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Absolutes, politics and dangerous Courts

On numerous occasions, Mr Palmer has been quoted as saying something to the effect that he considers the Courts to be the least dangerous part of government. He probably intended the remark as a compliment as well as an argument in support of his once so strongly favoured Bill of Rights. But, in the colloquial phrase, it is certainly a back-handed compliment.

To say that something is the least dangerous is nevertheless to say that it *is* dangerous! The implication – indeed the express concern – is of course that all government is dangerous. This is, at best, only a partial truth, because government as such is not only necessary, but a positive good. Still, as Lord Acton so sagely remarked in a different order of emphasis, it is not only that absolute power corrupts absolutely, but that all power corrupts. In that sense there is a risk in all government, whatever its constitutional form and whatever institutions it operates through.

One aspect of the Bill of Rights as originally proposed is the risk to the Courts. This has been put generally in terms of the Judges being unelected and the risks therefore of them being untrammelled by the political pressures of public opinion, which can be described as the non-institutional form of democracy. The Judges are thought therefore to be able to exercise unbridled power. In practice the right of appeal and the doctrine of precedent generally avoid this problem becoming a serious one.

There is also, however, a more insidious difficulty that we need at least to be aware of. This is the fact that, as in the United States over recent years, and more latterly in Canada, the argument about rights has become a new form of politics; and the Courts have become the forum for the determination of political issues. This necessarily affects the nature of the Court system, and even more profoundly, the public perception of this.

It is in the area of what are called "single issue politics" that the question becomes most obvious. Justice Oliver Wendell Holmes once observed that "all rights tend to declare themselves absolute to their logical extreme". It is in this way that these issues come before the Courts. In the American magazine, *The Atlantic Monthly* for May 1990, there is an article on the topic entitled "Nothing in Moderation" by Fred Siegel, an historian who is currently a fellow at the Institute for Advanced Study, in Princeton, New Jersey.

Mr Siegel first makes the point that the most recent American Presidential election of 1988 was unique in that virtually all the central issues, which he enumerated as criminal rights, abortion rights, capital punishment, and the required recital by teachers of the Pledge of Allegiance, were judicially generated. In a general sense he is suggesting that George Bush ran against the Supreme Court and Michael Dukakis tried to have the Supreme Court as a running mate. Mr Siegel adds that there was a related distinctive characteristic in that the election produced the lowest voter turnout in 64 years.

The point Mr Siegel makes is primarily related to the American situation of course. Essentially it is that when politics become judicial they have deleterious effects on the losers and thus on the political system. He expresses the point in this way:

> Democratic politics ideally revolve around the compromises needed to secure widespread consent for government actions. Representative government, which encourages citizen participation, leaves the losers in a political contest with part of what they asked for or at least a feeling that their interests were considered. A judicialized politics, in contrast, bypasses public consent. Profoundly anti-democratic when it goes beyond vindicating the fundamental rights of citizenship, judicial politics alienates voters by placing public policy in the private hands of lawyers and litigants. And since rights are absolute, it polarizes by producing winner-take-all outcomes, in which the losers are likely to feel embittered. It's that bitterness, that resentment – whose symbolic residue is the stuff of thirty-second political-attack ads – that now helps drive American politics . . . The attempt to constitutionalize policy – most dramatically with abortion – has resulted in a zero-sum, single-issue politics. Where an interest masked as a right is involved,

the single-issue proponents can withstand the collapse of the heavens as long as their interest is served. That is because the assertion of rights fences off the proponents of policies from the social costs those policies impose on the public at large.

Mr Siegel continues his argument with a medical analogy. Rights, he says, are a bit like antibiotics. They are wonderful prescriptions that, when used well, preserve substantive as well as formal freedoms. For all of us, rights are important for they are the true basis of the fundamental freedoms which we enjoy as New Zealand citizens. In particular cases they must deal with specifics, even at the risk of these sometimes seeming to be trivial. But rights should never be confused with wants, as they too often are, here as elsewhere.

When antibiotics are overused they can produce severe reactions, and so, Mr Siegel argues, can a rights-based policy. Many New Zealanders, for instance, are now feeling that way about claims for "Maori rights" based on the Treaty of Waitangi. This is undoubtedly part of the reason for the extent of public support for Winston Peters, and is also part of the reason for the strongly adverse reaction of the government to some decisions of the Court of Appeal on "Maori rights" issues.

The American situation, and the critical point of Mr Siegel's article, is summed up in his final paragraph.

> The politics of rights subverts the constitutional design for self-government. Rather than having the Bill of Rights stand guard over the body of the document [ie, the American Constitution], it displaces it. The politics of rights replaces the politics of persuasion and deliberation with a judiciary whose swollen powers bring disrepute to the essential notion of rights even as they undermine public trust in government. We as Americans today have more rights than ever, yet by and large we feel more politically powerless.

It is always risky to attempt to transfer principles and practice from one constitutional or judicial system to another. Thus Mr Siegel's reference to what he calls the swollen powers of the judiciary may be true of the United States, but it is not true of New Zealand. The issue is now with us however, and the criticism of the American situation should serve as a warning.

There does tend to be, in this day of instantaneous communication, a tendency for ideas – legal, political, moral and economic – to travel. A recent illustration for us is the statement made by the Director-General of Television New Zealand when first commenting on the now notorious "Frontline" programme. He is quoted in *The Dominion* of 19 May 1990 as referring to the media being involved in an important constitutional process. A constitutional process? This journalistic arrogance derives from a presumption that some of the more inane interpretations by the United States Supreme Court of the American Constitution are applicable in New Zealand. Such a claim to being above the ordinary provisions of the law, for by invoking the name of the constitution and claiming to fulfil the high principle of a role in the constitutional process, that is what it amounts to, has been bluntly rejected by the House of Lords in two decisions in the last few years. In *"X" Limited v Morgan Grampian* [1990] 2 All ER 1 giving judgment on behalf of their Lordships in a case involving a young journalist named Goodwin who refused to disclose his source of a story, Lord Bridge stated:

> The journalist cannot be left to be be judge in his own cause and decide whether or not to make disclosure. This would be an abdication of the role of Parliament and the courts in the matter and in practice would be tantamount to conferring an absolute privilege. Of course the courts, like other human institutions, are fallible and a journalist ordered to disclose his source may, like other disappointed litigants, feel that the court's decision was wrong. But to contend that the individual litigant, be he a journalist or anyone else, has a right of "conscientious objection" which entitles him to set himself above the law if he does not agree with the court's decision, is a doctrine which directly undermines the rule of law and is wholly unacceptable in a democratic society. Any rule of professional conduct enjoining a journalist to protect his confidential sources must, impliedly if not expressly, be subject to whatever exception is necessary to enable the journalist to obey the orders of a court of competent jurisdiction. Freedom of speech is itself a right which is dependent on the rule of law for its protection and it is paradoxical that a serious challenge to the rule of law should be mounted by responsible journalists.

More directly to the point were the comments of Lord Ackner in the "Spycatcher" case, *A-G v Guardian* [1987] 1 WLR 1248. His Lordship was considering the argument that since publication of the book in the United States was protected by the Supreme Court's interpretation of the American Constitution, an English Court had to follow this. At page 1306 Lord Ackner said:

> My Lords, English justice will have come to a pretty pass if our inability to control what happens beyond our shores is to result in total incapacity to control what happens within our very own jurisdiction. Some 60 years ago, Sankey LJ in a lecture entitled "Principle and Practice of the law today" said (see (1928) 165 LT Jo 241 and 242):
>
> > Amid the shifting sands and cross-currents of public life the law is like a great rock on which men may set their feet and be safe.
>
> For the word 'rock' the appellants would have your Lordships now read 'jellyfish'!
>
> If the publication of this book in America is to have, for all practical purposes, the effect of nullifying the jurisdiction of the English Courts to enforce compliance with the duty of confidence both by interlocutory and by permanent injunction, then, as counsel for the Attorney-General ruefully observed, English law would have surrendered to the American Constitution. There the Courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in this country is, as yet, not above the law, although like some other powerful organisations they would like that to be so, that is until they require the law's protection.

In many ways it could be argued that the right of free

speech in America is an even better example of the abuse of rights concepts than the abortion example Mr Siegel discusses in his article. But no American academic would now dare argue about the absolute right to free expression in principle, although the flag burning cases as being an exercise of free speech must surely give some of them cause for second thoughts — if they can stop laughing at the frivolous foolishness of that decision.

It is of course easy, too easy, to deride the application of principles in particular cases. The Courts however, in the very nature of the system, must deal with particular cases. The problem is not in protecting rights in whatever circumstances they are applicable but in extending the concept of rights until it becomes a portmanteau for all the wish-lists of the world. Rights are too important to be devalued in this way.

There needs to be a greater conceptual clarity about what rights are, and what are merely political values, even if important political values. In clarifying that issue there will follow a clarification too of the relative roles of the political and judicial processes. There is a necessary inter-relationship, a symbiotic dependence of the political and the judicial on one another. There must inevitably be a degree of tension. No one can ever draw the line with clarity, much less with finality between them. Both the political and the judicial functions are part of the one constitutional process providing New Zealanders with a life of freedom under the law.

P J Downey

Correspondence

Dear Sir,

The debate on "fairness" as a legitimate judicial test

I would like to make a small contribution to the debate on the use of "fairness" as a significant yardstick for judicial decision making. I write partly in response to Mr W V Gazley ("Do I ultracrepidate?" NZLJ March 1990) and to Mr D F Dugdale ("Techniques of Judicial Reasoning" 9th Commonwealth Law Conference 1990), both of whom are opposed to such an approach.

I suspect that one of the greatest handicaps faced by common law lawyers is their legal training — the philosophy that the law is the result of precedent. This is an approach given much less emphasis in other legal systems.

Until perhaps 10 or 20 years ago the English legal approach was falling into disrepute, because consumers of legal services perceived that the law paid little attention to what was fair.

Fortunately, in recent times, common sense has been slowly prevailing: but with relatively little help from those who took to heart their original legal training.

I would welcome the day when the only yardstick of judicial reasoning is the test of "fairness". What is fair in one decade will be unfair in another. What is fair to certain persons in certain circumstances will be unfair to others.

Mr Gazley laments:

> Certainly Counsel for one party might not share it, [the individual Judge's view of fairness] given the time and trouble he or she has taken to argue the law from precedent and principle.

There are two simple answers to such a proposition.

The first is that if precedent and principle would result in a decision which is unfair, then there is something wrong with the precedent and principle. What is fair should prevail: why should someone win upon a technicality, if the result is not a fair one?

The second is that while Judges will have differing views as to what is or is not fair, they show no greater propensity for unanimity over what is allegedly drawn from precedent and principle. The fact that there will be different views is, at best, neutral.

Finally, perhaps those who criticise the test of fairness have fallen short of their own desire to observe principle. The *Shorter Oxford English Dictionary* describes "fair" as meaning ". . . free from bias, fraud, or injustice, equitable, legitimate . . .".

Why should not every judicial decision be tested against that yardstick (as applied on the day of judgment), in preference to what might have been decided on some earlier occasion?

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The Commonwealth Law Conference

The 9th Commonwealth Law Conference was held in Auckland in the week after Easter 1990. The Conference was successful on all counts — including the high standard of the papers delivered. In this issue of *The New Zealand Law Journal* there is published an overview of the Conference by A O Ferrers at p 196 and a light-hearted breakfast address about CER by Warren Pengilley at p 199. It is hoped to publish in *The New Zealand Law Journal* a selection from the Conference proceedings when the tapes become available.

Case and Comment

Removing a trustee

Re Ann Myfanwy Fulton Trust (High Court, Auckland, M706/88, 4 December 1989, Eichelbaum CJ; *Rossiter v Wrigley & Alves* [1989] BCL 1311

It is generally said that trustees can be removed under one of four methods: by virtue of express provision in the trust instrument; under s 43 of the Trustee Act 1956; under s 51 of the Trustee Act 1956; and by exercise of the Court's inherent jurisdiction (see Garrow and Kelly's *Law of Trusts and Trustees*, 5ed, 1982, 232-234; and *Nevill's Law of Trusts, Wills and Administration in New Zealand*, 8ed, 1985, 145-146). Two recent decisions are pertinent to this subject, one directly, and the other indirectly.

The case directly on point is *Re Ann Myfanwy Fulton Trust* (High Court, Auckland, M706/88, 4 December 1989, Eichelbaum CJ), which concerned an exercise of the Court's inherent jurisdiction. The plaintiff was the sole surviving beneficiary of a trust arising under his mother's will. He was about 18 months away from obtaining a vested interest in the capital of the trust fund, although at the time of trial his interest was in the income only and was at the discretion of the trustee. The defendant was the sole trustee, and was the plaintiff's uncle. The trust had various assets, most notably a controlling interest in a company whose purpose was as a shareholding vehicle with shares in other companies belonging to "the Mutual Group" and carrying on business as Avis Rental Cars. The defendant was not only a trustee. He was also a director of the various companies; and held shares in each of the companies either personally, or by means of companies in which he had a controlling interest, or as a trustee of various other trusts. The plaintiff applied to have the defendant removed as trustee.

There was no dispute as to the relevant legal principles. Eichelbaum CJ quoted passages from *Letterstedt v Broers* (1884) 9 AC 371, and Miller v Cameron (1936) 54 CLR 572, and cited the leading New Zealand decisions: *Hunter v Hunter* [1938] NZLR 520 and *Preston v Preston* [1960] NZLR 385. The Court has a duty to see that trusts are properly executed, and must be cognisant, in the exercise of its discretion, primarily of the welfare and interests of the beneficiaries.

The plaintiff relied on three factors to urge the Court to remove the defendant. First, he suggested that there was *hostility* between himself and the defendant. It was clear that mere friction was not adequate, nor mere evidence of hostility. Eichelbaum CJ found that "[s]ince 1986 relations between the plaintiff and the defendant have deteriorated to the point where no personal communication of any effective nature exists between them", and that there was clear evidence of personal hostility. Most importantly, the hostility was caused by the unreasonableness of the defendant. Significantly, His Honour cited as appropriate to this case a comment of Macrossan J in the Queensland Supreme Court in *Re Whitehouse* [1982] Qd R 196 at 206:

> . . . the disputes and the state of animosity which exists have been attributable to the defendant to an extent sufficient to make the Court apprehensive as to his future administration of the trust.

The significance of this citation will be highlighted herein. This concentration on the position, and behaviour, of the trustee is, it is suggested, quite proper, since it is from this quarter that the danger to the trustee comes. Mere hostility on the part of a beneficiary (or even all the beneficiaries) should not of itself be adequate for a trustee's removal.

Secondly, the plaintiff alleged the existence of *actual or potential conflict between the trustee's duty and his personal interest*. Eichelbaum CJ accepted that there was a potential conflict by virtue of the defendant's personal involvement in and interests in the various companies. He also examined in some detail two transactions in which he concluded that an actual conflict occurred, and in one of which the trust clearly took second place. Must there be cases of actual conflict before the Court will intervene? It is suggested that nothing in Eichelbaum CJ's judgment warrants such a limitation. Indeed, he refers to the plaintiff as having a "proper concern that the rights of the Trust *might be submerged* in the defendant's commercial decisions taken in the interests of 'his' group of companies, which led to the raising of reasonable questions *which . . . the defendant resented*" (my emphasis). The implication is that a possibility of conflict is adequate, and certainly this would be so where hostility is manifested by the trustee towards reasonable concerns or inquiries. Furthermore, in referring to an argument from the defendant that the life of the Trust was only a further 18 months, and therefore the Court should decline to act, Eichelbaum CJ said:

> The potential for continuing situations of conflict between duty and interest is such however that from the point of view of the Court's duty to the plaintiff as beneficiary of the trust, there is a clear obligation to intervene . . .

This approach is quite consistent with equity's general prophylactic approach where the integrity of trustees is in question. Significantly, His Honour also cited *Re Whitehouse* in his discussion of this second argument of the plaintiff.

The third factor relied on by the plaintiff — the *defendant's apathy in fulfilling his obligation to render proper accounts and provide information to his beneficiary* — was not discussed as a separate item. It is suggested, however, that a persistent failure of this kind, and a failure to exercise other trust duties and powers (eg powers of investment) could well found a removal, particularly where such failure was either caused by, or was evidence of, a hostility from the trustee towards the beneficiary.

Re Fulton Trust is a useful example of the ambit of the Court's inherent jurisdiction to remove trustees. Particularly to be welcomed is the reminder that where possibilities of conflict between duty and interest exist, the Court's scrutiny will err on the strict side. This must be a timely encouragement to trustees of family trusts, who might well be family members who are at the same time intricately involved and personally interested in businesses in which the trust has a property holding of some type, to behave in a scrupulous manner. Often, of course, solicitors and other professionals act as trustees with family members, and it is well for these professionals to guard diligently the impartiality and integrity of the entire trusteeship.

