature. Whenever a sentence is imposed there is an attempted reconciliation of widely differing interests. The participants include the prosecution, defence, Judge, offender and victim. No system is capable of satisfying all these competing interests.

Any debate on a public policy matter such as sentencing must deal with the respective roles of Parliament and the Courts. Should either body have the greater responsibility for determining sentencing policy, or is there scope for a third alternative? Have the Courts failed us with the wide discretion they have enjoyed? Would Parliament or some other body do a better job?

In addressing this latter question it must be acknowledged that Parliament is likely to be far more reflective of public opinion than the Court, which is able to elevate decision making above the reactive tension created by the three year electoral cycle. The influence of public opinion is graphically illustrated in the current debate on the minimum and mandatory sentences. There is undoubtedly widespread support for both these concepts.

Minimum and mandatory sentences

In the United States over the last ten years 49 States have introduced minimum sentencing laws. Some of these States have also enacted mandatory penalties requiring imprisonment to be imposed and in some cases, setting out the exact sentence that must be served. At first glance the concept of mandatory sentencing appears logical — that is, offenders convicted of the same crime should receive the same penalty. But while consistency is a legitimate objective

of sentencing policy, it should not be applied in a rigid fashion irrespective of the circumstances of individual cases. In the real world not all offenders are identical – mitigating or aggravating circumstances do exist and the Judge must have the ability to reflect these in the sentence. Factors such as the seriousness of the crime, the culpability of the offender, previous convictions and the likelihood of reoffending can all vary widely. These factors which are by no means exclusive should be considered when determining what sentence is appropriate in a particular case.

The trend towards mandatory sentencing in the United States is a reaction to a period of open ended sentencing which resulted in wide variations in sentencing patterns. Until recently many States placed particular emphasis on rehabilitation and the actual sentence served by an offender was decided by a Parole Board. The Court imposed an indeterminate sentence and the Parole Board decided if the offender was likely to be rehabilitated. Such a system led to extreme variations in the length of sentences served for similar offending.

Under the new system adopted by many States the punishment is designed to fit the offence rather than the offender. While a strong measure of consistency may be maintained, little thought is given to the circumstances of the offender or the prospect of rehabilitation. Such a system adds a strong political dimension to sentencing law and increases the prospect of immediate public pressure altering the sentences imposed. Politicians anxious to appease excited voters will be tempted to continually tamper with penalties.

While at one end of the process the United States has severely curtailed discretion, at the other end the prosecution has a wide freedom over whether to proceed with a charge, and what that charge should be. Added to this is the practice of plea bargaining process which in effect, determines the sentence that will be imposed before the case is tried, rather than after the Court has heard all the evidence and reached a verdict.

Problem of disparity

In New Zealand the present system gives Judges wide discretion and does little to provide guidance as to how to balance competing considerations. But has this system failed us?

There is no doubt that some Judges are more likely to impose imprisonment than others. Some are more likely to impose lengthier terms of imprisonment and are also more likely to react to public opinion. This has led to a growing body of opinion that judicial discretion is an archaic and inadequate concept. While it must be acknowledged there is disparity in sentencing, woefully inadequate research means we have little knowledge of the extent to which this occurs. This lack of research handicaps any discussion on whether the problem of disparity is so serious that the system should be radically altered.

While there may be a judicial reluctance to admit disparity as a serious problem, there are factors in New Zealand which should minimise the extent to which it occurs. Ours is a small country. Judges are well acquainted with the sentences their colleagues are imposing and regular judicial conferences on sentencing are convened. Our news media has a preoccupation with crime and considerable publicity is given to Court proceedings. Any variation in sentencing brings immediate reaction. We have a system of legal aid and an Appeal Court structure which also leads to uniformity.

Achieving uniformity

Many other countries are not so fortunate and have struggled to achieve uniformity by varying means.

In the United States a detailed numerical sentencing system has been introduced in Minnesota and other States in recent years. Using a points system a Judge determines the presumptive sentence in any particular case through a detailed balancing of the competing factors, all of which are specified in legislation. The heaviest weighting is given to the offender's record, and this is balanced against the gravity of the particular offence. When departing from the presumptive sentence a Judge must provide written reasons specifying the substantial and compelling nature of the circumstances why the sentence selected is more appropriate, reasonable or equitable than the presumptive sentence. This only occurs in a small number of cases as maintaining certainty in sentencing is a high priority of the sentencing policy.

Critics of the system have argued that it is essentially sentencing by computer and that the grid numbers may tend to overshadow the underlying principles of sentencing policy. The role of the Appeal Court in formulating sentencing policy is severely reduced. It is only where a sentence departs from the guidelines that it can be reviewed by appeal. While uniformity may be achieved, there will be injustice in treating as a standard case one that has some exceptional factors, but the sentence did not depart from the guide lines.

The clear intent of the Minnesota guidelines is to ensure violent offenders are sentenced to imprisonment. A further consideration not so widely known is that these guidelines must keep the prison population within authorised limits. Detailed research as undertaken to establish the likely number and length of prison sentences. Any alteration to the guidelines that may increase imprisonment requires a compensating reduction elsewhere.

There are, of course, variations on the Minnesota system that rely less on a rigid formula for weighing competing situations.

Guidelines

The state of Pennsylvania has introduced sentencing guide lines following recommendations from a specially established Commission on Sentencing. While these guidelines are similar to those used in Minnesota, being based on an offence gravity score, and a prior record score, there are important differences. Pennsylvania Judges are provided with three sentencing ranges rather than one. There is the standard range as well as two other ranges of sentences where it is judged there are aggravating or mitigating circumstances.

Most American commentators claim that guidelines have been a success. They have produced more uniformity in sentencing as well as meeting the stated objective of increasing sentences for serious

crime. In Pennsylvania 78% of those convicted of aggravated assault serve time in prison while the figure was 48% before the guidelines. Incarceration increased similarly from 81% to 91% for rapes, and 81% to 93% for all robberies. Whether this change is in the best interests of the victim, the offender and society as a whole has yet to be seriously examined.

In Finland the focus is on the factors to be considered by the sentencing Judge and there is no attempt to predetermine the actual sentencing outcome. Rather, the sentencing proposals are embodied in statute with the particular features of the offender and the offence chiefly to be relied upon identified along with criteria as to whether prison is or is not a suitable sanction. These standard principles are designed to give the Courts a consistent policy framework in determining sentences. The Courts themselves will then develop the details of the tariff through case law.

Just last year Sweden enacted new sentencing laws. Like Finland the legislation sets out general principles governing the choice of sentence. The legislation uses the concept of "penal value" as a means of assessing the sentence. Penal value is determined by the degree of harmfulness of the conduct, and the offender's culpability in committing it. The statute gives a list of the aggravating and mitigating circumstances to be taken into account.

Canadian developments

Canada is another country likely to revise its sentencing structure in the near future. Concerns about serious sentencing disparity and lack of direction to sentencing Judges has led to a report from the Law Reform Commission. Sentencing, the Commission suggested, should be based on the "just deserts" principle of righting the wrong. While emphasis is placed on the wrong done and the need to restore the rights of the victim, the common good must also be served with what they term "reconciliation between the offender and society". The Commission affirmed the role of the Criminal Court as one of "doing justice" rather than "social engineering".

The Commission report was followed by legislation which was introduced into the Canadian Parliament in 1984, but never passed. That Bill adopted the "just deserts" philosophy and saw the ultimate goal of sentencing as protection of the public. Other considerations were deterrence, redress for victims and opportunity for rehabilitation.

The work of the Canadian Commission does provide us with some important principles that have application in New Zealand. One such principle is fair notice. Citizens must know the likely penalties for offending. A second principle is truth in sentencing. The sentence imposed by the Court is close to that actually served. Some States in the United States have gone as far as abolishing parole and introducing determinate sentences. A third feature is the need to balance individual circumstances against the need to treat similar offences in a similar fashion.

Consultation on principles

Perhaps it is time in New Zealand for Parliament, in consultation with the legal profession and other interested parties to sit down and carefully determine the principles upon which a modern sentencing system ought to be developed. Having provided clear guidance to the Courts we can then leave the implementation of the principles through individual sentences up to the Judges.

Such a set of principles may well include some of the Scandinavian and Canadian ideas I have mentioned. The simplest method involves ranking offences according to their gravity. Bench mark penalties are then set for each category of offences. This is considered the "average" sentence for a "run of the mill" case. Finally sets of aggravating and mitigating circumstances are drawn up and the Court addresses these factors when it departs from a bench mark penalty.

Fundamental to any sentencing policy is the role we see prisons playing in the system and the use of alterntive penalties. Sir Clinton Roper and his Committee confirmed something we all know, prisons in their current form do not rehabilitate offenders back into the community. Lengthy terms of imprisonment also fail to deter potential offenders from committing serious crimes of violence. In reality the only real deterrent is the fear of being caught.

Protection of society

Despite a failure to deter, Society is still entitled to be protected from persons who habitually engage in crimes of violence. Locking them behind bars may not rehabilitate them, but it will help make Society a safer place.

The philosophy behind sentencing reforms in Minnesota and Sweden is much the same. The offender should get his "just deserts". It is considered vital to the integrity of the criminal justice system in those jurisdictions that the sentence given to the offender is proportionate to the seriousness of the crime committed. New Zealand has, of course, made some progress along these lines with the passage of the Criminal Justice Act 1985 whereby a presumption of imprisonment exists upon conviction of a crime involving violence.

That legislation was also an effort to reduce prison numbers by ensuring that most property offenders were given alternative sentences. In spite of this the numbers in our prisons have continued to rise. The growth in prison numbers got so bad in 1987 that prison officers started setting their own limits. This resulted in some sentenced inmates being held in police cells. Recent changes to abolish parole for certain violent offenders will inevitably exacerbate this problem. Given the very real economic constraints the Government is under, it is not a solution to build more prisons. In any event, prison numbers would simply expand to meet the available space and the taxpayer would be punished as much as the offender.

Alternative sentences

The solution is to be found in developing and using alternative sentences to imprisonment for offenders convicted of crimes other than those involving serious violence. It is of concern that the judiciary have in the past been reluctant to use those alternatives that are available on a more frequent basis. This was highlighted by the Roper Report which pointed out that despite the introduction of a range of community based

sentences over the last twenty years there has actually been an increase in the percentage of sentenced offenders who are imprisoned – from 5% of offenders in 1982 to 6% in 1987. Similarly, the percentage of offenders fined has dropped from 81% in 1982 to 71% in 1987.

We must discover why alternative penalties are not being imposed more readily. Whatever the reasons there now needs to be a change of attitude. This may best be achieved by new legislation giving clear guidance to Judges as to how they exercise their sentencing discretion. If Parliament decides it is desirable to seek community based sentences to be used more frequently the Courts should properly reflect this policy in their sentencing.

Possibility of Sentencing Boards

A significant school of thought within the legal profession sees the establishment of a sentencing board as central to improving the current system. Such a Board would conduct research into matters relevant to sentencing practice and work with Parliament to develop both the statutory maximum and minimum penalties for certain offences as well as the guide lines to be followed by the sentencing Judge. Sentencing practice is a mix of disciplines and a sentencing board would reflect this fact.

The Board would have an ongoing function so that the sentencing system keeps up with changing patterns in our society and in the type of crimes that are being committed. Such a board would also address the problem of leaving our Judges considerable discretion without providing them with any guidance as to how they should exercise it, while ensuring that they will still be able to reflect the individual circumstances of each case where it is appropriate to do so.

The President of the Howard League for Penal Reform, Peter Williams QC, has put forward another idea. He has suggested establishing a Criminal Appeal Sentencing Board. The sentencing Court would retain the present discretion it enjoys, but a multi-discipline Board would carry out a review function. This body would not only hear appeals, but would also be able to review sentences while they were actually being served.

Overhauling and improving

Before we embark on any major reform we must identify the failures of the present system. There is no convincing evidence that the radical new systems introduced in other countries will necessarily be a major advance for New Zealand. Rather it may be better to overhaul and improve our present system. There is much that can be done.

The introduction of suspended sentences, to give a real incentive for offenders to stay within the law – greater emphasis on diversion to keep young offenders out of the criminal system – the use of military cadets, Outward Bound and other youth training establishments to teach youthful offenders self respect, and respect for others – the introduction of electronic detention in cases where offenders deserve some form of incarceration, but need not be held behind bars.

A grid system of sentencing, or a set of rigid principles may provide consistency, but there is also a price. All practising lawyers will know that sometimes it is worth taking a risk, particularly with young offenders. The emphasis on the years ahead must be capturing the hearts and minds of young offenders and turning them from a life of crime before it is too late. That, together with increased parental responsibility and educational and employment opportunities will do more to reverse our criminal statistics than any sentencing formula we may implement. □

Appointment of Queen's Counsel

Dr George Barton

On 21 December 1989 the Attorney-General the Rt Hon David Lange issued a press statement in which he announced the appointment of Dr George Barton as a Queen's Counsel.

Dr Barton graduated from the University of New Zealand BA LLB in 1948 and LLM in 1953. He was awarded a Humanitarian Trust Fund Studentship in 1948 and studied at Cambridge University graduating PhD in 1953. He was an associate officer with the Human Rights Division of the United Nations from 1949-1952.

He joined the Law Faculty of Victoria University College in 1952 and was a senior lecturer between 1952 and 1955 and again from 1959-1967. He became a Reader at Victoria in 1967 and was appointed Professor of Jurisprudence and Constitutional Law in 1968 holding that chair until 1976. He was Dean of the Law Faculty between 1971 and 1973. Dr Barton resigned his chair in 1976 to concentrate on his practice.

The Attorney-General said that Dr Barton has an international reputation as an outstanding legal researcher, teacher and practitioner. His legal writing covers many areas of legal theory, practice and policy.

"It gives me great pleasure to announce this appointment", the Attorney-General said, "Dr Barton is an outstanding member of the legal profession, regarded by many of his colleagues as New Zealand's leading barrister. Throughout a career of over thirty years at the Bar, Dr Barton's approach to his practice is to accept a brief from any person with a cause that should be argued, no matter how unfashionable or unpopular it may be. Although at the top of his profession, Dr Barton is prepared to match his fees to the ability of individuals to pay, any other approach would have been unthinkable for him, as it would have resulted in many clients not being able to bring their grievance to court for determination. His type of professionalism, although increasingly rare, is to be admired".