The second case, indirectly on the point, but nonetheless raising a potentially new and as yet unrecognised, fifth, method whereby the Court might remove a trustee, is the decision of Doogue J in *Rossiter v Wrigley & Alves* [1989] BCL 1311. I have discussed this decision in considerable detail elsewhere (see "Reviewing a Trustee's Act, Omission or Decision Under s 68 of the Trustee Act 1956" forthcoming [1990] *New Zealand Recent Law Review*), and will not repeat that material here. However, it is of interest to note that s 68 of the Trustee Act 1956 clearly provides, in my view, a means whereby the Court, on the application of "any person who is beneficially interested in any trust property", may remove a trustee. Section 68 has a counterpart section in Queensland: s 8 of the Trusts Act 1973. It was this section which was used successfully by the plaintiff in *Re Whitehouse*, the decision referred to by Eichelbaum CJ in *Re Fulton Trust* as "a case having much analogy with the present", to cause the removal of the trustee in that case. Presumably the section has the same scope here, and, as I argue in my other paper, Doogue J's interpretation of it is in some respects even more favourable to a plaintiff beneficiary than the Queensland Courts' interpretation. The texts will need to add this fifth method.

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Holiday pay — Matrimonial property or separate property for the purposes of the Matrimonial Property Act 1976?

In *Roberts v Roberts* [1990] BCL 497 Williamson J was principally concerned, on an appeal by the wife, with the question whether the husband's redundancy payment amounting to $24,521.01 was matrimonial property or separate property. The Family Court, applying the decision of Sinclair J in *Wharfe v Wharfe* (1988) 4 NZFLR 634 to the facts of the case, held that the payment should not be treated as matrimonial property either in whole or in part. His Honour upheld this decision.

It is the second question which arose on the appeal which is of particular interest: were the holiday pay that had accrued to the husband ($912.02) and the current holiday pay of $1,589.02 to be classified as matrimonial property or not?

The spouses married on 1 February 1964. They had three children, now all adult. The parties' separation occurred on 29 October 1987. The husband started working for his employer in January 1963 as an electrician. He remained in his job until he was given four weeks' notice on 7 October 1987, that is to say, shortly before the parties' separation. His employment finally terminated on 7 November 1987, that is to say, very soon after the parties' separation. The employer had evidently decided to close down the complete section in which the husband worked. The husband was not a member of any union and seems to have had no written or formal contract with his employer concerning employment or redundancy matters. On termination of his employment in November 1987 the husband received both the amounts of holiday pay he was owed.

It was submitted before Williamson J on behalf of the wife that payment of holiday pay was required by statute and that a right to the payment arose as soon as the employment was terminated.

For the husband, it was argued that the holiday pay was part of his normal income during the year and was not part of property acquired during the course of the marriage.

The Family Court had held that the right to payment for holidays was a right that arose only on cessation of employment and that, until that time, the right was a right to elect to take a holiday and not to a payment of a sum. Since the husband's employment ceased following the parties' separation, the holiday pay was, that Court decided, the husband's separate property.

Anderson J analysed the situation thus: holiday pay to enable an employee to take a period away from work for which he is paid is a payment in relation to future activity. Entitlement to such annual holidays with pay is governed by s 11 of the Holidays Act 1981. Section 13 of that Act enacts that, where the employment of a worker is terminated before he has taken the whole of any holiday to which he has become entitled, his employer shall be deemed to have allowed to the worker, from the date of the termination of the employment, the balance of the holiday not already taken, and shall pay forthwith to the worker, in addition to all other amounts due to him, holiday pay for that balance. In His Honour's opinion, s 13 applied from the date of termination of employment and was in respect of holidays deemed to be allowed to an employee. In the present case, the greater part of the holiday pay — the $1,589.02 — was for the future, ie, after both the date of separation and the date of termination of employment. The $912.02 for holiday pay accrued prior to the commencement of the year of termination, however, was payment to which the husband had become entitled prior to the date of separation. He had a right to this sum and, by virtue of ss 2 and 8(e) of the Matrimonial Property Act 1976, that sum should have been included as Matrimonial property.

P R H Webb
University of Auckland.

Mismatch or misjudgment:

The Mercury Bay Boating Club Inc v San Diego Yacht Club et al

By Hon Mr Justice Thomas, a Judge of the High Court of New Zealand

The America's Cup has become a sporting event of major interest to New Zealanders. The last episode, of the monohull against the catamaran was however, hardly a sporting event at all, and the subsequent majority decision of the New York Court of Appeals has not made it so. In this article Mr Justice Thomas critically analyses the Court's decision, and considers that the conclusion of the minority is correct, and that it was not open to San Diego to respond to Mercury Bay's challenge with a catamaran.

Introduction

One can readily agree that sporting events should be contested in the appropriate sporting arena. The frustration of many people, keen yachtsmen included, with the fact that the America's Cup was apparently determined in the Courts and not on the water is therefore understandable. Nevertheless, such a reaction is too simplistic. As in any other area of human activity disputes will inevitably arise in sport, especially when it is so often the vehicle for big-monied interests. When disputes do arise, and they cannot be resolved amicably or within the framework of the particular sporting code's own governing structure, the only recourse available to the aggrieved party short of capitulation is to initiate the appropriate legal proceeding.

When the San Diego Yacht Club met the Mercury Bay Boating Club's challenge for the America's Cup in a monohulled-keel yacht with a twin-hulled catamaran, legal proceedings were probably inevitable. This was not just because the resulting gross mismatch was too great an affront for Mercury Bay to ignore, but because San Diego put both the fundamental nature of the Deed of Gift under which the America's Cup competition operates and its legitimate conduct as the trustee under that trust instrument squarely in issue. These were issues which could not be resolved on the water or in the protest room.

I therefore followed the various legal confrontations in the Courts of New York with close interest. Initially, I admit, I was less than confident of Mercury Bay's prospects of success. The Club's United States counsel appeared too inclined to advance a more comprehensive interpretation of the Deed of Gift than necessary to simply exclude a catamaran from the competition. As a result, argument before Justice Ciparick of the New York Supreme Court, and then the Appellate Division of the Court, seemed to focus far too much on the appropriate formula to control the defender's selection of a vessel to resist the challenge, such as the proposal that it must be "like or similar" to the challenging vessel or "somewhat evenly matched" with it. In resisting the expansion of the deed to incorporate a Court-imposed lasting formula which would govern the selection of the defending vessel, San Diego appeared to capture the high ground – or the weather berth.

I consider that the essential questions were two-fold; whether or not a catamaran is outside the terms of the deed – a question of determining the intention of the donors – and whether or not San Diego's choice of a catamaran was a violation of its fiduciary obligations under the trust deed. New Zealand counsel, I consider, would have framed the case in these terms, and a New Zealand Court, I believe, would have been receptive to the notion of determining the issue on this more restricted basis.

It is well recognised that, as a case progresses through the various tiers of an appellate structure, the issues tend to become increasingly refined. Key points emerge with greater clarity and force, and the Court's determination is likely to read that much more compellingly as a result. Regrettably, only the former can be said to be the case here. The issues before the New York Court of Appeals were developed along the lines of the questions I have identified above, but the Court's determination is anything but compelling.

By a majority of five to two the New York Court of Appeals found in San Diego's favour on both issues. I have been both surprised and dismayed to find the reasoning of the majority shallow and seriously flawed. Their contentions are not so much refuted as routed by the dissenting minority. With all due respect, the majority are patently wrong.

The interpretation of the Deed of Gift

Although I would close the question at the word "catamarans", one cannot cavil too much with the majority's early formulation of the issue:

> The legal issue we must determine is whether the donors of the America's Cup, as the settlors of the trust in which it is held, intended to exclude catamarans or

> otherwise restrict the defenders' choice of vessel by the vessel selected by the challenger. (Uncorrected Opinion of Majority, p 12)[1]

In turning to ascertain the settlors' intention, however, the majority adopted a strictly literal approach to the interpretation of the Deed of Gift. They found that nothing in the deed *expressly limits* the design of the defending club's vessel, nothing *expressly limits* the competing vessels to monohulls, and there is nothing to *expressly require* the defending yacht to have the same number of hulls as the challenging vessel. Finding no ambiguity in the language of the deed, the majority then declined to refer to extrinsic material as an aid to interpretation.

I am, in the first place, critical of this approach. A Court's objective in examining a trust instrument is to ascertain the intention of the donor as the settlor of the trust. After all, it is the donor's gift. While it is a well-established principle that the settlor's intention is to be ascertained from the language of the trust instrument when the words used are unambiguous, adopting a strictly literal interpretation is frequently a sterile exercise just as likely to obscure as it is to assist in ascertaining the settlor's true intention. In contrast to the construction of a contract where the Court is called upon to determine the intention of the two or more parties concerned, the construction of a trust instrument involves only the intention of the settlor. It would seem self-evident that the Court should seek to promote his or her intention rather than defeat it.

Oddly enough, over the years it has been American Judges rather than their English counterparts who have been more assertive in looking beyond the bare terms of an instrument to determine the intention of the maker. Yet, the majority's reasoning in this case is reminiscent of some of the worst examples of what Lord Denning has called the "double-thinking" of the English Chancery Judges of earlier times.[2] In effect, the majority ascertain the intention of the settlors by the simple device of finding that there is nothing in the Deed of Gift which *expressly prohibits* San Diego from doing what it did. That it may have been outside the contemplation or wishes of the donors does not appear to concern them.

Further, it is unconvincing to hold that a trust instrument is unambiguous on the basis that a catamaran is not *expressly* prohibited or that a monohull is not *expressly* required. Lack of ambiguity is surely to be found in the use of express words, not their absence. In other words, the majority's opinion would have been more soundly based if the deed had expressly permitted a catamaran or expressly provided that the competition was not limited to monohull vessels. This is particularly so having regard to the express language which the majority had to ignore or explain away.

My second criticism, then, is that even the literal meaning which the majority attribute to the Deed of gift is untenable. In my view, the language points ineluctably to the conclusion that the donor[3] of the gift contemplated a race between monohulled vessels, and monohulled vessels only.

The most clear indication that this was the settlor's intention is to be found in the requirement that competing vessels, if of one mast, are to be not less than 44 feet nor more than 90 feet on the load water line or, if of more than one mast, not less than 80 feet nor more than 115 feet on the load water line. Consistent with this, the only dimensions of the challenging vessel the challenger is required to disclose in the notice of challenge are the "length on load water line; beam at load water line and extreme beam and draught of water". While these dimensions are critical in assessing the potential water speed of a monohull they have little or no relevance to a catamaran. Different criteria would be specified for multi-hulled vessels.

To meet this point the majority advance an explanation for the required disclosure by the challenger which beggars serious belief. They claim that because the challenger may have had unlimited time to design and construct its vessel, and the defender's preparation is limited to ten months' notice of the challenge, the challenger has a competitive advantage. The requirement that the challenger disclose these dimensions, the majority says, is the means by which the deed removes the "competitive advantage which would otherwise inure to the challenger". (Ibid, p 14) They conclude, therefore, that the question of whether the dimensions themselves relate to multi-hulled vessels is simply not relevant to the issue of whether the deed precludes a catamaran defence.

With respect, this reasoning cannot withstand scrutiny. For the purpose of interpretation, any significance the period of ten months might have is to be viewed from the perspective of the settlors in the latter half of the 19th century when the Deed of Gift was settled, and not having regard to today's circumstances. The period of notice was extended from six months, as it was in 1857 (repeated in the 1882 version of the deed) to ten months in 1887 by the New York America's Cup Committee assembled to work with George Schuyler, the surviving donor, on the terms of the deed. Following an abrupt challenge in 1887 by the Scottish challenger, *Thistle*, the period of notice was enlarged to ten months specifically to allow the New York Yacht Club, or any defending club, adequate time to meet the challenge.

In any event, if it had been the surviving settlor's intention to eliminate this in-built competitive advantage which the challenger allegedly possesses there had to be better ways of doing it. Why, for example, stipulate the period of ten months and create the problem in the first place? Providing a longer period of notice would have been the obvious method of avoiding any disadvantage to the defender if it had been a factor in the settlor's thinking. And why, then, if that is not correct, should the settlor seek to redress this competitive imbalance by requiring dimensions relating to a monohull only? Furthermore, to defeat this so-called attempt to remove the competitive advantage which would otherwise inure to it, the challenger only had to specify the maximum load water line length of 90 feet. The defender could not go beyond that. Anomalously, the majority's reasoning would "remove" the advantage for a challenger specifying less than the maximum load water length but not for a challenger stipulating the maximum dimension!

The deed utilises other language pointing to the settlor's intention to

restrict the competition to monohulls. The deed specifically allows "centre-board or sliding keel vessels" to compete. There is to be no restriction "upon the use of such centre-board or sliding keel", and "the centre-board or sliding keel" is not to be considered part of the vessel for the purposes of measurement. It will be noted that the references are in the singular. As the minority observe; "the drafter had in mind a vessel with *one* hull, using one centre-board or sliding keel, not a catamaran having *two* hulls and *two* centre-boards or sliding keels". (Uncorrected Opinion of Minority, p 22.)

In addition, until 1956 when the deed was amended by an Order of the New York Court, the challenger was required to sail from its country of origin to the match venue "on its own bottom". At the time the deed was drafted catamarans were too small and not sufficiently seaworthy to undertake the ocean crossings necessary to get to the site of the match. It is highly improbable that the donors had them in mind at all or, if they did, that they thought it necessary to specifically exclude them. They were not what the America's Cup was about.

A further indication that the donors did not have catamarans within their contemplation is to be found in the fact that the surviving settlor expressly provided for the maximum and minimum waterline dimensions of yachts with one mast and different waterline parameters for vessels having more than one mast. It is again anomalous that he should be thought to have recognised and made provision for vessels with more than one *mast* but not vessels with more than one *hull*. Furthermore, if the settlor also saw fit to specifically "allow" and provide for vessels with a centre-board or sliding *keel*, he would surely have thought it necessary to explicitly "allow" and refer to the use of catamarans.

To support its literal construction, and thus enable it to dismiss extrinsic material which could assist with the exercise of ascertaining the settlor's intention, the majority relied upon a single phrase, "any one yacht or vessel". The deed accords a challenger the right of sailing a match for the Cup with a yacht or vessel propelled by sail, and constructed in the country to which the challenging club belongs against "*any* one yacht or vessel" constructed in the country of the defending club. Given its plain and natural meaning, the majority assert, this phrase means that the defender is able to defend in a single vessel of *any* type. The word "one" was inserted in 1882 by Mr Schuyler to prevent a "fleet defence" of the type which the British challenger *Cambria* had been forced to meet in 1870. He explained in writing at some length that this amendment made clear what the deed already provided, that is, that the defending club was limited in its defence to only "one" yacht as opposed to more than one. He thought, not unreasonably having regard to its primary meaning, that the use of the word "any" already conveyed the requirement of one vessel. In other words, the phrase is to be read as "any *one* yacht or vessel", not "one yacht or vessel *of any kind*".

It is odd, to say the least, that the majority should have held the meaning of an inherently ambiguous phrase so plain and clear that they were able to avoid referring to the very circumstances which would have indicated that their interpretation was demonstrably wrong.

Furthermore, the phrase "any one vessel or yacht" does not fall to be interpreted in a vacuum. It is used in the context of a deed with clearly stated objectives which, I would have thought, plainly point to the meaning the settlor intended the deed to bear. First, there is the donor's express stipulation that the cup is donated "upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries". Secondly, the organised yacht clubs of a foreign country are to be "entitled to the right of sailing a match" for the Cup. Each of these objectives frame the donor's purpose and intent.

First, it cannot be thought that the settlor contemplated a race between monohulls and catamarans if the competition was to be preserved as a perpetual challenge event, the emphasis being on the fact that it is a *challenge* event. The challenger dictates the terms in giving advance notice of the challenging vessel's dimensions. The deed is bereft of overall meaning unless one makes this assumption.

The majority's decision effectively converts the deed into a perpetual defender's gift. The defending club can render any challenge futile if it has the potential to ship a catamaran against a conventional yacht. And any balance in the bargaining capacity of the challenger and defender in deciding upon the racing arrangements pursuant to the "mutual consent" provision is destroyed. Indeed, the settlor's well-intentioned "mutual consent" concept would effectively provide the defending club with a dominance equivalent to a power of veto.

Nor, in the second place, can it be thought that the settlor would have envisaged the racing of a catamaran against a monohull as "friendly competition". It is anything but that. Consequently, the majority's strictly literal construction of the phrase in question is not easily reconcilable with the original and basic purpose of the donor's trust. Indeed, for the majority to be correct, it must be envisaged that the donor has on one hand donated a cup for "friendly competition" and on the other hand intended to provide the defender with the means of subverting that very aim.

The majority seek to meet this point by arguing that the phrase "friendly competition between countries" more aptly refers to the spirit of co-operation underlying the competition contemplated by the deed. Thus, they conclude, San Diego responded to Mercury Bay's "competitive strategy" in making the challenge by availing itself of the "competitive opportunity" afforded by the broad specifications of the deed, a response available to the defending club when the race arrangements are not agreed under the mutual consent provision.

To my mind, this interpretation also undermines the clear conditions on which the trust was created. The Cup was donated "upon the condition" that it would be preserved as a perpetual challenge Cup for friendly competition between foreign countries. These clear words, phrased as a condition of the gift, do not readily import the notion that the donor's aim in donating the Cup only arises in the implementation of the "mutual consent" provision relating to the

actual match arrangements.

The same can be said of the donor's injunction that yacht clubs of foreign countries are *entitled* to the *right* of sailing a *match* for the Cup. Construing the terms of the deed in such a way as to enable the defending club to create a gross mismatch is to make a mockery of the challenger's "entitlement" and "right", and the notion of a "match" for the Cup. Again, had they been prepared to look outside the terms of the deed, the majority would have been forced to conclude that their perception of a "match" did not coincide with Mr Schuyler's – "a match means one party contending with another party upon equal terms as regards the task or feat to be accomplished". (Minority, p 15)[4]

Furthermore, the majority's interpretation means that a defending club could meet a challenge to race a yacht of, say, 70 feet load water line length with a defending vessel measuring 90 feet at the load water line. In other words, irrespective of the dimensions specified by the challenger in its notice of challenge, the defender could always go to the limit of the dimensions specified in the deed. This renders the express opportunity for the challenger to specify a vessel, if of one mast, of something between 44 feet and 90 feet or, if of more than one mast, between 80 feet and 115 feet, a redundant mockery.

For all the above reasons, I am drawn inescapably to the conclusion reached by the minority; the Deed of Gift, in both its original and amended forms, contemplated only monohulls. It was never open to San Diego to respond to Mercury Bay's challenge with a catamaran.

Breach of trust

I turn now to the second question aptly defined by the minority in these terms:

> Can it be consistent with the duties of a holder and defender as trustee of the America's Cup to meet a lawful challenge by a monohull with a catamaran for the express purpose of avoiding the very competition which the gift of the Cup was intended to promote? (ibid, p 3)

As with so many carefully crafted questions, it virtually answers itself. But the substantive point is sound. It is not open to a trustee charged with fiduciary obligations to disregard those obligations for a purpose alien to the controlling trust instrument. And the trustee must act with irreproachable fairness. The law demands nothing less, and ought not demand less.

Confronting San Diego with the trust obligations it agreed to undertake as the custodian of the trophy did not require the Court to arrive at a construction of the Deed of Gift favourable to Mercury Bay. The argument applies, the minority contend, even if it is held that the literal meaning of the deed encompasses a defence by a catamaran. As they put it, the "resolution of the decisive issue – whether the Deed of Gift has been properly construed – depends not on whether the Deed of Gift *can be read* to encompass a catamaran but whether San Diego, as trustee, *ought to have read it that way*". (Ibid, p 18)

The minority therefore found that San Diego had violated its obligations as the trustee by unilaterally adopting a literal and narrow construction of the trust instrument for the very purpose of creating a mismatch and retaining the Cup at all costs. It thereby subverted the whole objective of the gift in trust. To arrive at this conclusion the minority invoke much the same factors as I have discussed in relation to the question of interpretation. Thus, they refer to the condition under which the Cup is to be presented as a perpetual challenge cup for friendly competition between foreign countries, note that these requirements are mandatory, and observe that it "seems self-evident that a defence of the cup *calculated to circumvent a lawful challenge* and to *avoid any competition* would flatly contradict these two instructions". (Ibid, p 13). They refer again to the donors' instruction that the challenger "*shall always be* entitled to the right of *sailing a match for this Cup*" and suggest that it is equally self-evident that a defender "cannot act deliberately to prevent 'a match' without violating this unequivocal mandate". (Ibid, p 14).

I agree, but I am not entirely comfortable with the formulation adopted by the minority. Incorporating the notion that San Diego is in breach of its trust obligations for interpreting the deed strictly or narrowly seems unnecessary to me. The standard of conduct expected of trustees is very high and very strict. It suffices, in my view, that San Diego as a trustee used a catamaran to subvert the express objectives of the trust and ensure for itself, as the defending club, a certain victory. It is a simple breach of trust.

The majority first endeavoured to counter this argument by contending that the question of whether San Diego's conduct is acceptable is wholly distinct from the question of whether it is "legal"; concepts of "sportsmanship" and "fairness" are, with respect to sporting contests, to be resolved by members of the yachting community rather than the Courts. I have already touched upon this point. Apart from the fact that San Diego submitted to the Court's jurisdiction and did not raise the point before Justice Ciparick, the Agreement of Assignment and Acceptance,[5] which it duly signed before the Cup was released to it, expressly recognises that, as "the trust under which the Cup is held" had been created under the laws of the State of New York, the terms and conditions of the Deed of Gift are to be "*governed by*, and construed in accordance with" the laws of New York, and that "any proceeding for the amendment or interpretation of such terms and conditions [is to] be brought before the Courts of the State of New York." (Emphasis added.) What was in issue, in addition to the fundamental meaning of the deed, was whether the conduct of San Diego could be said to be in accordance with the law relating to charitable trusts in New York, not a dispute over sporting ethics or racing rules. The issues were uniquely appropriate for adjudication in the Courts of New York as contemplated by the deed.

The difference between the majority and minority is most acute in their approach to San Diego's responsibilities as custodian of the Cup. While the majority acknowledge that the trustee of the America's Cup is "obliged to act in good faith and in the spirit of friendly competition by reasonably attempting to reach an accord on

the terms of the matches to be held", (supra, p 19) they do not extend these qualities to the selection of the type of vessel to meet the challenge. When making this decision the defender is, according to the majority, acting as a competitor – and apparently anything then goes.

Having regard to the terms of the deed this approach is also indefensible. The majority, in effect, deny the existence of the trust and the strict fiduciary duties which attach to anyone in the position of administering a trust. It is also noteworthy that San Diego agreed to accept the donors' trust pursuant to the following provision in the Assignment and Acceptance of the Cup: "[San Diego] hereby accepts the Cup subject to the *said trust*, and to the *terms and conditions*, of the Deed of Gift. (Emphasis added.)

The majority seek to militate against the strict application of San Diego's trust obligations by describing the trust as a competitive or "sporting trust". Yet, as the minority confirm, it is clear that the America's Cup trust is not a sporting trust; it is a valid New York charitable trust.

Moreover, the majority are unconvincing in attempting to explain why this particular trust should not be treated like any other trust. Why, it may be asked, should a trustee in one particular area of human activity be permitted to deviate from the terms of the trust he or she has so solemnly assumed? Why, it may also be asked, is it any less important that effect be given to a donor's intention in the sphere of sport than in any other area of human endeavour?

Again, in my view, the issue comes back to the intention of the donor as settlor of the trust. For the majority to be logical and correct, it must be responsibly argued that the donor did not intend the custodian of the trophy to be a trustee in any recognised sense of that word. Otherwise the majority would be overtly defeating the settlor's intention. Any such proposition also seems self-evidently wrong. As apparent from the above quotation, San Diego accepted the Cup subject to the "trust" evidenced by the deed. And it did so in the context of the donor's statement of the objectives of the Cup and the rights of the challenger.

I accept that there is legitimate area in which San Diego is undoubtedly a competitor and not a trustee, and in which it is fully entitled to act as a competitor – and a tough competitor at that. Indeed, I would go further than the minority in this regard and acknowledge that the defending club must be able to bring its competitive instinct to bear long before "the first warning gun of the race goes off". (Minority, p 11.) The America's Cup is just as much about design, technology, innovation and resources as it is about sailing skills and crewmanship. I agree that the defending club should not be inhibited in striving for a competitive advantage in any of these respects. However, it is one thing to meet a monohull with another monohull within the dimensions specified by the challenger which, for one reason or another, is nevertheless vastly superior in performance, and quite another thing to meet a monohull with a catamaran, to which the dimensions specified by the challenger are irrelevant, for the very purpose of assuring a "no contest" victory. It is not inappropriate to say that the former represents a difference in degree, the latter a difference in specie.

Furthermore, in making the decision to race a catamaran, San Diego was deliberately seeking to secure the cup by staging a mismatch in contravention of the objectives and spirit of the Deed of Gift. Its purpose was openly venal. In judging the conduct of a trustee it is not permissible to disregard the trustee's known purpose. Again the distinction is clear; in meeting the challenge of a monohull with another monohull of the same specified dimensions, but nevertheless one of superior design or technology giving it a significant advantage on the water, the defender is acting in accordance with the objectives of the Deed of Gift; in meeting the challenge with a catamaran to which the notified dimensions are inapplicable for the very purpose of avoiding any real competition or match the defender is circumventing the objectives of the deed and subverting the intentions of its donor.

In virtually renouncing the defender's role as a trustee, the majority has inadvertently opened up other avenues for the over-zealous defender to thwart the objectives of the America's Cup. No one has ever suggested that the Deed of Gift is elegantly drafted. For example, while the deed provides that, in the absence of mutual agreement, the defending club is to select the ocean course for the match, it does not require the club to give advance notice of the course to the challenger. The defending club could, adopting the majority's "literal" approach to the interpretation of the deed, withhold all information as to the course until it is too late for the challenger to effectively compete with it. Such a move would surely be branded as outrageous, found to be contrary to the spirit if not the letter of the deed, and held to be a gross violation of the defender's trust obligations as the custodian of the trophy. Selecting a catamaran is of the same order.

A lawful challenge

If my assessment of the majority's decision has any validity, the question will undoubtedly arise; how is it that, first the majority of the Appellate Division and, then, the majority of the New York Court of Appeals, so emphatically found in favour of San Diego and against Mercury Bay. I believe the answer lies in the Judges' perception of the "merits" of the case.

The Judges in the majority in both the Court of Appeals and the Appellate Division adopted a starkly different attitude to the merits from Justice Ciparick and the minority Judges in the two appellate Courts. To the Judges who perceived Mercury Bay's challenge as unfair, in the sense of being opportunistic or smart, cutting across established convention, putting San Diego at a real disadvantage, and depriving other potential contenders of their expectation of participating in the anticipated 12 metre regatta in 1990 or 1991, a strict construction of the deed and a spartan view of San Diego's obligations as trustees seemed logical. As the majority of the Appellate Division openly observed, if Mercury Bay adopts a literal interpretation to the deed to make an unconventional challenge in modern terms it cannot complain if the deed is interpreted literally against it. Those Judges, on the

other hand, who perceived Mercury Bay's challenge as perfectly legitimate and more in keeping with the spirit of the America's Cup competition than the latter-day 12 metre challenges, bridle at interpreting the deed in such a way as to permit the conspicuous inequality of a race between a monohull and a catamaran. Nor are they prepared to approbate such conduct in one having the status of a fiduciary.

So it is that the majority in the New York Court of Appeals speak of Mercury Bay's "unorthodox challenge" and "competitive strategy" with apparent disfavour when alluding to the factual background to the dispute. And the minority in both appellate Courts, along with Justice Ciparick at first instance, find Mercury Bay's challenge "unquestionably proper" in every respect.

To my mind, however, the majority have missed the key point in assessing the merits; initially Mercury Bay's challenge had been held to be a *lawful* challenge by Justice Ciparick, and her decision had not been appealed by San Diego. The club chose to meet Mercury Bay on the water. It is therefore my view that, as the trustee under the Deed of Gift, San Diego was obliged to start with the fact that it was presented with a lawful challenge. This being the case, it could not then adopt a course which on the one hand accepted that the challenge was lawful but on the other treated it as improper.

Furthermore, it is to be observed that it was San Diego which was vested with the duties of a trustee. Mercury Bay, as the challenger, was not subject to a trust. The issue should not, therefore, have been approached as if it were a dispute between two parties to a negotiated contract. It was San Diego's conduct as a trustee which was the conduct in issue. Examining that conduct it is inconceivable that San Diego should be exonerated from violating its trust in meeting a monohull with a catamaran for the express purpose of turning the event into a mismatch and aborting a challenge judicially held to be valid.

Conclusion

Notwithstanding Chief Justice Wachtler's concurring claim that the case has "little significance for the law", (Concurring Opinion, p 1), I venture to predict that it will attract considerable attention within legal circles, and will be closely analysed and examined in legal publications, particularly in the United States itself. It is certain that the majority's decision will not emerge unscathed. Indeed, if I am at all correct in discerning the shallow and flawed reasoning on which it is based, the decision will ultimately be perceived as part of yet a further blemish on the history of a great trophy.

And the majority itself? Eventually also, to borrow and distort Lord Atkin's famous dictum *Perrin v Morgan* [1943] AC 399, at p 415), they must confront the ghosts of a dissatisfied George Schuyler and the earlier donors of the Cup waiting on the opposite bank of the Styx to receive them. And there, I suggest, looming spectre-like but with true judicial bearing behind them, will be Justice Cardozo and the other great jurists of the New York Court of Appeals, their thunderous countenances saying it all. □

1 As at the time of writing, the Court's decision was available only as three separate and uncorrected opinions; that of the majority, a concurring two page opinion by the Chief Justice, and the dissenting opinion of the minority.

2 Lord Denning, *The Discipline of Law* (1979) at p 23.

3 For simplicity, I refer to the donor or settlor in the singular unless the context requires otherwise. There were five donors when the America's Cup was originally donated in 1851. In 1881 the Cup was returned to the surviving donor, George Schuyler, by the New York Yacht Club in order that it might be conveyed back to the Club under a more specific deed of gift. This he did in 1882. The deed of gift was further revised in 1887.

4 I do not contend, as may have been conveyed in earlier submissions, that the phrase "friendly competition" or the word "match" is to be interpreted as having a particular meaning which *in itself* eliminates a catamaran. Rather, the "friendly competition" and "match" provisions establish the objectives by which the Deed of Gift is to be interpreted and the settlor's intention properly determined.

5 The Deed of Gift contemplates that the triumphant challenger for the Cup will enter into an agreement called an "Assignment and Acceptance" with the defeated defending club before assuming custody of the Cup. Thus, the Royal Perth Yacht Club entered into an Assignment and Acceptance with the New York Yacht Club in 1983, and San Diego with the Royal Perth Yacht Club in 1987. My quotation is from the latter document.

Criticism and alternatives

Of all the sentimental errors which reign and rage in this incomparable republic, the worst, I often suspect, is that which confuses the function of criticism, whether aesthetic, political or social, with the function of reform. Almost invariably it takes the form of a protest: "The fellow condemns without offering anything better. Why tear down without building up?" So coo and snivel the sweet ones: so wags the national tongue.

In this protest and demand, of course, there is nothing but a hollow sound of words – the empty babbling of men who constantly mistake their mere feelings for thoughts. The truth is that criticism, if it were thus confined to the proposing of alternative schemes, would quickly cease to have any force or utility at all, for in the overwhelming majority of instances no alternative scheme of any intelligibility is imaginable, and the whole object of the critical process is to demonstrate it. The poet, if the victim is a poet, is simply one as bare of gifts as a herring is of fur: no conceivable suggestion will ever make him write actual poetry. The cancer cure, if one turns to popular swindles, is wholly and absolutely without merit – and the fact that medicine offers us no better cure does not dilute its bogusness in the slightest. And the plan of reform, in politics, sociology or what not, is simply beyond the pale of reason; no change in it or improvement of it will ever make it achieve the downright impossible. Here, precisely, is what is the matter with most of the notions that go floating about the country, particularly in the field of governmental reform. The trouble with them is not only that they won't and don't work; the trouble with them, more importantly, is that the thing they propose to accomplish is intrinsically, or at all events most probably, beyond accomplishment. That is to say, the problem they are ostensibly designed to solve is a problem that is insoluble. To tackle them with a proof of that insolubility, or even with a colorable argument of it, is sound criticism; to tackle them with another solution that is quite as bad, or even worse, is to pick the pocket of one knocked down by an automobile.

H L Mencken
The Cult of Hope (1920)

The 9th Commonwealth Law Conference — a personal view

By A O Ferrers, formerly an Auckland Practitioner and now of Queensland.