The Attorney-General stated that the appointment of Dr Barton to Queen's Counsel at that time was a special one, and that there will be the usual list of Queen's Counsel appointments issued in the new year. □

Limiting lawyers' liability

By D F Dugdale of Auckland

It tends to be thought of as axiomatic that a solicitor must accept an unlimited personal liability for his negligent acts and omissions. So for example the New Zealand Law Society in opposing (unsuccessfully) before a select committee the bill that was to become that nine days' wonder the Housing Corporation Amendment Act 1987 said:

> One of the hallmarks of a professional person is that he or she accepts responsibility for his or her actions. This is fundamental to the concept of professionalism.

Recently there have been reports of claims threatened or brought against legal firms running into hundreds of millions of dollars, amounts well in excess (one would surmise) of the limits of insurance cover that New Zealand practitioners could reasonably be expected to afford to have in place. I do not write from a standpoint of knowledge of these claims or any others. But the very fact of claims of this magnitude being suggested warrants a re-examination of the validity of the axiom. Is there really any justification for forbidding the incorporation of legal firms as limited liability companies?

The trouble with the legal mind is its resistance to change. Barristers adopted a style of Courtroom manners at a time when obsequious deference to those set in authority over one was the general rule. They continue to bow and scrape and use ridiculous expressions like "As Your Honour pleases" long after the rest of society abandoned this sort of boot-licking. Similarly barristers started wearing wigs when such adornments were fashionable but could not bring themselves to stop when everyone else stopped. Witnesses are still invited to swear on a Bible to tell the truth although nobody any longer seriously believes that they will as a consequence be deterred from perjury by fear of some sort of celestial policeman.

This mindset, the belief that if a thing is once done in a particular way it must continue to be done in that way for ever and ever, is of course at the root of the lawyer's reliance on precedents, using that term both in the forms and precedents sense and in the sense of sources of law.

Just as lawyers become rigidly stuck in the things that they do so also do they oppose innovation in respect of things that they do not do.

One of the things that is not done is for a group of lawyers to practise as a limited liability company. Another (until recently) was to advertise. What is the origin of these prohibitions?

The answer is to be found in nineteenth century English social history and the concern of the solicitors' profession to climb out of its relatively humble status. We can in examining this matter of rank trust the sharp observation of the writers of comedies of manners.

At the beginning of the century we have Elizabeth Bennett, whose mother was the daughter of an attorney, whose maternal aunt married an attorney and whose maternal uncle is settled in London in a respectable line of trade. She is addressed by Lady Catherine de Bourgh in these terms:

> You *are* a gentleman's daughter. But who was your mother? Who are your uncles and aunts? Do not imagine me ignorant of their condition.

One hundred years or so later there has been some improvement in standing, but solicitors are still treated with condescension by the *haut monde*. "Markby, Markby and Markby?" says Lady Bracknell. "A firm of the very highest position in their profession. Indeed I am told that one of the Mr Markbys is occasionally to be seen at dinner parties."

A little more than midway through the nineteenth century legislation was passed enabling the incorporation of joint stock companies with limited liability. This reform was not introduced without opposition or greeted with unmixed enthusiasm. To some it was seen as subversive of moral responsibility, a rogues' charter. Well-conducted and upright persons, it was widely believed, did not stoop to shirking their obligations in such a way. It is not in the least surprising that the solicitors' profession, desperate to show itself a cut above mere persons in trade, should have set its face against its members practising under the protection of limited liability.

It is plain that the prohibition against limiting liability is not founded on some highminded issue of fundamental principle but simply results from the aspirations to gentility of upwardly mobile legal practitioners of the Victorian age. So let us look at the matter afresh. It is in the public interest that there should be available the sort of rounded service that a firm of barristers and solicitors can but a solo practitioner cannot provide. The issue then becomes whether the public interest requires that a lawyer should be permitted to practise his profession in conjunction with others only on terms that there should be no limit to his vicarious liability for the negligent acts or omissions of those others.

It is difficult to discern any sound basis for such a rule. It is not as if were lawyers permitted to practise as limited liability companies they would escape scot-free. It would be painful to its principals if Markby, Markby & Markby Limited were to be wound up, even if they were able to preserve such personal fortunes as they might have accumulated. Any individual tort-feasor would continue to be vulnerable. It cannot be seriously suggested that such a change as is suggested would tempt lawyers into a reckless disregard of their obligations to their clients. After all, as an unplanned by-product of the Accident Compensation Act 1982 medical practitioners in New Zealand are virtually immune from civil suits founded on negligence and there is no suggestion that as a consequence

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The role of law in Maori claims

By P G McHugh, Sidney Sussex College, Cambridge

In this article Dr McHugh seeks to look at the ways in which Maori claims are being expressed in the common law or statute over the past decade. He also seeks to give a general indication of the directions in which future developments might take place. He takes the view that there is a legal backdrop to the activity of the Crown in this area and he argues that this places limits on the options open or available to the Crown. The article was originally given as a paper at a Colloquium at Rhodes House, Oxford in November, 1989.

Property rights are closely related to political power. Redistribute or rearrange property-holding in any society and you move political power. This proposition is fundamental to the so-called "backlash" attending Maori issues in New Zealand. The resistance to recognition of Maori as an official language has been relatively light compared to the touchiness over issues of property. Giving people language rights does not shift political power, but give them assets worth hundreds of millions of dollars and you have transferred economic and political power. The "backlash" is a resistance to Maori taking a central role in the country's political life rather than the marginal one to which they have been reduced over the past century.

Property rights are a pure legal creation. Lawyers traditionally speak of property as a "bundle of rights" — a person has a particular property right because the rules of the legal system will recognise and if needs be enforce it. The legal system of a particular society is the fount of property — it creates, nourishes and transmits. Law plays the pivotal role where the present issues on Maori property rights are concerned — their restoration, retention, and/or compensation for their loss. Very few lawyers have been involved on the Maori language issue but, by contrast, look at the property claims and see lawyers everywhere.

For Maori people the status of their property rights inevitably goes back to article the second of the Treaty of Waitangi. By this provision the Crown "confirmed and guaranteed" the Chiefs and Tribes of New Zealand and the "respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession".

For New Zealand lawyers the status of Maori property rights lies not in the Treaty of Waitangi itself but some common law or statutory rule giving those rights effect. The two sources of any legal rule in Anglo-Commonwealth legal systems are common law and statute. Any right derived from a treaty (such as a treaty of cession like the Waitangi pact), international law or even a concept of "natural law" is meaningless, incapable of municipal enforcement, unless there is some common law or legislative rule of recognition. Even then, the relevant legal rule of recognition will define the extent to which perception of right is matched by legal reality.

This point is, of course, basic to lawyers, but it is one with which non-lawyers have extreme difficulty: It is one thing to look at and interpret the Treaty of Waitangi, another to translate any "rights" isolated from that interpretative exercise into a legally-cognisable or enforceable format.

I intend to provide an overview of the ways in which that translation of Maori property and related rights, from Treaty of Waitangi into common law or statute, has been occurring over the past decade. There have been legal changes of immense significance yet, even so, the law remains in a formative state. I hope also to give a general indication of the directions in which it might develop. The concentration will be on the common law rules and their relation to legislation.

1 Statutory recognition of Maori rights under the Treaty of Waitangi

Over the past years there has been an increased political commitment to resolution of Maori land claims and issues. This, in turn, has been translated into legislative action. Numerous statutes now expressly incorporate a Maori dimension into the particular legislative regime. The Conservation Act 1987, for example, requires the administration of the Act as "to give effect to the principles of the Treaty of Waitangi" (s 4). The Long Title to the Environment Act 1986 lists a number of factors for "full and balanced account" in the management of natural and

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they wield their scalpels or prescribe their potions more carelessly than when they lacked such protection.

There are of course manifest advantages in the incorporation of legal practices quite apart from any questions of liability limitation. The changes to the Law Practitioners Act 1982 needed to accommodate practice by corporations would be minor. Is it not time to abolish a rule that has its origins in the inhibitions of the English class system? □

physical resources. The third of these refers to "the principles of the Treaty of Waitangi". Although the Treaty of Waitangi here is but one of five factors to be weighed and, if needs be, counter-balanced, such legislation is symptomatic of Parliament's willingness to incorporate Maori interests into the fabric of legislation.

There are more spectacular examples of such statutory recognition of the Treaty of Waitangi.

Section 9 of the State-Owned Enterprises Act 1986 prevented any Crown action "inconsistent with the principles of the Treaty of Waitangi". It was on this basis that Maori through the New Zealand Maori Council successfully challenged the proposed transfer of hundreds of millions of dollars of Crown assets into corporatised hands – state corporatisation being a prelude to eventual privatisation. The Court of Appeal held that s 9 required significantly greater provision for Maori interests. The tribes had worried that the transfer of Crown land to the State-owned enterprise, Landcorp, would make that land unavailable for satisfaction of Tribunal recommendations. The Court of Appeal rejected the safeguards in the Act as meagre and called for stronger, negotiated protections.

Similarly the Act constituting the Waitangi Tribunal requires adherence to the principles of the Treaty of Waitangi. The Tribunal's jurisdiction was extended recently to give it jurisdiction over historic claims as well as present policies or practices of the Crown. The Ngai Tahu claim, alleging fraudulent Crown purchases of huge tracts of the South Island during the nineteenth century, is the first such historic claim to reach the Tribunal. The Tainui *Raupatu* claim against the Crown's nineteenth century confiscations of large reaches of fertile central North Island land will be another shortly to be heard by the Tribunal.

The other speakers today will be able to tell you more of the way in which New Zealand fora, Courts and tribunals, have given expression to "the principles of the Treaty of Waitangi". My simple observation here is that this activity derives its legal foundation from the terms of a statute expressly referring to the principles of the Treaty of Waitangi. As the Tribunal has rightly emphasised, this very term – "the principles of the Treaty of Waitangi" – enables it to eschew strict legalism. The gap between, on the one hand, interpretation and, on the other, legal computation of the Treaty thus disappears, ironically because the legal rule that incorporates the Treaty into municipal law removes the gap. Legalism disappears because the permissive legal rule has been formulated to accomplish that result. This is not to say that the legal interpretation of the Treaty becomes completely irrelevant – rather it features in but does not dominate a broader canvas wherein the spiritual, cultural, linguistic, environmental, economic are as apt to arise.

Statutes can also recognise the Treaty of Waitangi by implication. The Town and Country Planning Act 1977 lists "the relationship of the Maori people and their culture and traditions with their ancestral land" (s 3(g)). Similarly the Law Commission Act 1985 requires recommendations for law reform to incorporate *te ao Maori* – the Maori dimension.

Such indirection affords no problem to interpretative agencies, the Crown, tribunals or officialdom, for plainly it is tantamount to an incorporation of the Treaty of Waitangi into the particular statute. My concern is with statutes which contain neither direct nor indirect incorporation of Maori rights under the Treaty of Waitangi, in particular those associated with property. It is on this front that legal developments of some significance seem to me imminent. This prospect will have enormous consequences for public administration in the country. To appreciate it we need first to survey the common law principles, the utterly Judge-made rules, governing the Crown's relations with the Maori tribes.

2 Common law and Treaty rights: the emergent doctrine of fiduciary duty

Several common law doctrines enable Courts to give some expression without statutory assistance to Maori rights under the Treaty of Waitangi. These are:

(1) The rule that treaties of cession bind the Crown in its executive (as opposed to Parliamentary capacity. In *Campbell v Hall* (1774) I Cowp 204, 98 ER 1045 Lord Mansfield listed amongst several "incontrovertible" propositions the description of treaties of cession as "sacred and inviolable". From this we get the legal restraint on the Crown acting in an executive capacity inconsistent with any promises in a treaty of cession of sovereignty such as the Waitangi document.

(2) The second common law doctrine is known as "aboriginal title". The term "aboriginal title" is used to describe the non-disruption of tribal property rights upon the Crown's assumption of sovereignty over their lands. The doctrine is based upon the fundamental distinction between government (or *imperium*) and ownership (or *dominium*). This aboriginal title is the basis of Maori claims to legal ownership of New Zealand's coastal fisheries. Essentially, the Treaty of Waitangi becomes by this doctrine no more than declaratory of rules which would have applied in any event so far as Maori property rights are concerned.

These two doctrines contribute heavily to a third new doctrine which New Zealand Courts are poised to recognise in its own right. This is the doctrine of the Crown's fiduciary duty to the Maori tribes. The Courts have already recognised some such doctrine but have extracted it from statutory references to "the principles of the Treaty of Waitangi". My suggestion to you today is that this basis in statute is not needed – The Judge-made law recognises that the Crown has a fiduciary duty to its tribal subjects irrespective of Parliamentary concession.

This might seem like an unremarkable legal conclusion to you; however its consequences are enormous. At the moment historic claims are channelled through the Waitangi Tribunal which hears, reports and makes non-binding recommendations to the Crown. The Crown is not constitutionally obliged to follow the Tribunal's recommendations. Tomorrow through Parliament it could repeal the Tribunal's empowering legislation. But the Crown is obliged

to heed the declarations of its Courts and would invite a constitutional crisis were it to respond otherwise. My belief is that the Crown's fiduciary duty would enable courts to give judgment against the Crown, often in relation to land and other claims over a century old, quite apart from the claims process of the Waitangi Tribunal.

A fiduciary obligation occurs in a relationship of the utmost good faith. A trustee, a company director, these are the typical fiduciaries recognised by the special part of the Judge-made law known as equity. A fiduciary responsibility arises where the person holding a legal power has with it a discretion which in the exercise affects the rights of those whose interests he must ensure. The concept of a fiduciary obligation has been said to be "the law's blunt tool for the control" of the exercise of the discretionary power.

The doctrine of aboriginal fiduciary obligation is North American in origin. In the United States and, to a less sophisticated extent, Canada, the Courts recognise that the Crown's administration of its assets is subject to its fiduciary duties to the native peoples. This fiduciary responsibility is distinguished from the common law aboriginal title in that an aboriginal title protects existing rights of use and occupation from loss. A fiduciary obligation is concerned with the standards and regulation of Crown behaviour.

I do not want to get into too technical a legal description of the Crown's fiduciary duty. However the North American cases guide the way in which it arises.

In several cases where the Crown or federal government has extinguished aboriginal title it has been held accountable for its disposition and use of the income generated from that extinguishment. This is no more than the settled principle that a trustee of land who holding the legal title gives the right of occupation other than to the equitable owners or beneficiaries, as by a sale or lease, remains a trustee for the assets remaining in his control. The trust does not end with the conveyance of the land. Thus the American Courts have held the federal government accountable for mismanagement of tribal property on the basis of an equitable and, separately, tortious duty of care.