Every expatriate on his or her way home wonders at the reception which he or she will receive. I had such thoughts. Our Boeing aircraft, adorned with the koru insignia of Air New Zealand, was bearing my wife and me to Auckland from Melbourne, where we had spent a few days en route from our Gold Coast home. These thoughts intensified as we slowly descended through the clouds to Mangere, but the warmth of greeting by our hosts dispelled any misgivings in a moment. I need not have worried. It was good to be back and to be so welcome.

The purpose of our return was to attend the Commonwealth Law Conference to be held in Auckland's brand new Aotea Centre, dubbed appropriately "the house that Cath built". When I had left for Queensland in December 1985, the site was just a large hole in the ground; now there stands a wonderful facility for a convention centre with a fine auditorium. I even spied Brisbane's Lord Mayor, Alderman Sallyanne Atkinson, in the crowd one day, when she confessed to checking it all out. Certainly Brisbane could do with something similar as its City Hall is ageing.

In the satchel for registrants was a 36-page booklet listing those registered at 6 April. Even a quick glance showed people coming from everywhere: in particular was Africa well represented with lawyers from Tanzania, Malawi, Botswana, Swaziland, Kenya, Sierra Leone, the Gambia, Nigeria, Uganda, Lesotho, Zimbabwe, Zambia and Ghana; America, Canada and West Indies boasted Bermuda, the Bahamas, Guyana, Barbados, Grenada, Jamaica, Cayman Is, Trinidad, Anguilla and Antigua; while Asia had people from Sri Lanka, Pakistan, India, Malaysia, Hong Kong, Mauritius, Singapore and Nauru; Europe from England, Scotland, Northern Ireland, Wales, Isle of Man, Malta and Gibraltar; and our own Pacific region from Tonga, Solomon Is, Kiribati, Tuvalu, Vanuatu, PNG and Fiji as well as fellow Australians and local New Zealanders.

Such a wealth of interest, a wealth of talent with a common interest in the law. A common-wealth gathering indeed.

As with all conferences of such magnitude, there was a variety of things to do. Allied groups took the opportunity to hold meetings – like LAWASIA, the Law Council of Australia, military lawyers and so on. I was nearly swept away on the stairs by Judges as they exited *en masse* from their gathering. It was alleged that there were more than two hundred of them. Lord Mackay as Lord Chancellor was no doubt in his element. What is the collective noun for such a body of Judges? A discourse? A . . .? It is interesting to reflect that once again it is a Scottish Judge who is turning the English law and the legal profession topsy turvy. It probably last happened when their Scottish Lordships pronounced in *Donoghue v Stevenson.*

On the social scene there were many choices too: you could dance the night away between dinner courses on board ship cruising the harbour; you could visit a local vineyard to sample its fine products; laze in thermal pools or you could visit an office for cocktails or a home for dinner. We chose the last two delights. Home entertainers had their dinner guests selected at random, but by the happiest coincidence we fortuitously ended up at the home of one of my erstwhile partners.

A great night was had by all. For the English couple and the Scots advocate it was the start of a New Zealand progressive wine tasting, in which area they had some considerable expertise. In London apparently there is a LSWS (which I interpreted to mean Law Society Wine Society) which has regular tastings. Lawyers, seeking o/s experience or on sabbatical or even on business, should bear such a ritual in mind to ensure their London visits fall at just the right time. I'm told it is not all Chateau Thames Embankment, beloved of Rumpole, either. I checked with the aforesaid frequenters of the bar later in the week and found that the progress was proceeding royally.

Indeed the Scot, who originally did not have an accompanying person, was later discovered with one who appeared to be of a vintage quite superb with a particularly good bouquet. At least he did not register, as some recorded in the list of registrants, that the accompanying guest was "to be advised". A sort of "watch this space" statement which I hope was filled in the course of the week.

Lest you should think that all this activity meant enforced absence from the business programme, let me give you some snapshots of those sessions which I attended.

On Tuesday there was discussion of environmental planning and the greenhouse effect. There was first an erudite and well researched paper from an American, Richard Stewart. How did he get there? Does the United States yearn to belong to the Commonwealth, which grew from the Empire it dumped two hundred years ago at a tea party which got out of hand? His office is Assistant Attorney-General with special responsibility for environment issues.

He suggested that we must have a comprehensive approach worldwide instead of national ones which prove to be "costly, inefficient and produce an enormous information overload." His approach would see nations co-

operating to limit their contributions to the greenhouse effect, each following an innovative national policy to this end. This would seem to involve some system of trading allowances between nations. As he put it:

> On the global scale two nations could agree to a voluntary exchange in which one would continue greenhouse gas emissions while the second, in return for a transfer of valuable resources from the first, would reduce its emissions so that the combined total of the two nations' net emissions did not exceed the sum of their individual emissions limits.

The approach seemed to me typically American. There was a complex problem affecting every nation. Hence to deal with it, there could only be a complex solution affecting every nation. By the time everything was in place to make it work, I think we would have either been incinerated or drowned.

This reasoned approach was in stark contrast to the contribution of Edward Goldsmith, a non-lawyer but an outspoken environmental campaigner who edits *The Ecologist*. His blunt message was mankind must change its habits, and soon, or else this Earth will become uninhabitable in a few decades. We are hooked on technology and material wealth and where has it got us? We are staring down the barrel of extinction. He preached a solution by reversing development and returning to the simple life where the use of resources rested with the family and the local community.

Judging by the questions at the end, nobody was interested in the Goldsmith view. He was not called upon. Apparently that was not an option. We were too far gone to go back. As Macbeth said:

> I am . . . stepp'd in so far that, should I wade no more,
> Returning were as tedious as go o'er.

Perhaps Edward De Bono should have attended the session to put before us some fresh approach and a little fun. He certainly did just that in his own packed session in the main auditorium. Comfortably seated on stage alongside an overhead projector, he smoothly proceeded on his merry way, constantly illustrating his messages with drawings of standard 2 quality in coloured crayons which we saw on the big screen.

For him humour is MOST significant. Its essence arises out of looking at any given situation from a different point of view or perspective. Hence justice can be reached by other than the adversarial or confrontational approach adopted by lawyers. Alas, this new method seemed to involve both sides putting all their cards on the table and in today's world who would do that? We would avert strikes, the Courts would no longer be clogged, solutions would be more quickly achieved. Could we really so radically change our thinking to make it work? Depends, I suppose, on your philosophy, on which subject De Bono told us this story:

> A teacher once asked his student, "What is philosophy?" "If there were two people, one clean and one dirty," the teacher said, "to which one would you give a bath?" The student replied, "To the dirty one, of course." "No," said the teacher, "that is logic." The teacher repeated the question. The student gave the same reply. This time the teacher said, "You'd give the bath to the clean person, because that person would obviously appreciate a bath more than the dirty person. However," said the teacher, "that is psychology." In a state of confusion the student said, "I don't know what you're asking me." "That's fine," said the teacher, "that's philosophy."

The Hong Kong session was packed. I was last in Hong Kong in November 1986, when there was a general air of optimism about the future. Since then there have been the tragic events of Tiananmin Square and publication of the basic law, now incapable of change and to be observed from 1997 onwards. Speakers said that it is widely believed that the United Kingdom has let Hong Kong down. Surveys apparently show that 68% of lawyers and accountants intend to migrate before 1997, but half of those would stay if the United Kingdom granted them a "right of abode". They want a bolt hole to run to, if necessary. Compared to other former British colonies, there has been no right of self-determination.

A bill of rights has been drafted but an accountant, Peter Chan, says that Hong Kong's Legislative Council has rejected this already in its present form. It does not please academics, lawyers or the public at large. Nor does it please China. Freedoms now appearing in eastern Europe will not be allowed in China whose Prime Minister is alleged to have said, "Socialist China will stand rock firm in the East." Of course, Hong Kong is but a stepping stone to Taiwan.

Mr Anthony Rogers QC, Chairman of the Hong Kong Bar Association, believed that Hong Kong is on the capitalist road to communism. Notwithstanding the basic law, which was an act of the People's Congress, Hong Kong will be subject to China's full constitution as modified by the basic law. In cases of doubt as to meaning, it will be the People's Congress (a political body), and not the Courts, which will be responsible for interpretation. In such an environment how can the common law survive? Rogers further believes that, if the legal system has to adopt Chinese as its official language, then that alone will kill the common law in Hong Kong.

The colony's Attorney-General found himself in a somewhat sticky situation, but he claimed that post-1997 remedies would be the same as now. There would still be, he maintained, an independent judiciary and an independent bar enhanced by the rule of law and a bill of rights. I wonder. If half the lawyers leave, what then? It is not a pleasant prospect.

As the Chief Justice of Zimbabwe said in the session on Human Rights, "Dictatorship does not sit happily with human rights". Power then comes before people. Seven days is a long time in politics. Hong Kong has seven years. Much is bound to happen in the interim.

Not surprisingly I found myself at the tax session. I have a love-hate relationship with tax, which I find attractive and repulsive at the same time. On occasions its inexorableness leads to absurdity, which is always good for a laugh.

Therein, together with the language it engenders, lies its irresistible drawing power for me, because nobody in their right mind likes tax.

The lead speaker was Professor Arnold from Canada. He advises governments in Canada, New Zealand and Australia on tax. You would think by looking at Australian tax law that his advice was appalling. But that, he says, is not his fault. The fault lies not with the people involved (Paul Keating must be relieved) but with the process, which on its present basis leads to "abysmal" drafting, in Australia especially. He believed that this undermined the whole tax system which led inevitably to its disrespect.

Taxation starts with an idea which in the fullness of time culminates in legislation. The process involves first tax economists on broad policy development, then there has to be a technical analysis by accountants and lawyers and finally the actual drafting by law draftsmen.

Arnold complained and trenchantly criticised Australia in particular for having these three stages kept very separate so that there were inefficiencies which led to bad drafting. He alleged (which a member of the audience from Canberra tried to refute with a very red face) that in Australia Treasury produces very detailed policy papers for the Australian Tax Office. These are virtually a directive to the Commissioner to pass on drafting instructions to parliamentary counsel. Arnold maintained that communication was largely in paper form with few actual face to face meetings between the three areas of input. He pleaded for combined committees right from the start in an effort to produce a better result. His plea may lead to his not being invited to return.

The Professor was complimentary to New Zealand because he believed that the technique of the consultative committee was an integrated system such as he preferred, although he felt that its performance would be even better, were it institutionalised. Furthermore he credited such committees with a public relations role in that they sold to the public at large the thrust of the tax changes which they were scrutinising. Robin Congreve to some extent joined issue on this aspect, in that expectations, with no hope of fulfilment, could be falsely raised, he felt, because those issues had not been at that stage, and may never be, accepted by Government.

Sir Anthony Mason, Chief Justice of the High Court of Australia, favoured the New Zealand approach over the system which Arnold was recommending.

There was a "house full" too at the session on Aids. We heard Mr Justice Kirby (President of the New South Wales Court of Appeal) at his best. Speaking *sotto voce* he held the audience enthralled, in the palm of his hand as it were. Will the law pass the Aids test? Lawyers need compassion, not condemnation. With no medical cure at hand to eliminate the virus, which strikes heterosexuals and homosexuals alike without discrimination, His Honour urged that we must protect our society by seeking to modify its behaviour. This means getting into people's minds. There must be education and information. Those at risk must be protected against alienation and discrimination, as was done with lepers. Lawyers have an important role to play in all this. It was a masterly and memorable performance.

My recollections are not complete without reference to the Conference's opening and closing. The "pocket programme" showed those ceremonies as in fact part of the social and cultural programme. I suppose that is right as there was very little business transacted at either function, though I gave and received a lot of cards on both occasions. Perhaps I should say that there is business hopefully "to be advised" too, so watch this space!

The opening in the main auditorium was a grand affair. Its pattern was fashioned around a traditional Maori welcome by the Ngati Whatua, the people who settled the Tamaki Isthmus. An elder of that tribe bade us welcome in his native tongue. He had no use for microphone or notes — his oratory flowed on without either with consummate ease. An elder of the neighbouring Tainui tribe responded properly and with due ceremony on our behalf. As this twenty minute exchange was conducted entirely in Maori, I did my best to enlighten the Indian delegate beside me as to what was happening to supplement the outline written in the programme.

The gracious and elegant Dame Catherine Tizard as Mayor then warmly welcomed us (even those from overseas on the North Shore were bid welcome) to Auckland, pointing out that it is really the capital of Polynesia with which area and the Pacific generally its future is inextricably linked, rather than with Europe any more.

Other welcomes came from Graham Cowley as President of the New Zealand Law Society ("Make friends this week," he enjoined), the retiring President of the Commonwealth Lawyers Association (Lt Col Hurley Whitehorne) and the Chief Justice of New Zealand (my old "Procedure" lecturer), the Rt Hon Sir Thomas Eichelbaum.

It was then the turn of the Attorney-General, the Rt Hon David Lange, and what a turn it proved to be! How he loves to be among his fellow lawyers. As the wife of the Chief Justice of Nigeria said to me, "Once a lawyer, always a lawyer." DL was at his exuberant best. But his exuberance carried him too far, as he wound up by not only welcoming us visitors, but also triumphantly declaring the Conference open! If not a king-size gaffe, it was a vice-regal size.

It put the following speaker, no less a personage than the Governor-General, His Excellency The Most Reverend Sir Paul Reeves, on the spot. We need not have worried for a moment, he was quite equal to the challenge of the occasion. With equable calm he said:

> Ladies and gentlemen, I am the last of eight speakers and we have been at it since 5 pm. The message clearly is "open the Conference" and I have just heard David Lange open the Conference. That was a new thought to me, ladies and gentlemen, because I thought it was my job. The fact that we are all so eager to perform this task is an indication of the importance we attach to the occasion . . . It is my pleasure to once again, and to endorse what he has already said, to declare the 9th Commonwealth Law

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On trans-Tasman banter and "things CER"

By Warren Pengilley

This is the text of a talk given at a breakfast hosted by Sly and Weigall on 17 April 1990 during the 9th Commonwealth Law Conference held in Auckland, New Zealand.

Dr Pengilley is the Trade Practices and Technology Divisional Managing Partner in the Sydney office of Sly and Weigall. He holds a number of academic qualifications covering the fields of Arts, and Law, Commerce and Accountancy. For present purposes, his relevant particulars are that he is a Barrister and Solicitor of the High Court of New Zealand in addition to Australian admissions. He is a former Visiting Overseas Fellow at the University of Canterbury and has also given guest lectures at the University of Auckland and Victoria University of Wellington.

I enthusiastically endorse the words of Vincent Price when he says that: "Only the dull are brilliant at breakfast". This quote is, indeed, the only plausible explanation of why Sly and Weigall should have asked me to speak this morning. The truth of the matter is, of course, that today I feel like the small boy who fell into a vat of molasses. He rolled his eyes heavenward and prayed – "Dear God. Give me a tongue equal to this magnificent opportunity!" Trusting that the Lord answers both our pleas, I would like this morning to offer some observations on tran-Tasman bonding and the economic and political fall outs of this in my own field of competition law.

Although I have not yet got my clipped vowel accent quite correct, I think I can fairly say, at least as much as a mere West Islander can say, that I have visited and seen, and been assimilated into what is called culture in this country. Like all Aussies who have spent any time at all in New Zealand, I have, in my time, been subjected here, to a good deal of trans-Tasman banter. This normally seems to take the form of a giggling Kiwi putting riddles to me – often incomprehensibly because of the incapacity of the Kiwi to articulate his riddle in full before breaking down and foaming at the mouth with fits of laughter.

Question: What's the difference between the Australian cricket team and the Milford Track?

Answer: Not quite everyone has yet walked over the Milford Track.

Question: Why do Australians drink their tea out of saucers?

Answer: Because all the cups are in New Zealand.

You will, therefore, realise the immense restraint I now impose upon myself in the interests of international comity in making no comment at all upon the results of the Commonwealth Games recently concluded in this fair city.

No doubt, in New Zealand, however, you will all be fascinated by a election quotable quote of Greg Chappell when he was heard to comment:

> I think the Liberal party advertisements were a little under-handed.

Now, whenever I come to New Zealand, it seems that I have been immediately preceded by Mr Justice Michael Kirby, President of the New South Wales Court of Appeal and,

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> Conference indeed well and truly open.

There was laughter all round at these sallies and none more than from the Attorney-General. He was having fun and we were off to a happy start and all friends together already. The genial Cowley beamed – we had fully accepted his exhortation.

And so we proceeded through the week, a happy week, an enjoyable week, a well-organised week which inevitably drew to its close on Friday with the closing ceremony and farewell party where we ate, drank and danced the night away.