So consider the Ngai Tahu claim, in particular two aspects, the Crown purchases and *mahinga kai.*

For those of you unaware this is a claim presently before the Waitangi Tribunal. The Ngai Tahu people allege that the Crown has not honoured the terms by which the tribe relinquished vast extents of the South Island. These "Purchases" required the Crown to set aside reserves for the local tribe and to protect their customary food and flora-gathering rights in the ceded lands (*mahinga kai*).

One approaches the whole of the Ngai Tahu – Crown relations on the basis of this fiduciary duty and looks to see if legislation has lightened rather than imposed this duty on the government. From the first the Crown negotiated with the Ngai Tahu as a fiduciary. It came to the now-disputed transactions with them already bound by this obligation. It negotiated with the tribe, obtaining their agreement to relinquish their rights of exclusive occupation (what the common law calls their "territorial aboriginal title"). However this did not discharge the Crown from its duties. Indeed it may have enhanced the Crown's responsibility in that (1) the terms of the agreement may have taken unfair advantage of the tribespeople and (2) the Crown may have failed to honour the agreement quite apart from questions as to its intrinsic "fairness". Each of these affords grounds to establish a breach of fiduciary duty.

Here it is appropriate to distinguish a *general* from a *specific* fiduciary duty. The general fiduciary duty is owed by the Crown to its tribes as a result of the historical and constitutional character of their relations. This general fiduciary duty might not be enforceable by a Court since by its nature it is vague and policy-oriented. That, however, is not to say that it will be without legal significance since it may have some bearing upon the interpretation of legislation and, it will be suggested later, the exercise of discretionary powers by public officials. This general fiduciary duty can assume a specific form in relation to particular transactions or dealings between Crown and tribe. Negotiation for the cession of an aboriginal title – the Kemp and Arahura "Purchases" in the South Island last century, would be classic examples. Another example, would be the Crown's attempts to issue quotas (the ITQ system) for the commercial sea fisheries without regard to the Maori property rights in the tribal fisheries.

The next question is: "do any statutes permit such breach of fiduciary duty?" I can only offer a provisional answer here as each individual case will depend upon the particular relevant statute law. However, one thing is clear: The one statutory provision designed to let the Crown off the hook, as it were, probably does not accomplish that result.

I refer here to what is now the infamous s 155 of the Maori Affairs Act 1953. This section provides that a so-called "Maori customary title" cannot be enforced against the Crown. Until 1984 this provision was ignored as a spent provision in the sleepy backwater of the 1953 Act. However that year I published an article written over a year previously and based on my doctoral research. For the first time the shabby history of this provision was revealed. Essentially, it was the outcome of a disagreement between the New Zealand colonial bench and the Privy Council in the first decade of this century. The New Zealand Courts had refused to recognise that the Maori might have any legally cognisable right to their ancestral lands, notwithstanding the property guarantee in the Treaty of Waitangi. In a notoriously influential case *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (OS) 72 (SC) Chief Justice Prendergast rudimentarily applied the feudal rule that all title to land must derive from a grant by a sovereign. By modish legal theory of the time (the jurisprudence of John Austin, and the view of a small, unrepresentative circle of publicists of international law limiting international personality to "civilised" societies), the Maori tribes lacked any sovereignty in 1840. This conclusion has been revealed as so flawed as to allow passage of the proverbial horse and cart. Certainly the Privy Council disagreed. When they did so in rather intemperate language (*Wallis v Solicitor-General* [1903] AC 491), the colonial bench and bar threatened to move for the abolition

of appeals to London. Parliament, however, intervened through the agency of New Zealand's most famous jurist, Solicitor-General John Salmond. Legislation drafted by his hand, s 84 of the Native Land Act 1909, codified the *Wi Parata* case. This section survives as s 155 of the Maori Affairs Act 1953 – a customary title is unenforceable against the Crown. Even the Crown has conceded the unconstitutionality of this provision. It disqualifies a section of Her Majesty's subjects, her Maori subjects, from vindicating their property rights in her Courts. Section 155 is now regarded amongst the most outrageous breaches of the Treaty of Waitangi and has been universally condemned as such.

I mention this – if I may digress for a moment – because history has an intriguing resonance. In September 1988, barely a few months after a Government Minister had disowned s 155, a Bill was introduced into Parliament (the Maori Fisheries Bill 1988) which would have rendered the Maori property right in their coastal fisheries unenforceable in the Courts.

Returning however to s 155 of the Maori Affairs Act, it is suggested that this disabling provision applies only to attempts by Maori to enforce a right of exclusive occupation of ancestral lands legally vested in the Crown (territorial aboriginal title). It does not apply to non-territorial aboriginal title such as coastal fisheries (a conclusion implicit in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 535 (SC). It does not apply to aspects of the Crown's fiduciary duty apart from the right to exclusive occupation. Thus s 155 might have prevented the tribes enforcing any claim to exclusive occupation of their lands whereover they had not sold or ceded such rights away. However loss of the right to occupy does not remove all of the rights which a beneficiary has against the fiduciary whose exercise of his discretionary power occasioned that loss. The fiduciary remains accountable for (1) its disposition of that land and (2) the proceeds which that disposition (a) has in fact produced and (b) should have returned had the fiduciary fulfilled his obligation to the tribal beneficiaries.

I have drifted into using the language of the law of trusts despite a caveat from the Supreme Court of Canada against applying its precepts too inflexibly to aboriginal claims. The American Courts are not so cautious in applying trust law principles to Indian claims. In both jurisdictions, however, the Courts stress that the government's obligations to the native tribes are *sui generis*. Its duties have many of the hallmarks of an orthodox trust relationship, but, ultimately, are rooted firmly in the history of official relations with the tribes.

It may be noted that the type of fiduciary relationship recognised by the North American Courts is an unequal one; a version of the trustee-beneficiary rather than equal partner model. In *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) the Court of Appeal described the Crown's duties to the Maori tribes in terms of an equal partnership. The Court was able to select that model of fiduciary relationship, however, because the statute in question (s 9 of the State-Owned Enterprises Act) itself suggested that model. Where the fiduciary duty is generated judicially (as opposed to legislatively), the model necessarily will have to be the "unequal" version of a fiduciary relationship. This result is a response to the constitutional imbalance of power between Crown (the superior party) and tribe.

So the Crown may be accountable in its Courts for breaches of fiduciary duty, some of them over a century old. Instinctively I hear the lawyers here think of the Limitations Act which prevents litigation once a claim has grown stale. The response to this however should unease the Crown: Limitations do not run in actions for breach of trust where fraud is alleged or to recover trust property from the trustee. These are the very points at issue in the Ngai Tahu claim with regard to the Crown purchases from the tribe several generations ago.

So returning to the Ngai Tahu claim, my suggestion is simple and for the Government frightening: The Ngai Tahu do not need to keep their claim before the Waitangi Tribunal which delivers "recommendations". There is a legal basis for an action in the Courts. A New Zealand Court has simply to be persuaded to apply the fiduciary doctrine as a Judge-rather than statute-generated rule. The North American Courts do so. It can only be a matter of time before the New Zealand Courts follow.

At the moment New Zealand Courts have based this fiduciary duty in the express terms of statutes referring to "the principles of the Treaty of Waitangi". I am suggesting that this duty arises irrespective of some statutory basis. The radical possibilities which this conclusion holds are immense, certainly as some here today such as Chief Judge Durie will recognise.

The recognition of this doctrine in its own right also has severe implications for the way in which legislation is interpreted. The old, now outmoded orthodoxy of previous generations has been that Parliament legislated on Maori matters in a legal vacuum. If my work has achieved anything over the past five years, it has been to show there exists a common law backdrop which inevitably must influence the way one looks at legislation. The judgment of Williamson J in the *Te Weehi* case (1986) has shown this point. In that case the Court examined s 88(2) of the Fisheries Act 1983 which exempted "Maori fishing rights" from the statutory scheme. The Court accepted that this section exempted a common law aboriginal title. This common law aboriginal title forms the backbone of present Maori litigation to establish the extent of Maori ownership of coastal fisheries. All parties concede some common law ownership but differ over its extent.

So just as legislation is becoming interpreted in light of any extant common law aboriginal title, so too will it come to be looked at in light of a separate albeit related doctrine of fiduciary duty.

Some will protest – as indeed once was the case with common law aboriginal title, the strongest judicial expressions of which in Commonwealth jurisdictions date from the early 1970s. Some will protest that this fiduciary doctrine is the latter day superimposition of legal doctrine on historical relations where nonesuch was conceived to exist. Indeed, when this argument is made reference is often had to *Tito v Waddell (No 2)* [1977] Ch

106. In this case Megarry VC held that the Crown's relations with a Pacific Island community were of a "higher political" trust, creating "moral" as opposed to "legal" obligations. This approach some argue to be more compatible with the historical record. But is it? The North American Courts clearly think otherwise. Look at the circumstances of Crown relations with Maori a little more closely. Is not the Treaty of Waitangi an express declaration of fiduciary duty? Did not the Crown protest (at least until Chief Justice Prendergast licensed otherwise in 1877) its lawful obligations to Maori under the Treaty? And does not the "incontrovertible" proposition in *Campbell v Hall* make it "sacred and inviolable". If there is some smug retrospectivity to judicial doctrines of aboriginal title and fiduciary duty, then too was there a smugness in the Crown assuming and protesting obligations to which its Courts were unequipped to respond. Why then should one be unhappy when the Crown is taken at its own word? Are New Zealanders simply too wedded to the idea that Crown Maori relations must be of an entirely political nature bereft of legal content? Pakeha New Zealanders certainly would not want their relations with the Crown to be utterly non-justiciable – it's a Glorious Revolution (1688) too late for that. We must not forget that access to the Courts to vindicate property and other rights is a fundamental right of the Crown's subject. It is one of those rights given the Maori in article the third of the Treaty of Waitangi. The Courts have stressed that the Crown's fiduciary duty to its aboriginal subjects is based in the historical relationship of the two. This is not legal-doctrine-come-lately so much as greater judicial responsiveness to the facts of history. Immigrant populations are essentially unhistorical and resent the historicism inherent in legal doctrine grounded in the past and its judicial confrontation.

From this you will gather my extreme impatience with those who insist Maori claims must be resolved entirely in the political arena. This has been a frequent theme of New Zealand Members of Parliament, particularly those in the Opposition. I suspect that these politicians are probably worried by the prospect of litigation since these days it is by no means clear that the Courts will respond as facilitatively as once. Indeed, we now have the ignoble prospect of the Crown taking the Maori to the Privy Council, an ironic reversal of legal history. The Canadian experience shows quite sharply how clarification of the law assists political negotiation. Certainly it gives negotiation an urgency and necessity which otherwise it would lack.

3 The doctrine of fiduciary duty and statutory interpretation

It has been seen that statutory references to "the principles of the Treaty of Waitangi" and probably indirect references will enable judicial response to the Crown's fiduciary position. But what where the duty is not incorporated even by indirect terminology into the statute?

The corollary of the doctrine of Crown fiduciary responsibility must be that statutes will be interpreted and must be administered in a manner consistent with this responsibility *unless* the statute authorises otherwise. The fiduciary doctrine thus becomes part of the legal backdrop to the legislative activity of the Crown.

There is an important inkling of this approach in Sir Robin Cooke's judgment in the *New Zealand Maori Council v Attorney-General.* Here Sir Robin observed that the principles of the Treaty of Waitangi required the Crown to act reasonably and in good faith. The "reasonability" of the Crown's conduct came, he said, "to the same thing" (at p 664) as that of the *Wednesday* case. In this case, *Associated Provincial Picture Houses v Wednesday Corporation* [1948] 1 KB 223, Lord Greene MR explained the concept of "reasonableness" as understood by administrative lawyers. A person entrusted with a discretion must "direct himself properly in law". "He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider". If one is to take Sir Robin Cooke's signal in the *Maori Council* case, it may be in the future that New Zealand Courts will require discretion-bearing decision-makers in public administration to take into account the Crown's fiduciary responsibility. Failure to consider the Maori dimension of exercise of a discretion may in future render that decision "unreasonable".

This possible development is in keeping with Sir Robin Cooke's impatience with any so-called barrier between "public" and "private" law. Here we would have the Crown's "private" law obligations, its accountability in equity under an aboriginal fiduciary doctrine, affecting the exercise of a public law discretion. This cross-fertilisation may intrigue indeed bemuse more orthodox lawyers, however it is very typical of the way in which Courts have responded to aboriginal claims.

The link of a fiduciary duty to *Wednesday* "reasonability" is not without analogy in administrative law. In *Roberts v Hopwood* [1925] AC 578 the House of Lords held that a local council had paid wages which were so excessive and unreasonable (being motivated by "eccentric principles of socialist philanthropy") as to be beyond its powers. Such philanthropy was not a relevant consideration. The council had to bear in mind its fiduciary duty to its ratepayers whose funds it expended. The fiduciary duty which a local authority owes ratepayers has been invoked in several cases since including the "fares fair" case (*Bromley LBC v Greater London Council* [1982] 2 WLR 62 (HL)). In that case the GLC's attempt to reduce bus and underground fares by 25% was held unreasonable in that it took account of the irrelevant (electoral promises) and excluded the relevant (the council's fiduciary duty to its ratepayers).

These cases on a local authority's fiduciary duty show that although a council's competence might derive from statute, its fiduciary duty to the ratepayer arises from the character of its relations with them. The GLC was held to have neglected its statutory as well as, separately, its fiduciary duty to the ratepayers. In short: there can be and was in that case a general fiduciary duty judicially as opposed to statutorily-generated. The suggestion that the Crown owes a general as well as

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Making one's bed under the Matrimonial Property Act 1976 and lying in it

By P R H Webb, Emeritus Professor of Law, University of Auckland

The problems associated with the concept of marriage of short duration, and whether property is for common use and benefit, continue to occupy the Courts. In this article Professor Webb considers the decision of the Court of Appeal in the recent case of Sloss v Sloss.

A most helpful and instructive decision in many respects, but especially upon s 8(ee) of the Matrimonial Property Act 1976 is *Sloss v Sloss* [1989] BCL 1255.

The husband used $85,538 of his separate property funds to acquire, in March 1985, in his own name, a commercial building in Clothier Street, Christchurch, for $290,000. The building was tenanted. It was purchased as an investment. For that purpose the husband borrowed $180,000 on first mortgage and $30,000 on second mortgage. It is this borrowed sum which is the central feature in the case. It was borrowed by the husband from an uncle of the wife at an advantageous rate of interest. The husband got his wife's help in this project by representing – both to her and to her uncle – that the property would be matrimonial property and that the venture would be a joint venture as regards him and his wife. The uncle clearly attached importance to this point. It influenced him in making the loan. He clearly expected his niece to benefit from the purchase of the building. The husband now claimed that his real purpose was to use the building solely as an investment for his own benefit.

The parties' marriage had lasted for two and a half years, after which they separated. The husband (who had been married before) was a farmer who had substantial assets at the time of marrying the wife. These assets amounted to some $225,000. They were mainly shares in his farming company. The wife had little more than a modest car.

Before the marriage, which took place in January 1984, the parties entered into a s 21(1) agreement. It was expressed to last for ten years from the date of the marriage. After the marriage, the wife worked as a secretary for four months, contributing her earnings. She thereafter carried out domestic responsibilities. She cared for the parties' one child. The husband attended to the farming operations.

The sole real issue before the Court was whether the Clothier Street building was the husband's separate property or was matrimonial property, and, if it was matrimonial property, in what shares it should be divided under s 15.

The Court of Appeal accordingly had to consider several noteworthy matters:

(1) Whether the Christchurch building was acquired after the marriage "for the common use and benefit of both the husband and the wife" within s 8(ee).

Richardson J dealt with this problem as follows:

> There are two particular features of importance in this case. First, the test is not one of actual use and benefit, of whether the property was applied for their common use and benefit (compare s 10(2)). "For" connotes purpose and the acquisition must be for the purpose of the common use and benefit of the spouses. In some cases where various purposes can be identified, it may be proper to distinguish in temporal terms between immediate and intermediate and longer term purposes and in the case of concurrent purposes it may be sufficient to adopt a dominant purpose test. These are familiar enquiries in other branches of the law. However, it is, I think, important that in a statute of such wide general application in daily life subtle distinctions should be avoided whenever possible in favour of a broader general test. That test hinges on the purpose of the acquisition – what was intended rather than what was actually done with the asset.

Second, "common use and benefit" is a compendious expression. It does not call for two separate enquiries. Certainly, the two elements in the concept must be recognised and it is the "use" element that has given rise to difficulties of interpretation in the decisions under the paragraph reported in the various volumes of the Matrimonial Property Act Cases and the *Family Law Reports* (see the review of the authorities in *Smallbone v Smallbone* (1982) 1 NZFLR 426 (Barker J) and the decisions in *Rogers v Rogers* (1982) 5 MPC 129 (Quilliam J), *Flett v Flett* (1985) 1 NZFLR 587 (Hardie Boys J) and *Hopkinson v Hopkinson* (1985) 3 NZFLR 408 (Barker J)).

The physical occupation of property is clearly a use of that property. In its ordinary

meaning, "use" is not, however, confined in that way. In its natural meaning it is a word of wide import. The *Shorter Oxford English Dictionary* gives as the first meaning, "[the] act of using or fact of being used", and amongst the more detailed definitions is, "utilisation or employment for or with some aim or purpose". The owner of land may be said to use the land when, without doing anything on that land, he obtains advantages from the land (*Newcastle City Council v Royal Newcastle Hospital* [1959] AC 248, 255) and in *R v Heyworth* (1866) 14 LT 600, 601 Lush J observed that: "The owner 'uses' the place [a slaughterhouse] by letting it out". Even the giving away of property may be a "use" of that property (*R v Wampole (Henry K) & Co* [1931] 3 DLR 754).

Further, the intended application of s 8(ee) is to matrimonial assets (other than the matrimonial home and family chattels) which are subject to a common association with both spouses. In that statutory context "use" as part of the compendious expression, "common use and benefit" should be given its wide natural meaning. To come within s 8(ee) it is both necessary and sufficient that it was intended that both spouses should share in the utilisation or employment of the asset and benefit from it. The statutory enquiry may be answered affirmatively not only where at the outset the parties are to share in that way but also in the case of longer term acquisitions where it is intended that they will do so over time.

The owner of property acquired as an investment and intended to be let is not the passive recipient of rents. The investment has to be managed and from time to time new tenancies arranged. In such a case it is not inapt to refer to that kind of involvement as the utilisation or employment of the property and if, on the facts, it is intended to involve that kind of sharing between the spouses, it is not inapt to describe the acquisition as being for the common use and benefit of both husband and wife.

Section 8(ee) and the facts of this case

As noted earlier, the wife's evidence was that they had an understanding that Clothier Street would be matrimonial property. The husband denied that but must, I think, be held to his unequivocal assurance to the uncle when seeking the finance that, "Firstly, this building is a joint venture between Sue and myself. It is matrimonial property."

The property itself is let to two tenants. One moved in in 1984 and the other in April or May 1985. The term of each lease is not in evidence but it seems that the leases are subject to periodic rent reviews, in one case after 2½ years and in the other after three years, and on expiry of the term of the lease a renewal or a new tenancy would have to be arranged. That contemplated involvement in the property is a use by the owner of the property and the acquisition of the property was, on the evidence, for the common use and benefit of the spouses.

There are, of course, many other cases on "common use and benefit" under ss 8(d) and (ee) (and the original s 8(e)): see the cases listed by Somers J in his judgment — in addition to those already listed by Richardson J — viz, *Fuller v Fuller* (1978) 1 MPC 85; *Campbell v Campbell* (1978) 2 MPC 33; *Best v Best* (1981) 4 MPC 14; *Bennett v Bennett* (1981) 4 MPC 12; and *Paulin v Paulin* (1987) 3 NZFLR 171. (One might suggest the possible addition of *Haggie v Haggie* (1978) 1 MPC 98 to the lists.)

Somers J said that the cases indicated that "a common user may readily embrace a benefit to both spouses but that such a benefit does not necessarily include a common user." By way of example, he instanced the spouse who outlays separate property to buy a block of flats or company shares and who intends to, and does, apply the income therefrom for the benefit of himself and his wife. Such spouse "does not thereby suffer a loss of the separate character of the flats or shares." The same, he added, was likely to be the case if the property was a business carried on only by the purchasing spouse, though, in such a case, the income would be matrimonial property under s 8(e), being earned by the endeavours of the spouse.

His Honour noted that the word "intended" did not occur in s 8(ee), but considered that the word "for" had reference to purpose or intention, ie of common benefit. Not so clear to His Honour, however, was whether s 8(ee) required the purpose to have been carried into effect or achieved as well. While it was easy to see that property intended for common use and benefit and actually used and benefiting could be regarded as matrimonial property, it was not so easy to see why property intended for common use but never so employed should have that status. He finally considered that the intended commitment of the separate property at the time of purchase was sufficient. In most cases, what was subsequently done — how the property was enjoyed or used — was the only evidence from which the intention or purpose at the time of acquisition could be ascertained. Here, however, the intention was to be determined from contemporaneous declaration. On any reasonable view, the declaration embraced both intended common use and benefit. On the facts, it is not possible to gainsay this point.

Casey J essentially agreed with this: he considered that the word "for" indicated that the purpose of the acquisition was to be the primary consideration. He added, obiter, that he "would not necessarily exclude from matrimonial property an asset originally acquired after marriage as separate property, but which subsequently becomes held for the common use and benefit of both spouses." He, too, explored the meaning of the word "use", saying:

> "Use" can attract many shades of meaning in the various contexts in which it appears, but one of its primary definitions in the *Shorter Oxford English Dictionary* relevant to the present enquiry is "employment for or with some aim or purpose". The degree of involvement by the user must vary according to the nature of the particular object. In an ordinary domestic situation, the ability of both spouses to exercise direct physical advantage or

control will usually establish whether it is for their common use and benefit, – eg a holiday cottage or the family car. But other assets may not be capable of such a physical relationship, and this is the case with the commercial property here. Its functions were to generate income and serve (hopefully) as an appreciating asset. Its value had shown a satisfactory rise at the date of hearing. Those functions make up its "use" to its owner.

The circumstances of its acquisition and the statements made by the appellant leave me in no doubt that, at the time, he intended to share that use and the ensuing benefit with his wife. The property was purchased at an early stage of their marriage, which both expected would last, and at a time when the wife was pregnant with their first child. Mr Sloss had money not immediately needed and on advice was looking to diversify investment because of the doubtful future of farming. It was natural enough that he should bring his wife into the discussions over a project that was so obviously important to the security of the family in the years to come, and that he should enlist her help in approaching her uncle.

He stops short at conceding any intention to give her a matrimonial interest. However, the weight of the evidence supports the opposite conclusion. . . .

There can be no doubt of the strength of Casey J's feelings concerning the attitude of the husband, for he immediately went on to observe as follows:

> There is no doubt (as the Judge found) that her uncle believed he had given him an unequivocal assurance that it would be matrimonial property and evidence of similar assurances was given both by the wife and her father. Mr Sloss had to go to the extent of saying that he lied in order to get the loan – a fact which presents some obstacles to an unreserved acceptance of his evidence that his real and undisclosed purpose was to use the property solely as an investment for himself.

(2) Accepting that the Clothier Street building was matrimonial property, was the husband's $85,538 contribution still his separate property, and was it to be deducted or excluded in arriving at the value of the matrimonial property?

This turned upon the combined effect of ss 8(ee) and 9(6) on the facts of the case. The interrelation between these provisions was painstakingly discussed in *Geddes v Geddes* (1986) 4 NZFLR 330 (CA) in the context of s 10(1) of the Act. It was held unanimously on the present facts that the husband's cash contribution to the building out of his pre-marital resources lost any separate identity once it was committed, with his consent, to property acquired for the spouses' common use and benefit. Even so, it is instructive to see how Richardson J approached this aspect of the case. He said:

> It is, I think, significant that, unlike s 8(e), s 8(ee) is not subject to s 9(2) under which, "all property acquired out of separate property . . . shall be separate property." Indeed s 9(2) is expressly subject to s 8(ee). That can only be for the reason that prima facie such property is regarded under the statutory scheme as not retaining its identity as separate property when the new property is acquired for the common use and benefit of the spouses. That property is matrimonial property even though it was acquired out of separate property.
>
> That characterisation is, however, subject to s 9(6) and to s 10. If property out of which the common association property was acquired came from an inheritance or gift then s 10 must also be taken into account. What that section does is to exclude the gift or inheritance which has been employed in that way if it can be identified – that is unless it has been "so intermingled with other matrimonial property that it is unreasonable or impracticable to regard that property . . . as being separate property" (s 10(1)) – or, in the case of an inter-spousal gift, "unless the gift is used for the benefit of both the husband and the wife" (s 10(2)). In short, the respective tests under s 8(ee) and s 10 must both be satisfied.
>
> Where s 9(6) is material the additional test is that the separate property owned before the marriage was used for the acquisition of the common association property with the express or implied consent of the spouse owning that property. That common association property within s 8(ee) is within the closing words of s 9(6), "any property referred to in s 8 of this Act." And, while the consent to the use of the separate property in that way required by s 9(6) will ordinarily be satisfied if the common association test in s 8(ee) is satisfied, there are other paragraphs of s 8 where the added requirement of s 9(6) could be of considerable practical significance.

(3) Whether, despite s 8(ee), the Christchurch building remained the husband's separate property by virtue of one clause in the s 21 agreement and whether the $85,538 did so pursuant to another clause in it. And, further, should the agreement be set aside under s 21(8)(d) – as having become unfair?

The first mentioned clause provided that all moneys arising from the conversion or realisation of any separate property owned by either party should belong to the owner of such separate property and any property acquired by either party with his/her separate property or the income and gains derived therefrom or the proceeds of any disposition thereof should be the separate property of the acquiring spouse even though such property acquired should be for the common use and benefit of the parties. The second clause provided that, notwithstanding that separate property was intermingled with matrimonial property, it should remain separate property.

The second clause was seen by the Court as having no possible application here as the husband's separate property had not been intermingled with any matrimonial property. It had lost its identity on being used to acquire the "common association" property.

The first clause was, however, seen as being directly in point. It had, it seems, never been referred to

in the discussions between the uncle and the parties. It would, indeed, bar the wife's claim to share in the building. In these circumstances, it was considered that to allow the husband to rely on the second clause as "an escape route" (as Richardson J aptly put it) would be inconsistent with his stance at the time – particularly to his assurance to the uncle that the purchase was a joint venture with his wife and that the building would be matrimonial property. It would also be contrary to the basis on which the wife and the uncle then acted.

Richardson J went on to make another important point, viz, that s 21 did not allow for a contracting out agreement to be voided as to some provisions and to remain valid for others. The present proceedings were concerned only with the building and there was no suggestion of proceedings being brought in respect of other matrimonial property. The family chattels were not subject to the s 21 agreement. It had not been suggested that, apart from the building, the husband's resources, if considered as separate property under the 1976 Act rather than as property excluded by the s 21 agreement, would be dealt with differently if the 1976 Act regime were applied. As, however, some unexpected question might arise in the future, it would be right, in his opinion, to protect the position and accordingly to make an order declaring the s 21(1) agreement void – *but subject to the condition that neither party would make any further application against the other in relation to their rights under the 1976 Act without the leave of the High Court.*

Casey and Somers JJ agreed with this solution. Casey J put it that, notwithstanding that the wife might not have been induced to act to her detriment by the husband's representations, he thought that the Act entitled him to form a broad view of the situation and say that, in all the circumstances and having regard to the advantage that the husband obtained with his wife's help, it would be unfair for the husband now to raise the s 21 agreement against the wife. In His Honour's view, the agreement might well have operated unfairly against her. He noted that the parties' home was on the farm – owned by the husband's company.