A feature of the closing ceremony was a specialist address by Sir Malcolm Ferrier QC, said to be sponsored by the Australian Legal Group and to be a specialist adviser to the International Court of Justice at The Hague. He was devastatingly funny – really every line a laugh. All of us were with him all the way. What a silk! How do his Judges react? And then the bubble burst. It was all a spoof: he was an Aussie professional comic and ex-lawyer. A K Grant will have to watch out.

And so it was goodbye from Graham Cowley and farewell from Sir Hugh Kawharu on behalf of the Ngati Whatua. All that remained was a beautiful rendering by the Aorere College Choir of "Now is the Hour", which meant that we could say our own personal goodbyes at the party which spread through the whole of the Aotea Centre. It was a fitting bash. My candy floss from the funfare sideshows was the first in many a year. Quite a relaxing evening!

The 9th Commonwealth Law Conference was over. We were left now with our memories and friends around the Commonwealth, whose cards jostled in my pocket. We were glad, very glad, we came. □

indeed, a speaker at this Commonwealth Law Conference. President Kirby seems to have a firm belief in the trans-Tasman Anschluss as a method of solving our legal problems. Respectfully dissenting from President Kirby's views, I have to say that I think that the imposition of the Australian constitution on anybody would be an act of singular non-neighbourliness – although it may perhaps be one way of obtaining trans-Tasman adjudication on common questions instead of proceeding down what I regard as being the strange sort of a path presently contemplated as regards misuse of market power and anti-dumping issues.

Nonetheless, I am, on occasions, forced to consider anew whether some form of trans-Tasman Anschluss would not perhaps be a good thing. Let us look at the plusses.

We both have a similar heritage. We both know that the Union Jack is a social disease caught from trade union officials – and that both our countries have caught it. We both have the same mild amusement at Englishmen who come to our shores wanting to do some surf riding but find no serfs prepared to be ridden. We are both literate societies such that we each know Coleridge is not the name of a small mining town.

We, in a trans-Tasman Confederation, could do something highly positive to preserve not only our own, but the world environment – things which perhaps separately we cannot, or will not do. A uniform writ stretching from the Cocos (Keeling) Islands to the Chathams could assuredly, with a bit of will, stop the obscenity of drift net fishing over a substantial part of the world's water surface – provided, of course, that we were prepared to put enough resources into the Australasian navy and air forces to blow the fishing trawlers of any nation out of the water if they insisted upon continuing to transgress our laws protecting both a fundamental part of the environment and a basic stock of world food resources. And I must say that, as I drank a peculiar drop of specially brewed beer whilst sweltering in a tin shed building on the Chatham Islands (described by an inexpert use of superlatives as a fisherman's "club"), I would have readily incorporated these islands into Australasia if for no other reason than to put my mouth to a can of Fosters.

But there will be no trans-Tasman Anschluss.

Whilst I think there would be considerable advantage in having the choice of voting Labour without thereby necessarily also returning Paul Keating as Treasurer, the downsides are too many. Though Australia could immediately increase its Olympic gold medals tally several fold by union with New Zealand, imagine the horrors of one of the world's most exciting rugby internationals – the All Blacks versus the Wallabies – being downgraded to a mere inter-State feature. Another downside of Anschluss would be the thought of all those transvestite Kiwis in King's Cross actually having a say in running the West Island! No! No! It is all too horrible to contemplate!

But surely pragmatic self interest will compel economic and marketing unity between even the most heated sporting nationalistic rivals. The real question is whether all our good resolutions in the economic arena will come to useful and efficient fruition. The fatality of good resolutions, of course, is that they always come too late.

We have had a lot of history in the field of economic co-operation. We started off with the New Zealand Australian Free Trade Alliance – NAFTA. I though it was interesting as to the matters upon which we agreed in NAFTA, reflecting perhaps our mutual national cultures. Schedule "A" to NAFTA shows common policies towards such momentous matters.

- asses, mules and hinnies
- live sheep and goats
- swine
- badger hair and other brush-making hair
- guts and bladders; and
- (at least showing style more appropriate for a breakfast occasion) caviar and caviar substitutes.

But NAFTA wasn't good enough. The goods listed in Schedule "A" comprised only some 53% of goods traded between Australia and New Zealand. An even more telling comment on the inadequacy of NAFTA is the fact that about 90% of the trade in the items listed in Schedule "A" were, in any event event, free of duty prior to the conclusion of the NAFTA agreement! In the real areas where economies were possible (such as dairy products and many manufactured goods for example), NAFTA simply did nothing. No doubt NAFTA was a start but, of itself, it wasn't much of a one.

The Closer Economic Relations Treaty ("CER") is, of course, a different ball game. CER aims to phase out tariffs and licences.

But we are at a conference of lawyers. Where does law come into it?

One of the objectives of CER is to "harmonise" commercial legislation in our two countries. I hope we can do so. My impression is that New Zealand will, and does, take into account Australian legislation in drafting its commercial laws. I believe, however, that there is a singular attitude in Australia of benign bewilderment when it is suggested that there should be consideration of New Zealand legislation when our laws are enacted – let alone any thought that Australia should really seriously consult with New Zealand when drafting its commercial legislation. There are, of course, notable exceptions but I believe that the comment is true as a generality.

The major concentration of my own particular practice at Sly and Weigall is in the field of trade practices and competition law. In New Zealand, this aspect of law is covered by the Commerce Act. New Zealand copied the basic elements of the Australian Trade Practices Act so there is a considerable similarity of approach to most basic issues. The problem occurs when the trading practices themselves are trans-Tasman. The problems which occur can manifest themselves most obviously in the following four cases:

(i) *Firstly, company mergers in one country can have an effect in the market on the other.* Recently, for example, there was a takeover of New Zealand Steel. This was a company operating in New Zealand and the takeover was approved by the New Zealand Commerce Commission as having New Zealand public benefit. Notwithstanding this, the

Australian Trade Practices Commission attempted (unsuccessfully – and quite rightly so in my view) to prevent the merger by injunction proceedings in Australia alleging detrimental effects in the Australian market. This was an attempt to make the Australian writ run in circumstances not too far removed from those of United States antitrust imperialism, about which Australia in the past has been a major complainant. Similarly in Australia there is, in the Trade Practices Act, legislation imposing sanctions for even totally foreign mergers if there is detrimental effect in the Australian market. The question arises as to how these issues should be resolved and who should resolve them. They are clearly highly relevant to CER issues of commercial harmonisation.

(ii) *Secondly, market power positions in one country can be used to the detriment of competition in the other.* Dumping is increasingly being seen apparently as a misuse of market power problem rather than as a problem of customs and countervailing duties. The present approach to dumping seems to be based on a theory that the Courts of our respective countries should be able to determine market power issues in the other. I find it quaint to contemplate the High Court of New Zealand determining issues of misuse of market power in the Australian market and vice-versa. I also find it strange that each legal system would be entirely dependent on the other for goodwill and resources in conducting any investigation in the other jurisdiction. Finally, there will undoubtedly be residual areas in which politicians have discretionary power – perhaps to block inquiries or enforcement of judgments – and this could spell doom in the crunch areas where it is most important that competition policy operate under the rule of law rather than as a matter of political patronage.

(iii) *Thirdly, local manufacturers can impose product exclusivity restraints on dealers prohibiting those dealers stocking competitive products.* This type of restraint, if effective, may well mean that dealers in either of our countries are commercially prevented from stocking imported products. If a local supplier is in a strong market position, this can effectively prevent a manufacturer in one country entering the market of the other. A good example of this may well be the prior policy of John Lysaght in Australia. It supplied steel products to Australian steel stockists on the condition that such stockists would not also carry imported products. The effect of this restraint was to preclude access to up to 80% of Australian retail outlets to overseas producers.[2] In effect, John Lysaght was imposing its own private import quota arrangements – something one would think totally opposed to the principles promoted by CER. There may be a similar issue involved perhaps in the *Fisher and Paykel* case currently before the New Zealand High Court but, as this case is *sub judice*, it is not appropriate here to comment on this point any further.

(iv) *Finally, there is a problem that "markets" in our respective legislation are defined nationally rather than trans-nationally across the Tasman.* At present, Australian law does not really care what Aussies do to Kiwis and vice-versa. This is hardly conducive to free access to the markets of one country by a producer in another.

Well, how are we going to determine these issues? They are not Australian or New Zealand issues. They are trans-Tasman competition issues. The obvious answer is a trans-Tasman Competition Court which is part of the legal system of, and whose writ runs in, each country. This Court would presumably have to function under a *Trans-Tasman Competition Treaty*. I see no real difficulties in agreeing on this if adequate goodwill and resolve exists on each side. The alternative is nationalistic determinations and Court remedies being subject to political discretions as to their enforcement in the country in which the judgments are not made. Inevitably there will be conflicts of law between, and other difficulties of, enforcement of judgments in each of the two jurisdictions.

Why won't we create a Trans-Tasman Competition Court? I suspect there are two reasons.

The first is that we each speak the same language and suffer the disability of not having fought bloody conflicts on each other's soil killing each other's citizens. Possibly it is true that division and war are uniting factors in fusing diverse nations into a single economic entity. For whatever reason, we seem quite incapable of doing that which in the European Economic Community is the linchpin of its economic unity.

Secondly, perhaps there is the fear that the Australian High Court will invalidate Trans-Tasman Competition Court decrees if the Judges of that Court do not have life tenure. I think this would be an interesting challenge to the Australian High Court as, to date, it has consistently held that the "treaties power" in the Australian Constitution overrules all. Does the "treaty power" overrule those provisions of the Australian Constitution which entrench the tenure of Judges in the same manner as it has overruled other powers – for example, those of the Tasmanian State Parliament when that Parliament wanted to construct the Franklin Dam contrary to a world heritage listing protected by a treaty entered into by the Australian Government? However, even if the judicial tenure issue is determined adversely, there are several other ways in which a Trans-Tasman Competition Court can be brought into being, though each is probably less perfect than making such Court a part of the judicial system of each of our countries.

I think that I am saying nothing radical. Anything less than the creation of such a Court has considerable imperfections. I fear we will try to "muddle through" with imperfections rather than seek the creation of a solution which will work. I really fail to understand why Australia and New Zealand cannot reach agreement on this issue when

the French and the Germans have had no problems doing so. I guess, as regards Australia and New Zealand, that arrangements such as those which I have suggested will eventually come into being simply because nations will act rationally towards each other when all other possibilities have been exhausted. All other possibilities are, in fact, non-rational and they are certainly imperfect. For myself, whatever your view of his politics, I urge in this field the adoption of Roger Douglas' first principle of political decision making:

> From day one, if a decision makes sense in the medium term, go the whole hog for quality decisions. Nothing else delivers an outcome that will satisfy the public at the end of the day.[3]

I urge this philosophy as fundamental to how we should approach the problem of trans-Tasman adjudication of economic issues and issues under CER.

But enough of these sombre messages, important as they may be to our commercial future and to healthy competition policy in each of our countries. One must smile at the approach currently being taken. One can do this for one good reason. A person who can smile when things look wrong knows of someone else he can blame it all on. Clearly enough, the fact that we don't have a Trans-Tasman Competition Court is not my fault. It is that of our politicians. Nonetheless, I say of politicians, as I say of other people, that the definition of a well-informed and intelligent person is one whose views agree with your own.

It is a pleasure for Sly and Weigall to have been able to host this breakfast. It is a pity that all organisers, even those from my own firm, feel that any gathering must be justified by having someone speak at it. Nonetheless, given this imperfection in the nature of personkind, I thought perhaps I should speak on something which I personally regard as the greatest, but in many ways the least recognised, problem in the interface of economics and law currently facing both our countries. □

1 PJ Lloyd: "New Zealand Manufacturing Production and Trade with Australia" NZ Institute of Economic Research Inc. – Research Paper No 17 (1971) pp 81, 88.

2 See *John Lysaght (Aust) Ltd* (1977-1978) ATPR (Com) p 17304.

3 R Douglas (New Zealand Minister of Finance 1984-88 and Minister for Immigration 1989-90): "The Politics of Successful Structural Reform" – a paper delivered at the Pacific Regional Meeting of the Mont Pelerin Society in Christchurch on 28 September 1989. A shortened and edited version of this paper is contained in *Policy* (a Journal published by the Centre of Independent Studies) Autumn 1990 pp 2-6.

Mens rea and unreasonable mistakes — a reply

It is necessary only to make a brief response to Janet November, "Mens rea and unreasonable mistakes" [1990] NZLJ 130.

D P P v Morgan [1976] AC 182 belongs to that category of offences where the burden of proof in respect of *every element of the offence* is on the Crown.

In the context of those passages from the judgment of Lord Hailsham LC in *Morgan* and cited in "Mistaken Mistakes" [1989] NZLJ 355 at 356, His Lordship recalls Stephen J's urging in *R v Tolson* (1889) 23 QBD 168, 183 that

> mens rea means a number of quite different things in different crimes.

His Lordship continues:

> It follows from this, surely, that it is logically impermissible as the respondent sought to do in this case, to draw a necessary inference from decisions in relation to offences where mens rea means one thing and cases where it means another, and in particular from decisions on the construction of statutes, whether these be related to bigamy, abduction or the possession of drugs, and decisions in relation to common law offences. It is equally impermissible to draw direct or necessary inferences from decisions where the mens rea is or includes a state of opinion, and cases where it is limited to intention (a distinction I referred to in *Hyam v Director of Public Prosecutions* [1974] 2 All ER 41) or between cases where there is a special "defence" like self defence or provocation, *and cases where the issue related to the primary intention which the prosecution has to prove.* [Emphasis added]

The issue of a defence was redundant in *Morgan* because the prosecution was required to prove every element of the offence.

That the defendant's belief that he is being attacked need not be reasonable, as established in *R v Beckford* [1987] 3 All ER 425, represents an extension of *Morgan*. The ambit of the extension is manifested in Lord Griffiths' statement at page 431:

> It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that *self defence if raised as an issue in a criminal trial* must be disproved by the prosecution. If the prosecution fails to do so the accused is entitled to an acquittal because the prosecution will have failed to prove an essential element of the crime, namely that the violence used by the accused was unlawful. [Emphasis added]

The distinction between *Morgan* and *Beckford* is reflected in the respective bearer of the burden of proof. In the former, the persuasive and evidentiary burden is on the Crown. In the latter, the evidentiary burden is on the defendant.

It is submitted that no modification of the four categories is necessary. (See "Mistaken Mistakes" [1989] NZLJ 355, 357.) The difference between *Morgan* and *Beckford* on the one hand and *R v Wood* [1982] 2 NZLR 233 and *R v Metuariki* [1986] 1 NZLR 488 on the other, where there is a presumption of guilty knowledge, is expressed in their classification in Category I and in the second limb of Category II respectively. (idem.)

Elisabeth Garrett

Books

Liability of the Crown

By Peter W Hogg QC
The Law Book Company NSW, 2 ed, 1989, ISBN 0455 209693

Reviewed by P J H Jenkin, QC of Wellington

Peter Hogg is remembered well by his contemporaries at Victoria University for incisiveness of mind and a somewhat acerbic wit. Since then he has spent time in Australia and now resides in Canada, holding a professorial appointment at Osgood Hall Law School.

Liability of the Crown is the second edition of a book which had its genesis in Professor Hogg's doctoral thesis at Monash University. The book was published in 1971 with the author's hope that it contained: ". . . an accurate exposition of the existing rules of law:

> but I have tried to evaluate the adequacy of the existing rules on the basis that each must serve some good purpose if it is to survive.

The second edition has been expanded to include comprehensive coverage of Canadian authority and, in the words of the author:

> The inevitable result of my having lived and worked in Canada for 19 years is that the book has acquired a Canadian emphasis. However, Australia, New Zealand and the United Kingdom are also covered.

From this it can be seen that although the author may be claimed as a New Zealander by birth and training, the position of the Crown in New Zealand forms only an incidental part of the thesis. The result is that the book cannot be seen as a day to day tool for New Zealand litigators, but it does provide a very useful means of assessing the adequacy of our own law in a vital area of jurisprudence.

Hogg's book covers three principal areas of Crown liability (although not in this order): tort, contract and remedies.

In the scheme of the book adopted by the author, consideration of remedies follows a brief introductory chapter. At first sight, this sequencing may seem illogical, but it is one with which I personally have considerable sympathy. Administrative law generally, and litigation against the Crown in particular, is capable of providing immense satisfaction to an advocate, but even the most successful of arguments is of little comfort to the client unless some enforceable remedy is available to give practical relief. For example, a decision may be found on review to have been invalid through breach of the *audi alteram partem* rule; but that may be of no help to the successful litigant, if the hearing authority rehears the matter (obeying the rules this time) and still finds against him/her. *Fraser v State Services Commissioner* [1984] 1 NZLR 116 is a classic case in this context.