(4) Was the 80-20 division originally ordered by the High Court in the husband's favour correct? Or should the husband, as he contended that he should, have an even greater share? Richardson J summed the matter up thus:

> In contending for an even greater share for the husband, Mr Sissons submitted to us that in such a short marriage non-financial contributions could not assume great significance and the financial contributions must weigh heavily in the balance. This submission fails to recognise, as stressed by this Court on so many occasions from the first group of cases decided by this Court under the Act beginning with *Martin v Martin* [1979] 1 NZLR 97, down to *Reid v Reid* [1979] 1 NZLR 572 and onwards, that the just division of the matrimonial property to which the long title of the Act refers must reflect the proper recognition of the presumption of equal contributions of husband and wife to the marriage partnership.
>
> In terms of s 15, the equal sharing of matrimonial property other than the matrimonial home and the family chattels is to be departed from only where it is established that the overall contribution made by one spouse to the marriage partnership over the span of their lives together – that overall contribution being evaluated in terms of the criteria referred to in s 18 – has been clearly greater than that of the other spouse. Section 18(2) effectively enjoins the Court not to be mesmerised by the fact that one spouse may have made a greater financial contribution to property during the marriage. The statutory scheme recognises that in the general run each spouse contributes in different but equally important ways to the common enterprise which constitutes the marriage partnership and the legislation presumes that, in the ordinary circumstances of marriage, the respective contributions of the spouses, whatever form they have taken, will be in balance at the end of the day.
>
> A contribution to the marriage partnership by one spouse of separate property is properly treated as an additional contribution by that spouse for the reason that the separate property did not itself result from the operations of the marriage partnership. In the same way transactions with relatives or friends of one spouse which are not at arm's length and not on a commercial basis may warrant the inference that they were entered into in that way for the primary benefit of that spouse. If so, they are properly characterised as a contribution made by or on behalf of that spouse to the marriage partnership and ranking as an additional contribution by that spouse. The casting of the matrimonial net widely under s 8 is thus balanced by the recognition given to contributions of that kind in determining whether or not unequal sharing is called for under s 15 and, if so, the extent of the inequality.
>
> Where unequal sharing has been established, the same considerations as are involved in the presumption of equal sharing warn against reaching a conclusion that the disparity in contributions has been so great as to justify a massive differentiation between the spouses.

Having examined the parties' contributions, he concluded that

> clearly there was a very substantial imbalance, particularly having regard to the advantages to the marriage partnership of the husband's separate property base and his contribution of separate property to the purchase of Clothier Street.

The 80:20 division was upheld by all the members of the Court. It was also agreed that overdraft interest should not be taken into account in fixing an allowance for the husband's post-separation contributions in respect of the building. He had claimed this on the

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Discretionary exclusion of evidence

By Dr Don Mathias, Barrister of Auckland

This article compares the decision of the New Zealand Court of Appeal in Sutton *(1988) 4 CRNZ 98, with a number of recent Canadian decisions. In* Sutton *evidence was admitted even though it had been illegally obtained. It is contended that the evidence in* Sutton *could be admitted because the officer conducting the search did so in good faith; but that if there had been deliberate misconduct then the evidence obtained would be inadmissible.*

It was with adverse criticism at [1989] NZLJ 81 that Simon France greeted the decision of the Court of Appeal in *R v Sutton* (1988) 4 CRNZ 98; it seemed that there was no meaningful sanction against illegal searches which were bona fide if the evidence so obtained was to be admissible against the accused. Perhaps the most interesting holding in *Sutton* was the separate point that "Knowledge of a fellow police officer, even though not communicated in its entirety to the officer conducting the search, may be added to the knowledge of the searching officer for the purposes of deciding whether that officer has reasonable grounds [of belief as required by s 18(2) of the Misuse of Drugs Act 1975]": (1988) 4 CRNZ 98, 103. Would this pooling of knowledge and belief operate to redeem a search carried out by an officer who acted in bad faith? But this was not Mr France's quarrel; he was concerned that the discretion to exclude admissible evidence concentrates on the wrong issue. He suggested:

> New Zealand should abandon the focus on "fairness" and adopt a "public policy" approach similar to that followed in Australia. . . . the inquiry is directed towards the actions of the enforcement agency rather than pursuing a normally fruitless search for merit in the particular accused. (pp 82, 83)

The purpose of this article is to show that this is already the approach to the exercise of the discretion, and that the expression "fairness to the accused" is simply a way of stating a conclusion as to why evidence should be excluded following an analysis of the circumstances connected with the illegality. It must be accepted that this process of analysis is usually unstated by the Court of Appeal, in contrast to the detailed consideration of the relevant factors to be found, for example, in some judgments delivered by members of the Supreme Court of Canada (infra). In *Sutton* the overall impression must be said, with respect, to be one of lack of balance: there is detailed consideration of whether the particular search was illegal, and none on the reasoning process behind the determination that the evidence was properly admissible. On the other hand, the Court may well have thought that the evidence was self-evidently admissible (cf *Kuruma*, infra).

It will be apparent from the following discussion that the decision in *Sutton* was correct, and that it would have been the same even if the facts had fallen for decision in Canada, where special statutory protection is extended to the right to freedom from unlawful search.

Before attempting to identify the process of reasoning behind the exercise of the discretion to exclude evidence, it is important to be clear as to what sort of evidence is being considered. The discretion does not operate on confessions which are found to have been not voluntary. Those are inadmissible at common law. Nor does it concern statements which are inadmissible by operation of s 20 of the Evidence Act 1908. Nor should the exercise of the discretion presently being considered be confused with the discretion to reject evidence on the grounds that its probative value is outweighed by its prejudicial value. Where it does apply, it applies both to confessions and to "real" evidence – things found or obtained in the course of the investigation and sought to be produced as exhibits (or information about which is sought to be given in evidence).

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basis of *Meikle v Meikle* [1979] 1 NZLR 137 and *Rush v Rush* (1986) 4 NZFLR 236. It was held that to allow him any interest would involve double counting and his claim was disallowed. The appeal was accordingly dismissed.

It is submitted that the result is just. As Casey J put it, the husband "made his bed under the Act and must lie in it, regardless of what mental reservations he now says he had at the time." Indeed, the opening sentence of the judgment of Somers J puts the whole case in a nutshell:

> A husband who uses his separate property to buy a building and for that purpose borrows from his wife's relative and obtains her help to do so on the representation to both that the purchase will be matrimonial property can hardly be surprised if he is held to his word.

Further comment is needless. □

Often when a court says it would not be unfair to the accused to admit real evidence found or obtained unlawfully, what is meant is that such evidence is reliable. This is a narrow usage of the idea of unfairness and it should not be thought that such cases are decided on the point of reliability alone.

Analysing the spectrum of circumstances

In suggesting that a survey of cases on this discretion reveals a particular process of reasoning, it is not meant that the discretion is thereby confined or fettered, merely that it is disciplined. As the law meets new situations the processes of evaluation will adapt accordingly (by an interaction of what T S Eliot might have called visions and revisions) and the pattern of analysis may change; the point is that the exercise of the discretion will still be a rational process. When a Court holds that evidence should be excluded in the interests of fairness to the accused to prevent an abuse of process, it is only saying *why* the evidence should be excluded, and not *how* the existence of those grounds is to be determined.

An examination of cases on the exercise of this discretion reveals a spectrum of factual circumstances, at one end of which are cases of police misconduct in the course of the investigation, and at the other end cases of merely technical breach of such a nature as to fail to attract the exercise of the discretion. Between these extremes there are cases of wrongly invoked obligations, and also cases where the breach is more than merely technical and may be called unfair breach. Rather than call this latter area the area of unfair breach — an unsatisfactory description because unfairness in a general sense is common to all areas of exclusion — the description "more than merely technical breach" will be used since it conveys the notion of being close to the area of acceptability. If these groupings of cases may be likened to the different colours of the spectrum it will be recognised that like the colours they merge into one another and it will sometimes be difficult to say whether a particular case belongs in one group as opposed to the neighbouring group. Further, there will be a region of the spectrum where the acceptable meets the unacceptable, representing the separation of technical breach from breach which is more than merely technical, and the critical task is to determine how this distinction is to be recognised. In the following discussion the different regions of the spectrum are briefly identified, and then a comparison is be made with the position in Canada and the application of a test to identify unfair breach is considered. Moving across the spectrum from the inadmissible to the admissible areas, the regions are: serious misconduct by the officials carrying out the investigation; the wrongful invocation of obligations to provide evidence; more than merely technical breach of the suspect's rights or of procedural requirements; (and on the admissible side) breach which is merely technical.

(1) Was there serious misconduct?

In some cases the appropriate place in the spectrum for a particular case will be easily recognised, in others it will be necessary to consider the separate areas in turn. In doing so, the first inquiry that may be made of a given factual situation is whether the Court is called upon to exercise a supervisory role to prevent an abuse of process arising from a significant shortcoming in the methods adopted in the investigation of the alleged offence. The classically recognised exception to the rule in *Kuruma v R* [1955] AC 197 that a Court is not concerned with how admissible evidence was obtained recognises the unfairness to the accused that would accompany the admission of evidence obtained by a trick: per Lord Goddard CJ, delivering the advice of the Board, p 204. It was recognised that a criminal Court always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. In its narrowest sense, unfairness is linked to unreliable evidence; judicial concern at the unreliability of confessions led to the development of the discretion to exclude them: see *R v Thompson* [18 93] 2 QB 12, 18 (Cave J); *R v Kerr* (1910) 13 GLR 93, 94 (Cooper J); and *R v Voisin* [1918] 1 KB 531. An example of the use of trickery is *R v Mason* [1987] 3 All ER 481, where the police lied to the suspect's lawyer about the existence of an incriminating fingerprint at the scene of the crime, causing the lawyer to advise the suspect to confess; the Criminal Division of the Court of Appeal held that this police tactic was most reprehensible and it had such an adverse effect on the fairness of the proceedings that the Court ought not to have admitted the confession.

In this category of exclusion the wrongful conduct which gives rise to the exercise of the discretion will usually be deliberate. For example, the established procedures for the interviewing of youthful suspects may be ignored with the result that the young person is disadvantaged by immaturity: *R v W* (1986) 2 CRNZ 576 (Williamson J), *M v Police* (1988) 3 CRNZ 506 (McGechan J), *R v I* (1987) 3 CRNZ 444 (Williamson J), *R v W* (1988) 4 CRNZ 21 (Robertson J — here the breach occurred in good faith but was still fundamental). Again, there may be a denial of a suspect's basic rights, for example the right to have access to a lawyer when in custody for questioning: *R v Hapeta* (1988) 3 CRNZ 570 (Robertson J) and *R v Webster* [1989] 1 NZLR (Court of Appeal, obiter); or the right to remain silent: *R v Finlay* (1987) 3 CRNZ 483 (Heron J); or the right to be brought before a Court as soon after arrest as is reasonably possible: *R v Alexander* [1989] 1 NZLR (Court of Appeal, obiter). Sometimes a combination of factors may add up to unacceptable conduct, as in *R v H* (1985) 1 CRNZ 453 (Judge Green, where the police manipulated the suspect's custodial situation and took advantage of his drug withdrawal symptoms during persistent interviews in a way which amounted to "rigorous use of unbridled power which has no place in our society.") These various shortcomings in the procedures by which evidence is collected may be summarised as trickery, misleading the accused, deliberate disregard of the law, or conduct which is otherwise morally reprehensible: *Hope v Maxwell* (1984) 1 CRNZ 292, 297 (Tompkins J, noting the absence of these features on the facts of that case).

(2) Were obligations wrongly invoked?

A second line of inquiry, which may be embarked upon if the first does not indicate that exclusion of the

evidence is appropriate, is whether by wrongful conduct (bona fide or not) an enforcement officer has sought to bring upon the defendant a series of statutory obligations to create evidence against himself. This will arise, for example, where purported exercise of power under the Transport Act 1962 has led to evidence of the alcohol content of a breath or blood sample provided by the defendant. Illustrations of the Courts' careful assessment of the circumstances where evidence is obtained under this form of compulsion are *Howden v MOT* [1987] 2 NZLR 747, (1987) 2 CRNZ 417 (where there was a misrepresentation in good faith by the officer as to his powers of entry onto private property), *Reece v ACC* (1988) 3 CRNZ 449 (mere argumentativeness by the suspect on private property did not amount to revocation of the officer's implied licence to be there), *Burich v MOT* (1988) 3 CRNZ 177 (the suspect's warning that it was private property gave the officer notice that he should ask permission to remain there). Failure to mention the possibility of bail can lead to the exclusion of evidence of refusal to accompany the officer unless there was some very good reason why bail was not mentioned: *Pillay v MOT* (1988) 3 CRNZ 593, applying *ACC v Dixon* [1985] 2 NZLR 489, 492 ("unless the person is made aware that bail may be available there is a plain risk that consent to a blood specimen will be extracted by what is tantamount to misrepresentation. That the Courts could not countenance".).

There is an important distinction to be drawn between evidence obtained by this type of breach and the discovery of evidence by a search which is more than technically illegal. In the former case the evidence is actually created under the wrongly invoked legal obligation to do so, whereas in the latter case the evidence was there to be found, having been previously created.

(3) Was there more than a merely technical breach?

The third inquiry arises if the first two do not require exclusion of the evidence, and it involves asking whether the evidence sought to be adduced was created or discovered by a procedural breach which was more than merely technical. There will be some overlap with the second area of concern in terms of the seriousness of the breach, and even the first area may be difficult to distinguish in some situations. However the importance of this difficulty is lessened because in each case the evidence will be excluded. Custodial interviewing of youthful suspects is an illustration of this point: *R v H* (1986) 1 CRNZ 571 (Jeffries J) and *R v W* (1986) 2 CRNZ 576 (Williamson J, supra) might be placed in either category one or three, but in any event the result is exclusion of the statements. There may be a combination of unsatisfactory features of the interview, none sufficient in isolation to warrant exclusion but sufficient when taken together: *R v Curtis* (1988) 3 CRNZ 385 (Smellie J). It is important to remember that there must be a causal link between the misconduct and the creation or discovery of the evidence which is sought to be excluded. It should also be noted that the misconduct will not be deliberate in this category of cases. Nor need it be directly attributable to the police, as in *R v Edgerton* (1985) 1 CRNZ 616 (Casey J), where a friend of the suspect passed on to the police admissions made where there had been no caution that they would be passed on. Evidence obtained by undercover officers is not thereby obtained by trickery: in *DPP v Marshall* [1988] 3 All ER 683 it was held that the deception inherent in the use of undercover officers is not rendered unfair merely because they took part in an unlawful transaction. However it is well established that when such officers create, by persistent encouragement, an offender out of a person who would otherwise be a non-offender in a general sense, the evidence so obtained will be excluded: *R v Pethig* [1977] 1 NZLR 131, and see *R v Katipa* (1986) 2 CRNZ 4. Where this occurs the breach could amount to police misconduct.

An example of a wrongful search which was held to be "rather more technically illegal than unfairly illegal" is *R v Lee* [1978] 1 NZLR 481, 487 (Chilwell J), where a small bag of heroin was found inside the accused's right sock; the search had been wrongful because the accused had not been informed (as required by s 213(5) of the Customs Act 1966) of his right to be taken before a Collector of Customs or a Justice of the Peace. But there was no unfairness as the search was confined to the right sock and occurred after the customs officer formed the necessary reasonable cause to suspect that the accused had unlawfully secreted about his person any restricted goods. The accused had been informed of his rights immediately after the search. This was, Chilwell J observed, different from a hypothetical set of facts which would amount to unfairness, where an accused was completely stripped and searched at the foot of a gangway. It was held that wider issues of public policy were irrelevant, and the only consideration was whether there had been unfairness to the accused; in this respect *Lee* may have been modified by *Sutton*, see infra.

Another case of merely technical breach is *Kuruma v R* [1955] AC 197. A search of the appellant had allegedly shown him to be in possession of two rounds of ammunition, a capital offence. The search was unlawful because it was not carried out by an officer of or above the rank of assistant inspector. It seems that the most senior officer available was summoned to carry it out and it took place in relative privacy. The illegality of the search did not trouble their Lordships.

In each of the above categories of cases (or areas of the spectrum) it could be said that where evidence is excluded in the exercise of the Court's discretion, that is done in the interests of fairness to the accused. To summarise the grounds for exclusion in that way is misleading if it suggests that the Courts look for some merit in the accused; as the above analysis shows, the spotlight is on the conduct of the investigating officials. Mr France's claim that the focus on fairness involves a search for merit in the accused ([1989] NZLJ 81, 83 supra) is, with respect, not sustainable.

Fairness, miscarriage of justice, and disrepute to the administration of justice

Applying the above analysis to *Sutton*: there was no need to invoke the supervisory role since the officer who carried out the search acted in good faith and the breach occurred by reason of the difference between

suspicion and belief. The discovery of the evidence was caused by this breach, and it was merely a technical breach. Criticism of *Sutton* must therefore address the question whether the Court was correct in holding that the breach was merely technical and did not give rise to unfairness.

It is noteworthy that in *Sutton* the Court endorsed the use of the criterion of miscarriage of justice by the trial Judge:

> . . . we agree with the Judge that the evidence should be admitted unless there is the likelihood of a miscarriage of justice. (p 103)

It would plainly be inappropriate for an appellate Court to have to decide the question of fairness by criteria which differ from those used by the trial Judge. Basically it is a question of justice, and there is no novelty in associating fairness with justice; Aristotle observed the link in *Nicomachean Ethics* (C4 BC), Book 5 ("So just means lawful and fair; and unjust means both unlawful and unfair"), and so did H L A Hart in *The Concept of Law* (1961), Chapter 8 (". . . most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words 'fair' and 'unfair' "). The Courts must strive to prevent miscarriage of justice in order to avoid bringing the administration of justice into disrepute.

Avoidance of disrepute: the Canadian approach

One of the beauties of the common law jurisdictions is that where the law is similar, persuasive use may be made of foreign judgments. This alone is good reason for opposing the introduction of an idiosyncratic criminal law. The broad based discretion in New Zealand may be usefully compared with that which exists in Canada, and it will be suggested that what in New Zealand is excluded because there has been unfairness in the general sense, is excluded in Canada because to admit it would bring the administration of justice into disrepute. These are equivalent "Why" questions (ie "why exclude the evidence?"), and the Canadian answer to "How" to identify appropriate cases for exclusion will be applicable for that purpose in New Zealand.

In Canada 613(1)(b)(iii) of the Criminal Code provides that an appellate Court may dismiss an appeal against conviction notwithstanding that there had been a wrong decision on a question of law, if it is of the opinion that "no substantial wrong or miscarriage of justice has occurred". Statutory recognition is given to certain rights and freedoms in the Canadian Charter of Rights and Freedoms, which is to be found in Part 1 of Schedule B to the Canada Act 1982. These include, as clause 8, "Everyone has the right to be secure against unreasonable search or seizure." The evidential consequence of a breach of protected rights and freedoms is specified in clause 24(2):

> Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Judicial disagreement in one case

A disagreement as to the consequences of a breach occurred in the Supreme Court of Canada in *R v Collins* (1987) 56 CR (3d) 193. The majority held that the circumstances involved serious misconduct, while the minority Judge classed this as a case of excusable technical breach not requiring exclusion of the evidence. The brief facts of the case are that two constables who were at a surveillance post near a village pub saw the defendant seated with another woman at a table in the pub. The defendant's husband arrived at the table with another man. About 15 minutes later the men left the pub and drove in the defendant's husband's car to a trailer park a short distance away. The police followed them and searched the car, finding heroin, some multicoloured balloons and other paraphernalia. The defendant's husband was arrested. The constables returned to the pub and found the defendant still there. One constable rapidly approached the defendant and grabbed hold of her by the throat to prevent her from swallowing any evidence that may have been in her mouth. In the course of that they both fell to the floor. The constable then noticed that the defendant was concealing something in her hand, and at his request she released it. It was a green balloon containing heroin. The defendant was charged with possession of heroin for trafficking, and she was convicted after the trial Judge had ruled that although the search was unlawful, unreasonable, and in violation of her Charter rights, the evidence of the discovery of the heroin in her hand should not be excluded. Her appeal was unanimously dismissed by the British Columbia Court of Appeal, and she appealed to the Supreme Court of Canada.

It was assumed for the purposes of the appeal that the Officer who carried out the search of the appellant merely had suspicions rather than the necessary reasonable grounds. Weighing the disrepute which might attach to the evasion of a conviction by a person who had been found guilty of a serious offence at trial, against the greater disrepute which would attach if the Court did not dissociate itself from the conduct of the police, the appeal was allowed by a majority of 5 to 1 (the 7th Judge took no part in the judgment) and a new trial was ordered. Lamer J, delivering the leading majority judgment, observed (p 214) "we cannot accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs."

On this point *Collins* is distinguishable from *Sutton*, where there was no physcial violence done to the person of the accused by the officer who carried out the search of his car. The same weighing of the factors considered in *Collins* would apparently result differently in *Sutton*: in the particular circumstances of *Sutton* more disrepute to the administration of justice would attach to the evasion of a conviction than would attach to the appearance of judicial condonation of unlawful search procedures.

On the topic of unfairness, Lamer J observed at p 214 in *Collins* that there was nothing to suggest

that the use at the trial of the evidence obtained as a result of the search would render the trial unfair. Clearly then, unfairness was seen as separate from the question of disrepute; an unfair trial would necessarily bring the administration of justice into disrepute, but absence of unfairness did not require the conclusion that there was no tendency to disrepute. A separate majority judgment was delivered by Le Dain J, who agreed that having regard to all the circumstances, and in particular the relative seriousness of the violation of the right to be secure against unreasonable search, the admission of the evidence would bring the administration of justice into disrepute. But he added that he did not wish to be understood as necessarily subscribing to what Lamer J had said concerning the nature and relative importance of the factor which he called the effect of the admission of the evidence on the fairness of the trial.

The dissenting Judge in *Collins*, McIntyre J, purported to differ from the others on the formulation of the test by which it was to be decided whether the administration of justice would fall into disrepute by the admission of the evidence. The test employed by McIntyre J was whether the administration of justice would be brought into disrepute by the admission of the evidence "in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case" (p 199). It is possible that Lamer J (for the majority) applied a more conservative test, that of the standards of the reasonable person grounded in long-term community values rather that influenced by the shifting winds of public passion (pp 209, 210).

In any event, McIntyre J interpreted the facts as revealing the accused in a public place with heroin not concealed but in her hand and packed in a balloon, in circumstances which included the finding of heroin and balloons in her husband's car, and concluded that a reasonable man, dispassionate and fully apprised of the circumstances of the case would not be offended at the thought that on the issue of possession for the purpose of trafficking the trier of fact should be permitted to consider the unlawfully found evidence. His Honour was careful to point out that this was not a case where the search revealed "a concealed capsule or two of heroin, such as one might have for personal use" (p 199). On this approach the emphasis appears to be on the probative value of the evidence in the eyes of the reasonable person so described: if the probative value had been slight, then the admission of the illegally obtained evidence would have brought the administration of justice into disrepute. It seems that this consideration was taken into account under the rubric of unfairness on the approach described by Lamer J: there was no unfairness in the sense that the evidence was clearly highly probative.

Transferring this to the New Zealand context, the distinction between a merely technical breach and an unfair breach (or, more extremely, misconduct) is determined by whether admission of the evidence would bring the administration of justice into disrepute in the eyes of a reasonable person, grounded in long-term community values, dispassionate and fully apprised of the circumstances of the case.

Wrongful search of house or car

Readers of *Sutton* will be disappointed that the following two Canadian cases were not cited as illustrations of how this approach works. In *R v Sieben* (1987) 56 CR (3d) 225 narcotics had been found as a result of an unlawful search of the accused's house. The unlawfulness arose because the search was not supported by the correct documentation: a warrant was required, whereas the officers had, in good faith, believed that a writ of assistance was sufficient. The Supreme Court of Canada, in a judgment delivered by Lamer J and concurred in by the other members of the Court, held that the search was unreasonable because of the absence of a search warrant, and that the sole issue on appeal was whether the admission of the evidence would bring the administration of justice into disrepute. Applying *Collins* (which judgment had been delivered the same day), Lamer J remarked (p 228) "It is obvious to me that the use of this evidence in the proceedings would in no way cause the trial to be unfair." And although the breach was made more serious because the search took place in a dwellinghouse, it was not so serious that the admission of the evidence would bring the administration of justice into disrepute: one officer had reasonable grounds for carrying out the search, they acted in good faith under the law as it then was, and there was no suggestion that the search had been carried out in an unreasonable manner.

Here, fairness is linked to probative value of the evidence, and factors such as good faith and reasonableness of conduct are linked to the question of whether admission of the evidence would bring the administration of justice into disrepute by an apparent judicial condonation of unlawful police conduct.

The second illustration of the use of the criteria set out in *Collins* is *MacDonald v R* (1988) 66 CR (3d) 189, where the Appeal Division of the Prince Edward Island Supreme Court allowed the appeal and substituted an acquittal because there had been more than a merely technical breach of the appellant's rights. The police had searched the appellant's vehicle without having either a warrant or reasonable grounds to do so. In addition they failed to advise him of his right to counsel; this was also a right guaranteed by the Charter. It was held (p 192):

> The long term consequences of courts admitting evidence so obtained would bring further disrepute on our justice system in the eyes of a reasonable member of our community, knowing its values, being aware of all the circumstances and viewing the matter dispassionately. The admission of evidence obtained in the manner of this case would indicate to such a reasonable person that the courts condone, or are at least prepared to turn a blind eye toward, high handed, illegal and unwarranted police conduct.

The Court observed that in this case the actions of the police were quite deliberate and unjustified and in bad faith.

On the spectrum metaphor used above, *Sieben* would fall within the acceptable area (breach that was

merely technical), and *MacDonald* within the first area (misconduct).

Disregard of accused's rights

It must not be thought that probative value is the sole determinant of fairness. Where unlawful police conduct leads to the creation of the evidence, as in the case of a statement obtained in flagrant breach of the rules, it will usually be unfair to admit the statement as evidence, and consequently to admit unfairly obtained evidence would bring the administration of justice into disrepute. An illustration, again from the Supreme Court of Canada, is *R v Manninen* (1987) 58 CR (3d) 97. Here, in denying the accused, who was detained for questioning, access to a lawyer, there had been an "open and flagrant disregard of the [accused's] rights" [under section 10(b) of the Charter] which was "wilful and deliberate". Again the judgment of the Court was delivered by Lamer J who said (p 106):

> As I stated in *Collins* . . . the use of self-incriminatory evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and thus will generally bring the administration of justice into disrepute.

Accordingly, the high probative value of the evidence and the seriousness of the offence (armed robbery) were outweighed by the seriousness of the violation of the accused's rights and the effect of the admission of the evidence on the fairness of the trial.

Where a blood sample is wrongfully taken from an unconscious person reasonably suspected of committing a blood alcohol offence, that can amount to unreasonable search in violation of the suspect's Charter rights. Where such a sample is obtained in wilful and deliberate violation of those rights (rather than in good faith), the evidence so obtained will be excluded: *R v Pohoretsky* (1987) 58 CR (3d) 113 (Supreme Court of Canada). The Court noted (p 116) that a violation of the sanctity of a person's body is much more serious that that of his office or even of his home.

Assessing the seriousness of the breach

Against the background of the reasonable person standard for assessing disrepute to the administration of justice, Lamer J evaluated the significance of particular factors as follows (pp 211, 212). Real evidence that was obtained in violation of the Charter will rarely operate unfairly for that reason alone (cf *Sutton*: there has to be something more than the mere fact that real evidence was obtained unlawfully). But where a violation of Charter rights causes the accused to be conscripted against himself through a confession or other evidence emanating from him, the use of the evidence will be unfair for it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination (cf the readiness of the Courts to exclude evidence in the cases of wrongly invoked obligations, discussed supra). An infringement of the right to counsel will generally give rise to such unfairness (cf *Hapeta* and *Webster*, cited in the discussion of New Zealand cases of serious misconduct, supra).

Relevant to the seriousness of the violation (p 212) are such factors as whether the breach was inadvertent or in good faith, as opposed to deliberate, wilful or flagrant; the existence of circumstances of urgency or necessity to prevent the loss or destruction of the evidence will also be material, and the availability of investigatory techniques which do not involve violation of rights would make the violation more serious. Excluding evidence essential to the charge would tend to bring the administration of justice into disrepute, especially where the charge was serious; but if the breach led to unfairness the seriousness of the charge would not be grounds for allowing the evidence to be given ("the more serious the offence, the more damaging to the system's repute would be an unfair trial" p 212.)

A factor which was held to be irrelevant was the availability of other remedies for the breach:

> Once it has been decided that the administration of justice would be brought into disrepute by the admission of the evidence, the disrepute will not be lessened by the existence of some ancillary remedy . . . . (p 213).

It should be noted that, in contrast to this, in *R v Alexander* (Court of Appeal, CA 31/89, 28 April 1989, McMullin, Casey and Ellis JJ), the Court of Appeal observed that:

> the evil involved in the illegal detention is not without a remedy. It is open to disciplinary action [within] the Police Force, or to an action for unlawful detention at the suit of the detainee.

It is respectfully submitted that this consideration is irrelevant to the question whether the discretion to exclude the evidence should be exercised at trial for the alleged offence.