Hogg's study indicates that in Canada and Australia, as well as in New Zealand, legislation has placed the Crown in a somewhat similar position to the ordinary citizen, but there are clear limitations (notably in the availability of injunctions against the Crown). Hogg's consistent thesis is that the Crown should be in no different position from any of its citizens and that such Crown exemptions as remain owe more to historical anomaly than the practical requirements of a modern society. While the second edition does not specifically claim to evaluate the existing rules in the manner claimed for the first, there is no doubt that the same intense scrutiny is applied.

Chapter 4 of the book deals with the vexed question of Crown privilege. Although there are few significant references to New Zealand authorities, the author provides a valuable analysis into the decreasing impact this privilege has in litigation. Inevitably, he provides no guidance on the essentially New Zealand problem of reconciling cases such as *EDS v South Pacific Aluminium* [1981] 1 NZLR 153 and *Fletcher Timber Ltd v A-G* [1984] 1 NZLR 290 (CA), with the changed emphasis on discovery and inspection which now apply under the High Court Rules. (See, for somewhat different approaches, *T D Haulage Ltd v M K Hunt Foundation* (A 1435/85, HC, Auckland) and *Mihaka v A-G* (CP 370/86, HC, Wellington.) Hogg concludes, reflecting the general approach taken in New Zealand, that:

> It is now clear, however, that any claim of Crown privilege is reviewable by the Courts, and that vague appeals to "candour" within the public service or the "proper functioning" of the public service are unlikely to outweigh the competing value of having all relevant material available in litigation.

(For a recent application of these principles see *Green v Housden & Anor* (1989) 11 NZTC 6, 342.)

Perhaps the most interesting section of the book is that dealing with negligence. Hogg has typically forthright views on the matter, coming firmly down on the side of development through the Courts rather than by legislative intervention. Unfortunately, through the timing of the writing of the book, his views on *Caparo Industries plc v Dickman* [1990] 1 All ER 568 could not be included.

If there is one area where the text appears unduly brief, it is in the small section given to negligent advice by the Crown through its servants. While the concept of "foreseeable reliance" is mentioned, the author does not attempt to establish the boundaries of this

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Schizophrenia and Protection Orders

By W R Atkin, Senior Lecturer in Law, Victoria University of Wellington

Enduring powers of attorney can now be given in New Zealand pursuant to the provisions of the Protection of Personal and Property Rights Act 1988. An article on the subject was published at [1988] NZLJ 368. In this article the author discusses the first reported case on the topic. Mr Atkin concludes that the case illustrates how interests can clash and how the purposes of the legislation can be given effect to.

1 The background

The decision of Judge Inglis QC in *In the matter of "Tony"* (1990) 5 NZFLR 609 is the first substantial judicial discussion of the Protection of Personal and Property Rights Act 1988.[1] The decision illustrates several aspects of the legislation, in particular the strength of the least restrictive intervention principle and the ability of a person under some disability to sort out their own affairs by the grant of enduring power of attorney.

Tony was a schizophrenic aged in his fifties, who after suffering a stroke went into hospital and then into a half-way house, from which he has not returned. Prior to this he was largely cared for at home by his mother, but she was also a stroke victim and was hospitalised. Tony's family had prevailed upon him to contribute between $13,000 and $17,000 for the renovation of his mother's flat. The family had a continuing concern about Tony's wellbeing and a family member applied under the 1988 Act to be Tony's welfare guardian and manager of his property. Tony had however been advised by a social worker to grant an enduring power of attorney to the Public Trustee, which he duly did. This meant that for all but everyday dealings, his property was effectively in the Public Trustee's hands. It should be noted that enduring powers are a creation of the 1988 Act and, in contrast to ordinary powers of attorney, they continue to operate despite the onset of mental incapacity on the part of the donor.[2]

The applications under the 1988 Act were opposed by those in charge of the institution at which Tony lived. Their view was that he was receiving enough protection and did not need anything further. It will be immediately apparent that there was a clash between the institution and the family. In this context Tony's own express views are unclear, but his counsel firmly opposed the application.[3] There was also a clash in psychiatric evidence presented to the Court. The psychiatrist who attended Tony at the institution considered that Tony was capable of making rational decisions and needed no more supervision than he was currently receiving. On the other hand, the psychiatrist called by the family took a different line. He thought that Tony was "severely handicapped" and "permanently incapable of properly managing himself or his affairs". The evidence of the first psychiatrist was challenged because it was given by affidavit and she was unavailable for cross-examination. Judge Inglis rejected this objection, invoking s 77 of the Act (which, like other Family Court statutes, bends the usual rules of evidence in favour of admissibility) and stating that the lack of cross-examination went to the weight to be attached to the evidence.

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concept apart from stating a number of examples where liability has been held to exist. For New Zealand readers, it is perhaps slightly disconcerting to have the *Meates* case *(Meates v A-G* [1983] NZLR 308 (CA)) referenced only by two footnotes.

For this reader, the largest single gap is that there is no reference to the position of "State-owned Enterprises" and the Crown's liability for their actions, inactions (or indeed, existence!). While commentary on these "animals" could not be expected, it perhaps indicates the extent to which this is not a New Zealand book, but one written primarily for Canadian consumption. With a little luck, a third edition of *Liability of the Crown* could perhaps be written when Professor Hogg has returned to his country of birth and can produce a New Zealand edition.

Misgivings of this kind should not lead any reader to neglect this book. It reflects the sharp intelligence and ability to communicate which clearly are still a characteristic of its author. Perhaps its greatest value is in the author's readiness to try to look at how the law is likely to develop, or where it ought to go if pushed in the right direction. □

2 Enduring powers of attorney

The applicant from the family was obviously unhappy about the enduring power granted to the Public Trustee. The ostensible reason for this was that, as Tony could revoke it at any time so long as he had the capacity to revoke, then the protection it provided was insecure. Behind this argument was the desire on the part of the family to control Tony's life and property. Judge Inglis was not impressed by the family's attitude and considered that the advice Tony had been given to grant an enduring power was eminently sound and he rejected any suggestion that the grant had been made under undue influence.

There was also a legal challenge to the existence of the power, on the basis that Tony lacked the capacity to grant a power and therefore the power was invalid. The question was whether the donor must have the capacity to manage the affairs which are the subject of the power or whether it is enough that the donor appreciates the significance of granting the power without necessarily having the greater capacity of management. If the fuller capacity is needed — which is needed for an ordinary power — then Tony would arguably lack that capacity, but not otherwise.

His Honour held that the lesser capacity is sufficient. In granting an enduring power, a donor is not really managing the property which is the subject of the power, but rather is delegating the management of that property. The capacity should go to an understanding of delegation, not to the management which is being delegated. As Tony had at least this level of capacity, there was no reason to upset the grant of the enduring power.

His Honour relied heavily on the decision of Hoffman J where the same issue arose in relation to the English legislation on enduring powers and where a similar conclusion was reached, *In re K (Enduring Powers of Attorney)* [1988] 2 WLR 781. Judge Inglis held that there was no relevant basis upon which to distinguish the English decision even though the New Zealand legislation has a number of salient differences. On the contrary, he found support in s 106(1)(a) which refers to the ability of a donor to revoke a power "while mentally capable of doing so", which must relate to the ability to revoke and not to the ability to manage. On the other hand, he was also faced with s 94(2) which saves "any rule of law" on the "capacity to give or to revoke a power of attorney". He restrictively interpreted this to mean rules governing ordinary powers of attorney and not enduring powers. He proceeded:

> It seems to me that enduring powers of attorney . . . as creations of the Act, must have been intended to be governed by the principles stated or implicit in the Act and that there is no logical reason why the principles governing ordinary powers of attorney should be applied to them.

It might also be argued that, although there are common law rules on ordinary powers, the common law is free to develop different rules for enduring powers given that they are a statutory innovation. Arguably, the decision of Hoffman J is a "rule of law" saved by s 94(2).

It is submitted that in policy terms the approach adopted in *In the Matter of "Tony"* is entirely sound. The Act is not intended to deal with people who have no disability or impairment. Its aim is to recognise the rights of people with some such disability and to establish a protective statutory environment under which their human rights are maintained to the greatest possible extent but where they need help and protection, that will be provided by a process which has careful safeguards against hasty or inappropriate intervention. Ordinary powers of attorney are designed not so much to assist people in this position as others who for perfectly understandable reasons (eg a period of residence outside New Zealand) need a trusted person to look after their affairs. The pre-eminent purpose of enduring powers is, far different from that of ordinary powers, to assist someone whose capacity is weak or may become so. This purpose is thoroughly consistent with the aims of the Act as a whole. Given this background, it would be most unfortunate if the Courts construed the Act in such a way that many people for whose benefit the Act was passed were unable to take advantage of the new provisions. An underlying theme of the Act is to encourage persons with disabilities to exercise what talents they do possess and to be as self-determining as possible. The grant of an enduring power is a classic example of how a person can make his/her own arrangements without the coercive intervention of the Courts. The procedure must surely not be frustrated.

3 The property management application

Jurisdiction to grant an order appointing someone manager of another's property is based on the person's whole or partial lack of competence to manage their property (s 25). Judge Inglis held that he had no jurisdiction to grant the property order sought by the family. His decision was based partly on the validity and appropriateness of the enduring power of attorney granted to the Public Trustee, and partly on the evidence that Tony was able to handle "perfectly adequately" the banking, income and shopping which were left in his control.

In reaching his decision, Judge Inglis gave another very important ruling. It was argued for the applicant that Tony's competence should not be judged solely by his present abilities, shaped by the protected environment of the half-way house, but that his ability to operate outside the confines of institutionalised life should be taken into account. This point was crucial, for the evidence indicated that he was looking after himself and coping very well in the institution. Remove him however from the institution and the evidence suggested that he would revert to his former state where his competence was very much in doubt. Judge Inglis held that the application "needs to be considered on the basis of the situation as it is, not on the basis of a hypothetical possibility that Tony may, contrary to present indications, leave Lincoln Grange and try to manage on his own." Tony's level of competence in relation to property matters was also to be considered taking into account the existence of the enduring power.

The theoretical possibility of the revocation of that power was not relevant to the question. His Honour was content to rely on the diligence of the Public Trustee to take action if such a revocation did take place.

A further ground for the refusal to grant the property order was the principle in the Act that any order should be the least restrictive (s 28). Given that the enduring power existed and that Tony was otherwise managing his affairs adequately, a management order would hardly have been the least restrictive.

In the light of the purposes of the Act, the approach to the assessment of competence is surely correct. In addition to the least restrictive intervention principle, the Act contains a presumption of competence (s 24), which makes sense only by evaluating current abilities, not potential inabilities. Furthermore, the desire to encourage self-determination evident in the legislation (cf ss 28(b) and 36(2)) would be obviated if the powers in the Act were to be exercised from a hypothetical rather than an actual standpoint. A person such as Tony either needs or does not need help and encouragement where he is now, and nowhere else.

4 The welfare guardianship application

The applicant sought to be appointed welfare guardian for Tony in order to make decisions about where he should live and what services and protection should be provided for him. The provision of a guardian for an adult is one of the major innovations of the 1988 Act. Prior to the legislation, there was power for the appointment of an administrator to handle a person's property under the Aged and Infirm Persons Protection Act 1912 and the Mental Health Act 1969, but there was no ready equivalent for handling personal matters. The inherent parens patriae jurisdiction of the High Court arguably existed and still exists, but had not been invoked in New Zealand.[4] Under the 1988 Act a person can become a guardian and make personal decisions in those areas specified by the Court.

The appointment of a welfare guardian is not however a straightforward matter. There are two jurisdictional hurdles to overcome. First, under the general jurisdictional provision for all personal matters (s 6), the applicant has the onus of proving that the person who is the subject of the application "lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care or welfare" or alternatively, an option which was not relevant at all in Tony's case, that the person is totally unable to communicate decisions about their personal life. The second jurisdictional hurdle is one which relates specifically to the appointment of a welfare guardian. Under s 12(2), an appointment can be made only if the person's lack of capacity to make particular decisions is complete. Clearly it is more difficult to prove that someone "wholly" lacks capacity than "wholly or partly" lacks the capacity. It must be pointed out however that the first jurisdictional hurdle is a general one — it is necessary to show impaired capacity to make decisions generally, whereas the second hurdle can be limited to a "particular aspect or . . . aspects" of personal care and welfare. As a result, it is not necessary for the appointment of a guardian to show that the person is totally incapable in all walks of life, but only in those for which the applicant seeks the guardianship order. In addition to these two hurdles, the Court is also faced with the same "least restrictive intervention" principle that applies to property orders (s 8). Guardianship is only one of a range of possible orders which the Court can make. It may of course decide to make no order at all but it can also decide that an order under s 10, which covers inter alia most issues relating to employment, accommodation and health care, of the Act may be suitable.

In *Tony*, Judge Inglis held that the evidence fell short of establishing any form of total incapacity. Indeed he doubted whether the evidence was sufficient to satisfy even the first hurdle, that Tony showed a partial incapacity to handle his affairs. One of the major decisions which he had made was to live at the institution. According to His Honour, "[t]hat decision does not in the least suggest a lack of capacity or a lack of competence; in fact it is a sensible decision . . ." As with the discussion of the application for a property order, His Honour considered that the question had to be considered in the light of Tony's present environment, and not as if he were removed from the institution. He drew a useful comparison to justify his ruling on this point:

> [The submission for the applicant] is the same as saying that a diabetic, who functions perfectly normally on appropriate medication, must be judged incompetent so as to require the appointment of a welfare guardian simply because of the likelihood of a diabetic coma if he forgets to take his medication.

In reaching his decision, Judge Inglis had to deal with an argument that the jurisdictional standards for personal and property orders differed. The basis for this argument was that the Part of the Act dealing with personal orders refers to "competence", while the Part on property orders refers to "capacity". In each case there is a presumption in favour of competence or capacity, as the case may be, casting a clear burden on an applicant to overcome the presumption. Arguably, as Parliament consciously used different words, it had different notions in mind, with competence requiring a higher degree of proof, ie a person might have in a broad sense the capacity to make decisions, but not the competence to do so in a way which would be normally accepted by the outsider. After a careful analysis of the Act, His Honour decided that there was no real distinction between the concepts of capacity and competence. He interpreted the terms against the backdrop that the Act is protective and remedial legislation and "was designed as a statutory break with the past". The provisions in the Act "should not become clouded by any attempt to read the words 'capacity' and 'competence' more than their immediate context requires". And again "[i]t is therefore wrong to allow the concepts of 'capacity' or 'competence' as used in the Act to be limited by any narrow

interpretation or, in particular, to be limited by similar common law concepts from which the Act has provided a radical departure."

It is submitted that the interpretation given to "capacity" and "competence" is correct. The reason why different terminology was used in the Act is somewhat obscure. What is not obscure is the overall philosophy and scheme of the Act. Essentially this is the same for both personal and property orders – a procedure for assisting people who for some reason are unable to make their own decisions, but intervention only as a last resort, after judicial inquiry and on the assumption that the person concerned will still be encouraged to be as self-determining and independent as possible. Whether non-consensual intervention by the Court is justified will always depend on the facts of each case and upon a careful analysis of the individual's situation. This will be true for both personal and property orders and it is not helpful to introduce fine distinctions between "capacity" and "competence". Clearly what will be different as between the two Parts of the Act is the focus of the factual investigation. In the one case, the issue is whether the person can manage property, while in the other it is whether the person can understand the nature and foresee the consequences of personal decisions (ss 25(1)(a) and 6(1)(a) respectively).

5 Conflict of interests

The final matter in *Tony* which is worthy of comment is the choice of a person to be manager or welfare guardian. Judge Inglis decided that no appointment should be made at all. However he also remarked that he considered it unlikely that a Court would be persuaded to appoint a member of Tony's family as manager or guardian. The reason for this was that the interests of the applicant and other members of the family would not coincide with Tony's. The Act expressly adverts to this – the Court must be positively satisfied that no conflict of interests exists before it appoints someone as guardian (s 12(5)(c)) and must take any likely conflict into account when choosing a manager (s 31(6)). There is no obvious explanation why the rule for property management should be weaker than that for personal guardianship but it is submitted that in most cases where there is a real chance of conflict, the Court will not go ahead with either kind of appointment. It does not follow that a family member will never be the appropriate person to appoint. In *Re O'Shea* (New Plymouth Family Court, PPPR 043/2/88, 23 Dec 1988) for instance a sister was appointed guardian and in *Re Long* (1988) 5 NZLFR 545 with the consent of other family members, an elderly woman's son was appointed manager. In some situations, a relation may have helped in the past and, with no ulterior motives, be thoroughly trusted. However, given the situation in *Tony*, where the family was pushing a line diametrically opposite to that supported by Tony's day to day carers and where the family had, perhaps quite justifiably got Tony to contribute financially to the improvement of his mother's flat, the wisdom of avoiding a family appointee is transparent. It should be remembered that, unlike other new legislation such as the Children, Young Persons and Their Families Act 1989, the interests of the person concerned and not the interests of that person's family take priority (Cf s 31(5)(b)). If there is any doubt over a potential clash of interests, the matter should be resolved in favour of the interests of the person who is the subject of the proceedings.

6 Conclusion

The Protection of Personal and Property Rights Act has now been in force for over a year. Indications are that it is being used less than had been predicted and has not given rise to major interpretation difficulties. No case, to the writer's knowledge, has so far got beyond Family Court level. A number of situations can come before the Court and several cases have involved the elderly.[5] Now with *Tony*, we have a clear example of a person suffering from schizophrenia. The approach adopted in that case is one which accords with the purposes of the legislation and illustrates how an application to the Court will not be automatically rubber-stamped. *Tony* shows well how interests can clash and how widely differing professional assessments can be presented to the Court. The extended treatment of the issues by Judge Inglis, although still only Family Court jurisprudence, is thoroughly welcome. □

1 For a discussion of the Act, see Atkin "The Courts, Family Control and Disability – Aspects of New Zealand's Protection of Personal and Property Rights Act 1988" (1988) 18 VUWLR 345, and the commentary in *Butterworths Family Law Service.*

2 See Atkin "Enduring Powers of Attorney in New Zealand" [1988] NZLJ 368 and Munday "The Capacity to Execute an Enduring Power of Attorney in New Zealand and England: A Case of Parliamentary Oversight?" (1989) 13 NZULR 253.

3 It appears that Tony had instructed counsel, but the Court also appointed separate counsel to represent Tony. The latter took a more neutral stance in the proceedings.

4 For judicial discussion on the parens patriae jurisdiction in the context of sterilisation operations, see *In re F (Mental Patient: Sterilisation)* [1989] 2 WLR 1025, *In re Eve* (1986) 31 DLR (4th) 1, *In re Jane* (1988) 12 Fam LR 662 and *In re Elizabeth* (1989) 13 Fam LR 47.

5 Cf *Re Long*, above, *Re Mrs E* (Palmerston North Family Court PPR (054) 5A/89, 16 August 1989, Judge von Dadelszen), *Re S* (Wellington Family Court, PPPR 085 011 89, 1 Sept 1989, Judge Inglis), and *Re G* (Levin Family Court, PPPR 031 001 88, 17 Feb 1989, Judge Inglis).

Professional partiality

The profession of the pedagogue is an honorable one, but the honor of any profession consists in its not arrogating to itself more than a profession should claim. In being a profession, it inevitably suffers indurations and partialities. Doctors are not only more but less sensitive to suffering than others; judges, to justice; journalists, to truth; soldiers, to slaughter. A profession ceases to be honorable when it makes too little effort to minimize such losses and, complementarily, when it fails to acknowledge them disinterestedly.

Christopher Ricks
The New Criterion
September 1989

Books

Essays on Criminal Law in New Zealand

Edited by Neil Cameron and Simon France,
Victoria University Press: $34.95

Reviewed by G L Turkington, Barrister of Wellington

This publication represents in the main a reproduction of a series of public lectures on the proposed 1989 Crimes Bill and delivered at Victoria University, Wellington last year. Those who were able to attend the eight papers delivered in the series will recall the stimulating criticism provided by the President of the Court of Appeal, Sir Robin Cooke which has been surprisingly omitted from the publication on the grounds that it has already been reproduced in the *Law Journal* ("The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235). The publication suffers accordingly as not representing a ready reference work of all major contributions to the debate, and the only one given in the series from the judicial perspective. It is irritating to find the Introduction making a number of references to Sir Robin's address, without satisfying the reader's curiosity with the full text.

The work commences with the address by the Rt Hon G W R Palmer, who strove to explain why a wholesale reform of the Crimes Act 1961 should now be undertaken. Then follows the paper delivered by Moana Jackson, who roundly criticised the proposed Bill as "white, male, and middle class". John Hannan, solicitor, was one of those who did not deliver a paper in the public lecture series, but was separately commissioned to provide an essay on the proposed definition of "act" and "omission". In a similar position were three other contributors: Kevin Dawkins, Senior Lecturer in the Faculty of Law, Otago University, who examined parties, conspiracies and attempts; Warren Brookbanks, Lecturer in Law, University of Auckland, who examined compulsion and self defence; and Peter Doone, Chief Inspector, New Zealand Police, who examined commercial fraud in New Zealand.

One of the major changes proposed by the Bill was the inclusion of a general part, which sought to define for the first time four basic fault elements said to be intention, recklessness, heedlessness, and negligence. It recognised the foundation of criminal liability as requiring a voluntary act, which it attempted to define also.

Faced with these new definitions, Victoria University Senior Law Lecturer, Neil Cameron, examines the defences of mistake, voluntary intoxication, necessity, duress, the use of reasonable force, and impossibility. His theme is for reform of the existing Act, and concludes that the Crimes Bill goes a long way to ensuring that "a person should not be guilty of an offence if he has behaved as any reasonable person in his situation might be expected to behave". Similar sentiment is echoed by Simon France, a Senior Law Lecturer at the same University, who discusses the mental element. While stressing that the Bill rightly recognises a subjective state of mind for liability to occur, he is strongly critical of the endangering provisions. Those provisions replace manslaughter, wounding, and injuring with intent, and criminal nuisance, so that the accused's intent becomes a central issue rather than the result. In an example chosen under Clause 132, he notes that a motorist who opens his door without looking and narrowly misses a passing cyclist is liable to a greater penalty for heedlessly doing an act likely to cause injury, than if the motorist actually got out of the car and assaulted the cyclist with intent to injure. The assault carrying a maximum of three years' jail, as opposed to five years for endangering. He notes a consideration of what might or might not be likely to endanger safety as employing an objective test, which is inconsistent with the subjective philosophy of the Bill.

Basil James, Director of Mental Health, examines mental disorder. He submits the Bill essentially reiterates the M'Naghten Rules, and argues it is drawn so narrowly to be of limited use especially to the wide class of offending involving diminished responsibility. For myself, I would have thought the clause widely drawn in introducing the concept of "mental defect or mental disorder" instead of the present "natural imbecility or disease of the mind" so that it could conceivably include many transitory illnesses, such as depression. The looseness of language clearly allows diminished responsibility, although the explanatory note to the Bill does not acknowledge that possibility, thus widening the defence to a concept not presently recognised.

Professor Gerald Orchard looks at some of the most dramatic changes proposed by the abolition of murder, manslaughter, and the defence of provocation, with replacement provisions for unlawful killing carrying a maximum instead of a mandatory life imprisonment. He argues for the retention of provocation as a concept by which juries recognise culpability as being diminished where crimes of passion are concerned. Murder should be retained as such, as reflecting the community's perception of the worst crime in the criminal calendar, but the mandatory life sentence, on balance, should be abolished. He argues against the endangering offences as being inconsistent with the result crimes mentioned in other parts of the Bill, and on the pragmatic ground that the community is more attuned to respecting a law which punishes people for the damage they have inflicted, rather than on speculation on the evil in an offender's mind. That, I note, may already be covered in an appropriate way by the existing law on attempts.

A further attack is made on the endangering provisions by Charles Rickett, another Senior Lecturer in Law from Victoria University, in his paper on Aids and sexually transmitted diseases.

The publication covers the major topics of reform proposed by the Bill and has meant a wider audience is able to be achieved than the lectures permitted. Some of the papers became part of submissions to the Select Committee, which, faced with strong opposition from the Judiciary, the Law Society, and

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Managerial proficiency in law: views of the legal profession

By Eric Steinberg and Nancy Ellis

A recent survey was undertaken to assess how New Zealand lawyers evaluated the legal knowledge and competence in various legal areas. The general impression by the lawyers was that business managers are weak in legal aspects of their work. The survey was carried out by means of a questionnaire dealing with some 30 legal topics.

Introduction

Business clients constitute a significant proportion of the practices of many lawyers. Contacts with these clients may range from start-up advice through to operational matters and culminate with representation regarding sale or winding-up of the business. The multitude of relationsips that business clients have with others can often have serious legal ramifications. Such relationships include those with the client's customers, suppliers, creditors, competitors, employees, the government and even the public at large. All clients will want to minimise the number and severity of legal problems arising from these relationships. Such minimisation will often require not only access to and use of professional legal advice, but also some degree of legal knowledge on the part of the business client as well. While such legal knowledge need not always be very extensive, it should at least be sufficient to deal with the problem of when and how to consult a lawyer. Legal advisers can rarely be available at each stage of the development of every business relationship. Unfortunately, however, legal problems can arise at virtually any stage. They can come in many forms including matters of contract, consumer protection, property, labour-management relations and company and securities law requirements. The business manager with the greatest relevant understanding of the law and the legal system will, therefore, be in a far better position than his naive counterparts in facilitating the smooth and efficient running of the business enterprise.

This article is intended to report the results of a recent survey conducted in order to determine how New Zealand lawyers rate their business clients' competence in various legal areas. Whether or not an enterprise employs full time legal counsel, it will almost invariably seek outside legal advice at some point. The perceptions of practising lawyers will presumably then accurately reflect both the knowledge and requirements of managers in businesses of all sizes. While there has been at least one survey of full time corporate in-house legal counsel in the United States,[1] little if any examination of the general practising profession has been conducted in the past. Such a study will presumably provide information relevant to businesses of all sizes and not just those with the resources to employ full time legal advisers.

Legal practitioners are well positioned to evaluate the legal knowledge and requirements of business managers. Formal legal training and experience give them an appreciation of the wide range of legal topics which can affect businesses. Also, since these lawyers are often only consulted after some legal problem has arisen, they are used to identifying the kinds of mistakes that managers make. Not only can they isolate the probable source of a problem, but they can also identify the skills necessary for the manager to have avoided it.

The Survey

The *New Zealand Law Register* for 1988 was used to select 299 lawyers in practice in New Zealand. A questionnaire including a list of thirty legal topics was sent to these lawyers. The topics were taken from the questionnaire used by Moore and Gillen[2] to survey in-house legal counsel in the United States, but several topics were modified to take into account New Zealand circumstances. The lawyers were asked to respond to two questions about each topic on a five point scale. First, they were asked how well most of their business clients could recognise and understand the legal issue or concept involved. Next, they were asked how important they thought it was for business managers to be able to understand the legal issue or concept involved. Finally, the respondents were asked for some background information about the length of time they have been in practice, the percentage of their practice that is devoted to business clients and the number of

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others, saw the Government refer the Bill to a Consultative Committee, which I understand to be working vigorously on a considerably amended version. I trust the surprising secrecy surrounding the consultation leading up to the first draft, and noted in the Introduction, is not continued in developing the form of the next Bill. But more importantly, adequate opportunity is permitted all interest groups to digest and debate any proposed changes there may be when they finally emerge. □

lawyers in the firm in which they practise. They were also asked if they had any comments about the study and if they would like a copy of the results.

This study focuses on the competence of business managers in law topics. Competence, in its present context has been defined by the *Oxford English Dictionary* as "sufficiency of qualification; capacity to deal adequately with a subject". The operative words in this definition are 'sufficiency" and "adequately". An absolute measure of managerial knowledge without regard to required knowledge is therefore meaningless in a study of competence. In this study, therefore, competence has been measured by the statistical significance of the difference between the average score given for "importance of understanding" and the average score given for "current understanding".

Results

One hundred and six usable responses were received. The majority of the respondents had been in practice for ten or more years. None of the respondents had been in practice for less than two years. About half of the respondents had more than 50% of their practice devoted to business clients and another third devoted between 25% and 50% of their practice to business clients. This information indicates that the lawyers responding to the survey had sufficient experience to provide meaningful information. Respondents were virtually evenly divided between those practising with firms of up to ten lawyers and those practising with firms of over ten lawyers. This indicates no large or small law firm bias. The questions asked along with the average responses to each question are shown below in Table 1. The questions in the table are ranked according to relative statistical significance of the differences between these averages. This therefore, constitutes a ranking based on degree of incompetence of business managers in these areas.

Table 1

Analysis of the results of the Questionnaire

Rank	Question	Average response *"Current understanding"*	Average response *"Importance of understanding"*
1	When does a particular action or set of words constitute a binding offer to contract or an acceptance of an offer to contract?	2.90	4.66
2	What duty of disclosure does an officer or director have in buying or selling securities of the firm?	2.50	4.09
3	When does the misrepresentation or coercion of one party to an agreement enable the other party to avoid the contract?	2.20	3.82
4	When is a firm responsible for a promise made by its agent or employee?	2.56	4.01
5	When is a firm liable for the actions or negligence of an employee or agent?	2.59	3.95
6	When can an agreement be avoided because of a misconception or mistake?	2.01	3.49
7	To what degree do statements contained in advertising, labelling, or packaging material render the firm liable?	2.70	4.06
8	Who bears the risk of loss of goods and when does it shift?	2.58	3.98
9	What are the comparative legal advantages of various forms of business organisation? (eg company, partnership etc)	2.69	3.98
10	When should a solicitor be consulted and how should a manager prepare for such a consultation?	2.80	4.06

Rank	Question	Average response *"Current understanding"*	Average response *"Importance of understanding"*
11	When would a failure to perform under a contract be excused by a Court?	1.87	3.19
12	What are the alternatives to litigation for the resolution of disputes?	2.57	3.77
13	What managerial policies are prohibited as unfair labour practices?	2.51	3.56
14	When is a firm liable to a user who has been harmed by a product the firm manufactures or sells?	2.74	3.80
15	What are the procedural rights of disputants in hearings before governmental agencies?	1.80	2.82
16	When are pricing decisions and alternatives limited by trade regulations and competition laws?	2.84	3.74
17	What trade association activities and communications among competitors are limited by competition laws?	2.62	3.55
18	What actions may constitute a violation of employment discrimination laws?	2.63	3.47
19	What are the relevant administrative agency regulations?	2.11	3.03
20	When is a firm liable for injuries to non-employees on its premises?	2.10	3.05
21	To what extent does the law protect individual rights and freedoms?	2.21	2.92
22	When do the quality of goods or services and the completion time conform to the terms of the agreement?	3.17	3.76
23	What are the key elements of the Court system and of Court procedures?	2.00	2.73
24	What are the essentials of legal reasoning and judicial decision making?	1.66	2.28
25	When is a promissory note, cheque, or draft negotiable?	2.81	3.44
26	For a credit transaction, how is security arranged?	3.16	3.75
27	What is "law" and what are the basic theories of jurisprudence?	1.63	2.07
28	What is the scope of government regulatory powers?	2.38	2.84
29	How and why does the law change and how are ambiguities resolved?	2.08	2.40
30	Is a firm ever liable for injuries to employees?	2.89	3.16

Notes:

Average responses for "Current Understanding" are the averages of the responses given on a scale of 1 to 5 where 1 represents no understanding and 5 represents a thorough understanding.

Average responses for "Importance of Understanding" are the averages of the responses given on a scale of 1 to 5 where 1 represents not important and 5 represents very important.

Analysis

In all but one topic, the average response for "importance of understanding" was significantly greater than the average response for "current understanding". This indicates that lawyers perceive that business managers with whom they deal do not have the required legal knowledge. It is reasonable to expect that practising lawyers would be unflattering in their opinions of their clients' legal knowledge. This attitude may help to justify the need for a lawyer. With this in mind, however, there is still some valuable information in the relative discrepancies between current and required level of understanding.

The topics included in the questionnaire were classified into two broad groups. Eighteen topics can be described as topics relating to the legal environment of business. These include topics like the legal system and legal institutions, when and how to consult a lawyer and labour law. Twelve topics can be described as traditional business law topics. These emphasise legal rules and principles and are concentrated in areas like contract, company and commercial law. Of the ten questions showing the greatest level of incompetence, only two are questions relating to the legal environment of business. New Zealand lawyers broadly perceive less need for managers to enhance their knowledge in legal environment topics than their knowledge in the more traditional areas. Within the traditional business law topics so strongly represented in this group, questions of pure contract law were very prevalent. In the entire questionnaire only five questions would likely be categorised as pure contract law questions, and yet three of these appear among the ten questions with the highest level of incompetence. This demonstrates a strong perception among lawyers that managers need to strengthen their knowledge of contract law. Of the two contract law questions not in the top ten in terms of incompetence, one is in 11th position and the other is in 22nd position.