Conclusion

New Zealand Courts will find helpful the approach taken in Canada to the assessment of the various factors relevant to the question whether to invoke the discretion to exclude evidence. It is not unexpected that the points made in the Canadian decisions are consistent with the results of New Zealand cases for they are made in exercise of the same discretion according to what are effectively the same criteria. An interesting consequence of this is that the protection extended by the Canadian Charter of Rights and Freedoms in the particular areas considered here is no greater than the protection enjoyed at common law as far as the admissibility of evidence is concerned. *Collins, Manninen* and *Pohoretsky* would be decided the same way in New Zealand, and *Sutton* would be decided the same way in Canada.

Finally, an answer to the question posed in the first paragraph of this article: if the officer carrying out the search did so in bad faith, that was deliberate misconduct by him and evidence obtained in the course of such a search would be inadmissible. *Sutton* would be distinguishable because the officer who carried out the search did so in good faith. □

Free Trade breach of social contract?

By Jeffrey Miller

Reprinted with permission from the Canadian publication, The Lawyers Weekly, *24 February 1989*

During the last election campaign, much was made of Brian Mulroney's 1984 promise that if he should come to power that he would not sign a free trade deal with the United States. Some took this promise more seriously than others. John Ruffolo, for instance, a salesman in Kitchener, Ontario, went so far as to take it as legally binding.

Last summer, Mr Ruffolo sued M Brian Mulroney and the Progressive Conservative Party of Canada for breach of contract and negligent misstatement. The Tories had promised not to engage in free trade with the US, Mr Ruffolo said, and had pledged to improve the postal service.

Mr Ruffolo advised her Honour Judge Pamela Thompson of the Toronto Small Claims Court that after encountering the promises in the news media and Tory campaign literature in 1984, he relied on them in casting his vote. It was his consideration in the deal, and he had got nothing in return. He claimed damages of $90.

Not surprisingly, Ruffolo's claim provoked little more than clucks and chuckles. But in the wake of the recent election, with the free trade deal now in effect, the June 28 decision makes you do a wide-eyed double-take.

Judge Thompson granted the defendants' motion to strike Mr Ruffolo's claim, reasoning, on the alleged contracts issue, that there existed "no legal relations between the parties," that a vote did not represent valuable consideration, and that there was no privity (or mutual reliance) between the citizen and his prospective government.

"To allow an action in contract," the learned Judge wrote, "based on promises made during an election would be *contrary to public policy and to the concept of representative democracy as we understand it* . . .

"The rule is that one cannot be heard to say he relied upon a statement so patently ridiculous as to be unbelievable on its face unless he happens to be that special object of the affections of a Court of equity, an idiot." (Emphasis added.)

If this is not deeply cynical, it is shockingly frank: A vote is not something given in expectation of good faith performance by an elected representative, it is a naked gift!

Democratically elected governments, the very fount of law, have no legal relationship with their electors. Once elected, a government may therefore change the social contract at whim, and anyone who believes differently is an idiot!

The election promises relied on by Mr Ruffolo could not be "negligent misstatements," Judge Thompson held, because Mulroney et al, our would-be protectors and law-givers, do not possess any particular skill or special knowledge for such predictions (which begs the question, would Mr Ruffolo have got further suing Mulroney, ex-businessman, for *fraudulent* misstatement?)

> The defendants were not in the business of running the post office nor were they involved in negotiating with the United States concerning free trade at the time the statements were made: They were in the business of attempting to be elected. It cannot be said, in the context of an election campaign, that a "politician" is a trade or a profession possessing special skill.

Does this mean you should hire someone to run the post office who promises during the job interview to run it one way and then runs it the opposite way once you've hired him? Does it mean casting a vote is a complete gamble that governments will do what they said they would on the hustings?

The very heart of public policy in Anglo-American law, the relationship between the citizen and his state, is founded on religious covenant, a matter of mixed choice (freedom), convenience, and hope—the *ultimate* contract.

The Queen, in whose name we transact all of our affairs, exists as God's representative on earth. Our Judges are her priestly interpreters. We swear promises before her and God that our word is true, that our affidavits, oaths of office, and testimony in Court are made honestly and in good faith. In return for our allegiance and reliance, for our *citizenship*, with the vote as its centrepiece, the government promises to act in good faith, to protect and preserve the social order as our agents and representatives.

The relationship between a citizen and his government, in other words, is *the fundamental* contract of our entire social order, the secular version of the Sinaiatic covenant that gave birth to our civilisation and subsisted through Greek, Roman, Anglo-Saxon, and Norman times.

It is commonly said in the street that election promises, and even government pledges, are as spume on the wind. But to give this the force of law is terrifying. Taken to its logical end, Judge Thompson's reasoning amounts to "Promise then anything, but do whatever it takes a preserve your own power and privilege." □

Treaty rights or aboriginal rights?

By R P Boast, Senior Lecturer, Faculty of Law, Victoria University of Wellington

The year 1990 is one in which there will obviously be much discussion about the Treaty of Waitangi. This article is a brief survey of the literature of one issue, namely the question of aboriginal title. As the author acknowledges, this is very much associated with the influential writings of Dr Paul McHugh who has contributed articles on the subject to the New Zealand Law Journal — *see [1988] NZLJ 39 and in this issue at [1990] NZLJ 16.*

Introduction

Maori claims to ownership and management of land and resources have — in terms of the norms of the existing legal system — two possible sources. One is the Treaty of Waitangi, concluded between the Maori tribes of New Zealand and the British Crown in 1840. (This paper will leave to one side the interesting question as to what the status of other, post-Waitangi, Crown-Maori treaties — such as the Fenton Agreement of 1880 or the Aotea Agreement of 1882 — might be.) The other source of a legal basis to Maori claims is the common law rule, or 'doctrine' of aboriginal title.

The relationship between treaty rights and aboriginal title rights is obscure. Recent decisions of the courts have not altogether succeeded in resolving the obscurities. The interpretation of s 88(2) of the Fisheries Act 1983 has caused particular difficulty. In this paper I will discuss briefly the nature of treaty rights and aboriginal title rights, attempt to identify the distinctions between them and consider the approaches taken by the courts. It is hoped that in so doing at least the basic issues will be clarified.

Aboriginal title rights

Anyone wishing to explore in any detail the aboriginal title doctrine as it relates to the circumstances of New Zealand should consult the publications of Dr Paul McHugh, now of Sidney Sussex College, Cambridge University. What follows here is only a very abbreviated survey.

The aboriginal title doctrine is a rule of common law although its actual juristic sources derive from sixteenth-century Spain and the writings of pro-Indian scholars such as Las Casas and Vitoria. It received its classic formulation in two judgments of Marshall CJ in the United States Supreme Court, these being *Johnson v McIntosh* (1823) 21 US 543 and *Worcester v Georgia* (1832) 21 US 315. The principle has been recognized repeatedly in United States law, and is also a feature of Canadian and New Zealand law. Leading recent cases from each of these three jurisdictions are *County of Oneida v Oneida Indian Nation* (1985) 470 US 226; *Sparrow v R* [1987] 2 WWR 577, 246, and *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

The concept of aboriginal title is not difficult to understand. It is a rule that rights of use and occupancy in lands and waters formerly exercised by native peoples continue as a recognized legal interest after conquest discovering or cession until such time as the rights are extinguished by the colonizing power. The aboriginal title is a burden on the Crown's primary title. Since the rule is a rule of common law it can be enforced in the ordinary courts; no statutory recognition of the right is necessary. Unless the aboriginal right has been taken away ("extinguished"), it still subsists and the courts can and do recognize and enforce it.

What is necessary to constitute extinguishment is uncertain. American cases have taken the view that aboriginal rights are extinguishable by treaty. No-one has so far attempted to argue that the Treaty of Waitangi amounts to an extinguishment of aboriginal rights by treaty in this country, but this might be a possibility, particularly if and when the Treaty of Waitangi is given some kind of formal legal effect. In *Te Weehi* (supra) Williamson J referred to the important Canadian case of *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d), and adopted the *Baker Lake* "test" for the purposes of New Zealand law. This requires that where aboriginal title rights are extinguished by statute the statute must exhibit a "clear and plain intention" to extinguish the right. An example of such statutory extinguishment is s 155 of the Maori Affairs Act 1953, which extinguishes Maori customary title to full-fee interests in land in New Zealand. An example from a different jurisdiction is the Alaska Native Claims Settlement Act, which the Ninth Circuit, United States Court of Appeals, has held to be an extinguishment of native hunting and fishing rights off the Alaska coast: *Village of Gambell v Clark* (1984) 746 F 2d 572. (This judgment has, however been reversed in the United States Supreme Court on the basis that the extinguishment could not apply to claims to the continental shelf outside the boundaries of Alaska see 107 s. Ct 1396 (1987).

Does statutory extinguishment of aboriginal title carry a right of compensation? No-one has ever

attempted to persuade a New Zealand Court that s 155 of the Maori Affairs Act is prima facie an expropriation of property rights and thus carries a right of compensation. Nor has such an argument been determined by any Court in relation to the provisions of the Coal Mines Act 1979 which vest the beds of navigable rivers in the Crown. In the United States the rule is clear: extinguishment is non-compensable. This was decided in the *Tee-Hit-Ton* decision of the United States Supreme Court – (1955) 348 US 272. But in Canada the question has been left open: see Hall J's judgment in *Calder v Attorney-General of British Columbia* [1973] SCR 313. Certainly this is a question deserving of exploration by the New Zealand Courts.

Limitations of the aboriginal title doctrine

The scope of the doctrine is somewhat elusive. What exactly are the "aboriginal" rights it protects? The answer appears to be that it relates only to property which was in some sense "aboriginally" used. It is hard to conceive of an aboriginal title claim to oil and natural gas (except as an adjunct to land), to non-traditionally used minerals, or to interests such as the preservation of the Maori language. Nor are Courts able to question the motives for Crown extinguishment – thus the New Zealand Settlements Act 1863, which confiscated huge tracts of land from some Maori tribes, was never open to challenge on the basis that it overrode aboriginal rights to land. Another criticism is that the rule forces indigenous claims and indigenous rights into the rather Procrustean bed of an obscure feudal rule of the common law. It is but another example of the dominant legal system constraining a minority within the terms and limitations of its own discourse.

For such reasons some North American commentators are somewhat less than enthusiastic about the rule. One Canadian scholar has described it as an "*a priori* legal postulate based on the popular wisdom of the eighteenth century and not on what the Indians themselves conceived to be their relationship to their lands". The preoccupation of the Canadian courts with it "forcefully emphasizes the colonial and feudal heritage with which much of our property law is still imbued". (W H McConnell, "The *Calder* case", (1973) *Saskatchewan Law Review* 88, 117-9.) For all that, the aboriginal rights doctrine has one great compelling advantage. It is enforceable in the ordinary courts and enforceability is not dependent on legislative recognition – as, of course, is the case with the Treaty of Waitangi.

Treaty rights

It is trite law that rights conferred by Treaty, even those protected by a Treaty of cession such as the Treaty of Waitangi, must be incorporated into a statute before they become enforceable in the Courts. The leading New Zealand case, *Maori Council v Attorney General* [1987] 1 NZLR 641 did not fundamentally alter this basic rule. Probably of greater significance is the High Court decision in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, where Chilwell J held that the Treaty of Waitangi "is part of the fabric of New Zealand society". Chilwell J said that the Treaty is part of a "context" in which "legislation which impinges upon its principles is to be interpreted, when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material" (p 210). This has much in common with Cooke P's statement in *Maori Council* ([1987] 1 NZLR 641, 656) that the Treaty can be used to interpret ambiguous legislation even in the absence of a statutory reference. (No such observation was made by the other four Court of Appeal judges in *Maori Council*.)

The extent to which the Treaty of Waitangi can be used as an interpretive device has been rendered uncertain by Ellis J's decision in *MRR Love v Attorney-General*, (unreported, 15 March 1988, High Court Wellington, CP 135/88). Here Ellis J interpreted *Maori Council* to mean only that "were it not for s 9 of the State-Owned Enterprises Act 1986 which expressly imposed the obligations of the Crown on the Ministers, the Court would not have been able to restrain the Crown from transferring Crown lands to the State-Owned Enterprises" (p 21). The legislation at issue in the *Love* case, the Ministry of Energy Act 1977 and the Finance Act 1982 made no reference to the Treaty; therefore the applicants had no present privilege or right which might be affected by the proposed sale of a state-owned corporation and their application for an injunction had to be refused. The logic of this seems unimpeachable; but the difficulty is that in *Huakina* the relevant legislation made no reference to the Treaty either, and yet Chilwell J's approach was very different. Why was the Treaty part of the relevant "context" in one case but not in the other?

At the present time one must conclude, then, that the basic rule that the Treaty requires statutory recognition to be enforceable, or even cognisable, remains intact. The somewhat broader approach of Cooke P in *Maori Council* and of Chilwell J in *Huakina*, emphasising the Treaty's relevance to the interpretation of statutes, certainly does not reflect judicial consensus and may be a minority view. The situation may be contrasted with the United States. American law differs from English and New Zealand law in that by Article VI of the Constitution treaties are "the supreme law of the land" and override anything in the constitutions or laws of any of the states. That this constitutional provision applies in full measure to treaties concluded with the Indian tribes has been recognised since 1832 (*Worcester v Georgia*, above).

This constitutional enshrining of the treaty rights of the Indian tribes has allowed the American courts to evolve a distinction between "treaty rights" and mere "privileges". This analysis has been given particular emphasis in cases dealing with Indian treaty fishing claims. If a treaty protects tribal fishing interests, then the members of the tribe have a "right" to the resource, and they are to be contrasted with other ordinary members of society – meaning, here, commercial and recreational fishermen – who have a mere "privilege". Indian rights in the resource, while not absolute, are of a special legal character. Important cases exploring the implications of this are *United States v State of Washington* (1974) 384 F Supp 312, at 322; and *United States v State of Michigan* (1979) 471

F Supp 192, at 266. Aspects of this analytical structure have been applied to the situation in New Zealand by the Waitangi Tribunal in its recent *Muriwhenua Fishing Report* (Wai-22, 1988).

Is the Treaty "declaratory"?

One view of the relationship between the rights protected by the Treaty of Waitangi and by the aboriginal title rule is the so-called "declaratory" model. Essentially, the argument is that the Treaty was intended to do no more than "declare" the existing common law as at 1840. The argument was recently raised before the Waitangi Tribunal, and is dealt with in *Muriwhenua* (above, at pp 208-209). Counsel for the Fishing Industry Association submitted that the Treaty was merely "declaratory" of the aboriginal title doctrine, and it could not, therefore, "be construed to confer rights any greater than the doctrine gave". The purpose of such an argument was clear enough. The objective was to establish that the only fishing rights protected by the Treaty were those in existence in 1840, determined according to fish species, fishing methods and fishing places. The Tribunal, however, was unimpressed, and at p 209 observes

> The [aboriginal rights] doctrine, it was claimed, upheld fishing rights but not exclusive rights, recognised fishing grounds but not zones, and was directed to sustaining traditional lifestyles, not to the pursuit of Western forms of trade. We were given to understand that the Treaty had therefore to mean the same... The trouble is, it doesn't. Once more a major rewriting would be required. Amongst other things, "exclusive" would need to be changed, and Lord Normanby would need to recall his instructions. He clearly envisaged that Maori would profit from the value development of those properties they had retained.

It is undoubtedly the case, thought the Tribunal, that the doctrine of aboriginal title did "form part of the necessary background to Colonial Office opinions" in 1840. Obviously there is "some concurrence between the doctrine and the Treaty principle of protecting Maori interests". Nevertheless the principles of the Treaty and the principles of the aboriginal title rules are distinct. The Tribunal could have said, additionally, that there is even less of a case for stating that the Treaty is "declaratory" when the specific provisions of the *Maori* text are taken into account. How can the concepts of rangatiratanga and taonga be said to be "declaratory" of the English common law rule of aboriginal title?

The Tribunal's view is that Treaty rights and aboriginal title rights subsist side by side. There is no indication in *Muriwhenua* that the Tribunal regards the Treaty of Waitangi as having the effect of extinguishing aboriginal title rights by consent. Extinguishment by treaty is a well-recognised mode of extinguishment of aboriginal title in the law of the United States. In fact that was a prime objective in concluding treaties with the various Indian tribes. In the United States, of course, treaties concluded with indigenous peoples are part of the law of the land; but the Treaty of Waitangi is not, except in so far as Treaty "principles" have been referred to in a variety of ways in a thin scattering of statutes. It would be too harsh to conclude that enforceable aboriginal title rights have been extinguished by the act of signing an unenforceable treaty of cession in New Zealand.

"Any Maori Fishing Rights"

Section 88(2) of the Fisheries Act 1983 states:

> Nothing in this Act shall affect any Maori fishing rights.

The section has a long legislative history. Statutory protection of Maori fishing interests has been in existence since 1877. But what is a "Maori fishing right"? Does it mean a *Treaty* right? Or does it it refer to "rights" protected by the aboriginal title rule — whatever they may be? Perhaps its refers to both? And what difference does it make?

These difficulties have led to a considerable amount of confusion.

The phrase "any Maori fishing rights" was considered at length in the High Court by Williamson J in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. Williamson J does indeed mention the Treaty of Waitangi in the course of his discussion. He refers to the rights protected by s 88(2) as "customary rights" (p 690, 691) which pre-dated and which were preserved by the Treaty of Waitangi. It seems clear, however, that in Williamson J's view the rights protected under s 88(2) are "aboriginal title" rather than "Treaty" rights in that he considers that the rights protected by the section are non-exclusive subsistence rights. The right is only a "right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply". (p 692) It should be noted that *Treaty* fishing rights — in the Waitangi Tribunal's view — are not so limited, and extend to a right to commercial development. In *Muriwhenua*, at pp 234-235, the Tribunal refers to the emerging body of international law on "rights to development" and notes, too, that although Maori fishing prior to 1840 undoubtedly did include a commercial component, the "right to commercial development of resources does not depend upon proof of a pre-Treaty commercial expertise". (p 235)

The exclusivity point is crucial. Williamson J felt able to distinguish earlier New Zealand cases on the basis that the right being contended for in Te Weehi was not exclusive: it was not being asserted that s 88 (2) preserved exclusive fishing rights for Ngai Tahu off the South Island coast. (As it happens, it might well be argued that aboriginal title rights can be exclusive, a point which I do not intend to pursue here.) What is clear is that the non-exclusive right to take shellfish for personal needs is very different from the Waitangi Tribunal's characterisation of the nature of Treaty fishing rights in *Muriwhenua*. It seems that if it had been asserted that s 88(2) did preserve exclusive tribal fishing properties Williamson J would have been unable to agree.

In *Ministry of Agriculture and Fisheries v Love* [1988] DCR 370, a decision of the District Court at Blenheim, Judge Taylor applied *Te Weehi* and acquitted the defendant, who had been charged under the Fisheries (Commercial Fishing) Regulations 1986. In this case, however, the defendant was taking undersized crayfish, and not for subsistence, but at least in part for commercial purposes. Judge Taylor found however, that s 88(2) still applied. After concluding that the defendant had shown that he was

exercising a Maori customary fishing right, Judge Taylor said:

> It is clear on the evidence that the local tribes jealously guarded their own fishing rights and endeavoured to exclude tribes who had no right to the particular area, but I imagine that even between tribes there were exchanges of fish for other articles, as would happen in any society. I find that clearly there were inherent in Maoris, in accordance with Maori custom, commercial fishing rights, that is rights of trading with fish. It is contrary to the traditions of any people to suggest that there was no use of the fish as a commercial object in the ordinary sense of the word. I find that there was and always has been a commercial fishing right among Maoris. . . I therefore find further that these commercial fishing rights are preserved by s 88(2).

Certainly Judge Taylor's view of the nature of Maori fishing practices is abundantly documented by the Waitangi Tribunal in *Muriwhenua*. His approach goes somewhat further than did Williamson J in *Te Weehi*. Judge Taylor does not make it clear whether he thinks s 88(2) preserves *Treaty* rights, such rights being distinct from aboriginal title rights, or whether the section is aimed at aboriginal title rights but that he is taking a broad view as to what the content of such rights are. (The overall structure and approach of his judgment seems to point to the latter.)

The third case is another District Court decision, that of Judge Cullinane in *Ministry of Agriculture and Fisheries v George Campbell and others*, unreported, District Court, Gisborne, 30 November 1988 (CRN 8016004552 – 4556). Judge Cullinane did not accept Judge Taylor's approach in *Love*. In *Campbell* Judge Cullinane appears to regard the rights protected by s 88 (2) as Treaty rights. "What I am concerned with here," he says, "is the exercise of rights purporting to be Maori fishing rights and plainly deriving from the overall protection accorded Maori fisheries by the Treaty of Waitangi" (p 75). However he cannot accept that the rights protected by s 88(2) could include any kind of commercial component. At p 76 of his lengthy judgment in this case he observes:

> It is neither in my view correct nor logical to proceed by a process of extrapolation from the extensive and sophisticated fishing practices of the pre-European Maori a practice of trading of sufficient size or significance to be designated commercial.

Most recently, Judge Inglis, in *Ministry of Agriculture and Fisheries v Pono Hakaria and Tony Scott* (unreported, District Court, Levin, 19 May 1989 CRN 8031003482 – 3) has come down firmly on the side of a "Treaty" approach to s 88 (2). Section 88(2), he says, "must include fishing rights preserved by the Treaty". The defendants were acquitted on a charge of taking toheroa contrary to the Fisheries (Amateur Fishing) Regulations 1986. As a criminal prosecution this case did not, said Judge Inglis "involve consideration of the wider issues raised in [*the Muriwhenua*] report or the litigation which has stemmed from it". Judge Inglis also paid close attention to the fact that in this case there had been strict compliance with the customary fishing practices of Ngati Raukawa. This is "not a case of harvesting toheroa for sale in the pub" said Judge Inglis (p 14). But what if it had been? Does Judge Inglis mean that *Treaty* rights extend only to "traditional" uses of kai moana?

All four cases are, of course, criminal prosecutions. The rules relating to the prosecutor's burden of proof in negating an affirmative defence such as s 88(2) may have had some impact in causing the current confusion about the content of the rights protected by the section. The review proceedings currently pending in the High Court will require a definitive settlement of the point. At present, three distinct theories emerge from the cases. One is that s 88(2) preserves fishing rights as defined by the aboriginal rights rule, rights which are non-exclusive and restricted to harvesting for personal needs (*Te Weehi*). A second possibility is that raised in *Love* – that s 88(2) refers to aboriginal title rights, but such rights *do* include a right to harvest the sea for commercial purposes. Thirdly, there is Judge Cullinane's view in *Campbell* and Judge Inglis' in *Hakaria and Scott* that the rights protected by s 88(2) are *Treaty* rights, but (confusingly) Treaty rights which do not include a commercial component but which extend only to the taking of fish in a "traditional maner" for subsistence purposes.

The Ngai Tahu case

The analysis of the four criminal cases considered above is incomplete as a discussion of the effects of s 88(2) without reference to Greig J's judgment in *Ngai Tahu Maori Trust Board v Attorney-General* (unreported, 2 November 1987, High Court, Wellington, CP 559/87). This, of course, was a civil case, an application for an interim injunction to restrain the Minister of Agriculture or his officers from issuing any further fishing quota in marine areas subject to Ngai Tahu's claim. Greig J granted the injunction and in so doing made a number of interesting observations on the effect of s 88(2).

Greig J characterised the effect of *Te Weehi* as correctly establishing that s 88(2) has at the very least a "passive" effect – that the provisions of the Fisheries Act do not apply to Maori fishing rights. Greig J thought, however, that the provisions of s 88(2) could be rather more far-reaching – "the carrying into municipal law of the Treaty obligation", which would have the effect of "making the right under the Treaty obligation enforceable directly". The section in other words not only might have the effect of putting into effect Treaty-based fishing rights, but doing so in an "active" (enforceable) rather than in a "passive" (mere non-applicability of the Fisheries Act provisions) sense. *Ngai Tahu* was only an interlocutory application, and therefore Greig J did not need to settle the point. The substantive proceedings in *Ngai Tahu* are now due to be argued in the High Court: the hearing has been timetabled for five months of evidence and legal argument. It will be interesting to see to what extent Greig J's suggestions are taken up.

Summary and conclusions

Who is right here? Does s 88(2) refer to "treaty" or to "aboriginal title" rights? Since the matter is about to be extensively litigated before the High Court it is perhaps somewhat presumptuous to venture an opinion. (But I shall do so anyway.) It seems that a compelling argument can be made that s 88(2) refers to *Treaty* rights because if it was meant to refer to "aboriginal title" rights the section might, in fact, be superfluous.

It is of the essence of aboriginal title rights that they are not dependent on statutory recognition. A persuasive argument could be made that the result in *Te Weehi* ought to have been the same even if s 88(2) had not been there. To the counter-argument that without it the rest of the Fisheries Act would have the effect of impliedly extinguishing aboriginal title there is the rejoinder that – as Williamson J emphasised in *Te Weehi* itself – there must be a "clear and plain intention" to extinguish.

This argument, if accepted, does not solve the problem as to what the content of Treaty-based fishing rights might be. The Waitangi Tribunal's view as noted above, is that Treaty rights do include the right to commercial development of the fishery. In *Muriwhenua* the Tribunal paid particular attention to the respective rights of the Crown and tribes arising from the cession of kawanatanga in Article I of the Treaty of Waitangi and the reservation of rangatiratanga in Article II. The Tribunal found, for instance, that laws of general applicability made for the purpose of conservation are a valid exercise of the kawanatanga (governorship) granted to the Crown, provided that the priority of treaty fishing interests over recreational and commercial fishing is taken into account (*Muriwhenua*, 227). This position is similar in many ways to that developed in Judge Boldt's epochal decision in *United States v State of Washington* (1974) 384 F Supp 312 and to the British Columbia Court of Appeal's decision in *Sparrow v R* [1987] 2 WWR 577. The Treaty, in other words, already provides a framework within which the proprietary rights of the tribes and the Crown's interest in conservation can be worked out.

The Treaty of Waitangi was a compact between the Crown and the tribes. The Treaty is written in the Maori language and at least to some extent the Maori text is based on Maori concepts. The Treaty of Waitangi, once recognised and given effect to, allows for a truly bicultural approach to the law to develop in a way that the aboriginal title rule – which is but a rule of the common law itself – never could do. The Treaty has value as a symbol: we can give meaning to it, and it can give meaning to us. The symbolic value of the aboriginal title rule, by contrast, is nil. Although it may provide a useful weapon in the legal armoury, its place in the New Zealand scheme of things can only be secondary. □

continued from p 20

specific fiduciary duty to its aboriginal tribes thus has at least one strong analogy.

Crown assets will be peculiarly vulnerable to the argument that the Crown holds them subject to an aboriginal fiduciary duty. The basis of this duty has varied in the important cases. Its source so far as Crown land and coal has been concerned is s 9 of the State-Owned Enterprises Act. Where the fisheries are concerned, it is the common law aboriginal title restraining the Crown. Both of these sources contained a statutory or common law rule of recognition incorporating a fiduciary aspect. My suggestion is that this fiduciary aspect can stand on its own apart from express statutory acknowledgment or the common law aboriginal title. Once that recognition occurs, if it occurs (as the American caselaw shows it can), Crown ownership and administration will be significantly affected.

In conclusion, I will repeat the earlier observation about New Zealand witnessing a fundamental shift of power. The restoration and recognition of Maori property rights under legal processes, through Court and the Waitangi Tribunal, have much to do with this. It is no wonder some are saying that Maori claims should be left entirely to the political process. There is, however, a legal backdrop to the Crown's activity, be it legislative or executive, delegated or otherwise. This legal backdrop does not give the Crown the free hand which might have been supposed a generation ago. No wonder those who would have the Crown concede less rather than more to Maori are worried by the prospect of litigation. Long used to a legal desert, the Crown now finds itself in something of a legal jungle using the machete-like approach of the now-dropped Maori Fisheries Bill 1988. This Bill contained an "Idi Admin clause", as Prime Minister Lange termed it, extinguishing the tribal aboriginal title over the coastal fisheries. This is symptomatic of how the shift of political power in New Zealand is not simply a function of the Crown's perception of some "moral" or entirely political obligation. The forces of movement have a solid legal core and that for some Pakeha may be most frightening of all. □

Perspective for 1990

Australia has just celebrated its Bicentennial. The written history of Australia is a history, most parts white, that goes back 200 years. The archaeology of Australasia currently goes back more than 30,000 years; it would not be a surprise if it went back well beyond 50,000. It is archaeological study that made Australia's birthday jamboree in January appear what it was: the celebration of a very recent episode only within a larger Australian human history.

The Cambridge Review
March 1988