Closer scrutiny of the questions reveals certain other rather convincing patterns. Five of the ten questions in which managers were viewed as being most competent could be termed as questions relating to the legal system and legal institutions. In the questionnaire generally, only six of the thirty questions could be so categorised. Lawyers clearly perceive much less weakness among managers in this area than in most others. There are two possible reasons for this. Lawyers either believe that managers have a solid understanding of this area, or that they do not need to have an understanding of this area. The latter appears to be the case since the average response of "importance of understanding" for all of these questions is less than three on the five point scale.

Two questions dealing specifically with company and securities law appear in the top ten in terms of incompetence. This indicates a perceived weakness in this area. On the other hand, there is no such weakness indicated by an analysis of the three commercial law questions. They are rather more spread out in the rankings.

Five questions deal with the administrative and regulatory process. With the exception of one question regarding government regulatory powers generally, this topic fell about halfway down the rankings.

There are three questions relating to labour law. None are in the top ten regarding incompetence. This indicates a relative competence in this area.

One question relating to when and how to consult with a solicitor ranks tenth overall in terms of incompetence. Lawyers see a relative weakness in their clients' skills in this area. This is a very broad topic as it encompasses consultation in virtually every area of law. Knowing when and how to consult a lawyer is arguably the most important reason for a business manager to attain legal knowledge. The questionnaire asked the respondents for any comments that they may have had that were relevant to the study. Probably of greatest significance is the frequency of comments concerning lawyer/client consultation. Nine respondents commented to the effect that business people should be better versed in when and how to consult a lawyer. Two examples of these comments are, "My main concern is that many businessmen make far too many decisions without consultation with professional advisers", and "A well-schooled client should know when to seek the lawyer's advice". Two respondents opined that the question "When should a solicitor be consulted and how should a manager prepare for such a consultation?" was the most important in the survey.

In summary, the results indicate that New Zealand lawyers think that business managers are weak in virtually all of the topics addressed. Weaknesses are perceived as greater in traditional areas such as contract and company and securities law. Comparatively less weakness is observed in legal environment areas such as the legal system, legal institutions and labour law. One important topic in which managers are seen as being relatively weak relates to the timing and nature of consultations with lawyers. Lawyers perceive this to be the third most important topic for business managers to understand.

The results certainly send out a clear message to business managers, ie that they could do with upgrading of skills in virtually every legal topic. Resources, however, being scarce as they are, they would do well to concentrate on traditional business law areas like contract, company and securities law. New Zealand lawyers, unlike the respondents to the Moore and Gillen American survey, do not see weaknesses to be as great in environmental topics.

Ramifications for lawyers

The question arises as to what benefits these results might provide for lawyers. Perhaps if lawyers take particular note of those areas where managers display the greatest degree of incompetence, action can be taken to avoid future problems. In many cases, the business manager's only vehicle for self-improvement in legal areas will be the lawyer acting for the business. An expansion of the lawyer's role may be necessary to facilitate the manager's acquisition of necessary skills. This would most likely take the form of an increased profile for the legal adviser through the promotion of an ongoing and very open lawyer-client relationship.

In many cases, business start-up advice provides the client's first exposure to the lawyer. Unfortunately, once the business

becomes a going concern, it is often assumed that there is little need for continuing legal advice. Clients often commence business and enter contracts without legal advice. This survey, however, reveals that contract law is one of the areas of greatest perceived managerial incompetence. It may be that many seemingly air-tight contracts only have their shortcomings exposed after a problem has developed. It would be preferable for business clients to receive preventive advice regarding acceptable and relevant means of contract formation for the business concerned. Not only might suitable standard form contracts be provided, but the legal adviser could convey an impression of continuing availability. This would be particularly important when standard contract terms are not used.

The nature of pre-contractual statements is an area in which many business clients could use both legal advice and increased awareness. Managers should be more aware of the significant legal effect of statements which might be considered by them to be merely idle sales talk. Lawyers could stress that advertisements, brochures and the like ought to be carefully prepared and examined with a view to potential legal ramifications. If this was done a few times, the managers would soon learn a great deal about the concept of misrepresentation. A previous study of small business litigation in New Zealand[3] indicated that a very large proportion of such litigation arose due to managerial incompetence in contract matters.

Two of the five topics perceived as evidencing the greatest incompetence related to businesses' legal responsibility for communications or actions of agents or employees. Managers need to be warned as early as possible of their potentially damaging legal effects. Nearly all businesses will make use of such persons. These people should always be made aware of the firm's policies and specific circumstances since their deviations may in fact cause the firm severe legal hardship. Solicitors should try to outline clearly the client's potential liability in respect of such agents or employees in the particular business context.

Another area of relatively high managerial incompetence was that of company and securities law. Often solicitors are confronted with the issue of what is the most advantageous form of business organisation. While the taxation issue is always an important one, it is by no means the only one. Solicitors should, therefore, avoid merely sending business clients to accountants for advice on whether or not to incorporate. The issues of limited liability, methods of raising capital, piercing the corporate veil and others may well merit discussion with the client. These clearly have major potential legal significance. The problems surrounding directors' duties are also deserving of specific attention from a preventive perspective.

Finally, the survey indicated significant managerial deficiencies in when and how to consult a lawyer. This topic is probably far too broad to address on a general level. If potential problem areas specific to each client are adequately addressed, the consultation problem may well take care of itself. A client well versed in the particular kinds of contingencies that merit legal advice will not likely cause much general concern to the legal adviser. The thrust of this issue really boils down to having the client knowledgeable enough to know how to use the solicitor "preventively". this is far preferable to seeking legal advice only after a major legal problem has arisen.

Conclusion

The information provided herein will hopefully be of some interest to lawyers with business clients. We have attempted to highlight several managerial weaknesses as perceived by the legal profession. Perhaps this will then assist practitioners to provide a more useful and meaningful service to their business clients. □

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1 Moore, G A and Gillen, S E, (1985) "Managerial Competence in Law and the Business Law Curriculum: The Corporate Counsel Perspective", *American Business Law Journal* Vol 23 pp 351-389.
2 Moore, G A and Gillen, S E (supra).
3 Steinberg, E and Ellis, N, (1989) "Small Business Litigation: Prevention and the Practitioner" [1989] NZLJ 128.

Legal aid

Unfortunately there is still the occasional senior police officer or Judge who makes public utterances which clearly show they have never seriously thought that they might themselves be defendants. As I understand it only the reigning monarch is immune from the possibility of a criminal charge. Any one of us may be arrested and charged, although without foundation, however innocent and blameless our lives may be. Any one of us may need to rely personally upon the safeguards for defendants which are built into the criminal justice system. . . .

Anyone of us may need legal aid. And if the safeguards or the legal aid system and level of remuneration are such that a senior Judge or senior police officer or the Chief Secretary of the Treasury would feel that the safeguards were inadequate or proper provision was not being made for his defence if he were accused, then those same provisions for any other defendant are inadequate.

It is important to emphasise this point because the provision of safeguards and a good legal aid service for defendants is not just a question of morality or social conscience. Moral principles are usually translated into political action only when they coincide in some degree with self-interest.

David Ward
Law Society President
Law Society Gazette
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Sovereign immunity in New Zealand

By W K Hastings, Senior Lecturer in Law, Victoria University of Wellington

When can a citizen sue a foreign state, or a commercial enterprise of a foreign state? This is a relevant and significant question involving commercial and international law. In this article the author suggests that it is time for an appropriate New Zealand statute defining when a state can be sued and that the Courts should feel less bound by precedent in this area.

The law relating to foreign sovereign immunity does not often come up for discussion in New Zealand Courts. When it does, Judges often express unease at having to deal with principles sourced in the somewhat esoteric field of international law. Smellie J in *Reef Shipping v The ship "Fua Kavenga"* [1987] 1 NZLR 550 at 552 stated that he could not "claim learning or experience (other than to a very limited extent) in [this] branch of the law". And Barker J in *Marine Steel v Government of the Marshall Islands* [1981] 2 NZLR 2 at 9 stated that it was "most unusual for a New Zealand Court to be faced with difficult points of international law" and questioned "whether a statute comparable to the United Kingdom and United States statutes . . . should be enacted in this country".

This paper will briefly outline what is wrong with the common law of sovereign immunity, and what should be done about it. Two options are proposed. Either rethink the common law by taking advantage of Lord Denning's famous statement in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 that "international law knows no rule of stare decisis", or jump on the legislative bandwagon and follow virtually every other common law jurisdiction by passing a statute which sets out when a state can be sued.

A definition of sovereign immunity

Sovereign immunity is invoked by a foreign state or foreign state enterprise when it is sued in the plaintiff's domestic Courts. The defendant alleges that it is immune from the Court's *jurisdiction*. It is *not a defence* to an action. The defendant alleges immunity on the basis of the rather pompous Latin principle *par in parem non habet jurisdictionem*, ie legal persons of equal standing cannot have their disputes settled in the Courts of one of them. To allow this would violate one of the fundamental principles of international law, that all states are sovereign equals. Thus even when a state enters into a commercial contract with a private individual, it remains a state when it breaches that contract, and in theory cannot be sued. To sue a state would be, in international jargon, to offend the dignity of that state. On this principle, absolute immunity is required.

On the other hand, international law has always recognised that states possess nearly exclusive jurisdiction over their own territory to pass laws, enforce execution and subject foreigners to the Courts' jurisdiction. So far as a state's jurisdiction to prescribe domestic law within its territory is concerned, it would not be outside the realms of probability to argue that a state has jurisdiction to regulate the conduct of foreign states within its territory. If Courts do grant immunity, they have often reasoned that the executive has granted an express or implied waiver of territorial jurisdiction over acts performed by a foreign sovereign within the territory.[1] To grant a waiver implies that the state would otherwise have had jurisdiction.

International law itself therefore contains a fundamental conflict between the sovereign equality of states on one hand, and territorial prescriptive jurisdiction on the other. Partly because of the common law doctrine of precedent, and partly because most English (and New Zealand) Judges are "transformationists" rather than "incorporationists" when it comes to the application of international legal rules in domestic law, the "absolute" theory of sovereign immunity prevailed until the late 1970s. States could never be sued in the domestic Courts of the United Kingdom.

The "restrictive" theory of immunity was developed to enable states to be sued if they were engaged in commercial activities (acts *jure gestionis*) which were subject to the forum Courts' jurisdiction. States remained immune from jurisdiction if they were engaged in governmental or sovereign activities (acts *jure imperii*). It was first applied to actions in rem by the Privy Council in *The Philippine Admiral* [1977] AC 373 and to actions in personam by the House of Lords in *I Congreso del Partido* [1983] AC 257. It is in theory inconsistent with the sovereign equality of states, but it is justified in terms that a state engaged in commercial activities has thrown off its sovereign cloak and become a trader like any other individual. As such, there is no offence to the state's dignity if it is sued. It also remedies a situation seen as unjust by firms who were left without a remedy if a state breached a contractual obligation. Just as individuals were left carrying the risk of no recovery under the

absolute theory, states now had the risk of a successful suit against them in the event they breached a contract under the restrictive theory.

Although the restrictive theory is easily enough stated, there are real problems in its application. First, when is an act done *jure gestionis* and when is it done *jure imperii*? A state is immune only if the latter act has given rise to the suit. Secondly, if a state enterprise is sued, when can it be considered an alter ego of the state and therefore immune from jurisdiction for "sovereign" acts, and when can it be considered totally separate from the state and therefore not entitled to invoke sovereign immunity because it is not sovereign? Non-state defendants usually argue first that the absolute theory applies and that they are really a department of state, and second, that if the restrictive theory applies, they were engaged in "sovereign" acts, and therefore still immune from suit. Since the absolute theory has more or less fallen into disuse, the key to sovereign immunity is how to characterise the act giving rise to suit. A secondary consideration is that an entity should not be denied immunity merely on the basis that it is separate from the state if the entity is performing governmental acts.

The common law: when is an act "commercial"?

Courts now seem to look at the character of an act, rather than its purpose, to determine whether it is commercial. In *Marine Steel*, Barker J characterised a very ordinary contract to repair a ship owned by the Marshall Islands government as "commercial" (at 5, line 43). In *Reef Shipping*, Smellie J thought that the entry into a charterparty and the giving of a guarantee by the government of Tonga had "much more of the quality of a commercial transaction" (at 558F). These decisions appear to be pretty uncomplicated. But are they? Is it relevant to the action to characterise the act of entering into a relationship with the plaintiff as commercial or not? Would it not be better to characterise the act giving rise to the action, ie the breach, as commercial? To do it the first way means that a state, once it enters the market place, forever loses its sovereign character, and the commercial nature of its breach is predetermined even though the breach may arise as a result of a very "governmental" act. It may well be better to say to a state "once a trader always a trader", but the cases contain no indication that this is indeed the value judgment on which Judges are acting.

This problem confronted Lord Wilberforce in the *Congreso* case. That case concerned actions arising from the breach by a Cuban state trading entity of two contracts to deliver sugar on ships owned by Cuba. The sugar was to be delivered to a Chilean state trading entity, but the contracts were breached because the Cuban government contracted with the Allende regime which was overthrown by the Pinochet regime before performance of the contracts could be completed. (Sounds like Bob Jones v Fiji?) The first ship, called the *Playa Larga*, was owned by Cuba throughout the transaction. The second ship was not owned by Cuba until it was purchased by Cuba on its way to convert the sugar in Haiphong. The House characterised the *Playa Larga* breach of contract as commercial because

> Everything done by the Republic of Cuba in relation to the *Playa Larga* could have been done, and, so far as evidence goes, was done, as owners of the ship: it had not exercised, and had no need to exercise, sovereign powers . . . It invoked no governmental authority. (at 268F)

Lords Wilberforce and Edmund-Davies were in the minority however in their decision to grant immunity to Cuba with respect to the *Marble Islands* breach. Rather than focus on the nature of the act giving rise to the cause of action (the conversion of the sugar in North Vietnam), Lord Wilberforce seemed now to focus on the nature of the initial relationship between Cuba and the plaintiff, and the *purpose* of the conversion:

> I cannot agree that there was ever any purely commercial obligation upon the Republic of Cuba or any binding commercial obligation: the republic never *assumed* any such obligation; . . . I agree that the purpose, above, is not decisive, but it may throw some light on the nature of what was done. The acts of the Republic of Cuba were and remained in their nature purely governmental. (at 271H-272A, my emphasis).

Lord Wilberforce would have given Cuba immunity with respect to the *Marble Islands* cause of action even though the only difference between the two actions was the fact that Cuba did not own the *Marble Islands* from the beginning. An act of conversion of a cargo of sugar is as easily characterised as commercial as the dishonouring of a letter of credit, guarantee, or a repair contract. Why focus on the wrong act to preserve immunity? Lord Wilberforce's opinion at the minimum shows how drastically wrong the characterisation test can go if it is not applied to the act giving rise to the suit. It does not have to be "once a trader always a trader" or "once a state always a state".

The purpose test is difficult too. States will always invoke some conveniently "sovereign" reason to breach commercial obligations. Cuba's severance of diplomatic relations with Chile was invoked in the *Congreso* case. A new policy with respect to the purchase of cement to build army barracks was invoked in *Trendtex*. The purpose test was abandoned because any invocation of governmental purpose would render the restrictive theory meaningless. It survives to some extent in Lord Wilberforce's judgment, and perhaps in the majority *Congreso* judgments as well. Lord Diplock seemed to say that if Cuba had passed a law or issued regulations or done some other sovereign act to order the conversion of the sugar, he may have allowed the claim for immunity. The facts indicated however that Cuba relied explicitly on its private law rights as owner and indirect operator (through a state controlled entity) of the *Marble Islands*. What difference should it make whether a state breaches a commercial obligation by passing a law or by acting as an ordinary person? It is surely the character of the breach that matters.

At common law then, there remain difficulties in determining to which act one applies the test, how one decides if it is to be

characterised as commercial, and whether one looks to the purpose of the act, to decide whether a claim to immunity will be successful. These decisions will often depend on a rather subjective view of what sorts of activities are properly governmental, a view that is bound to differ from country to country.

The common law: when is a state trading entity not an alter ego of the state?

Courts generally look to the amount of control a state has over the entity, and the functions performed by the entity, in order to determine if it is truly separate or is really a department of state. Judges often come to surprising results applying this test too. For example, Lord Denning described the Central Bank of Nigeria in the following terms:

> (1) The Central Bank of Nigeria is a central bank modelled on the Bank of England. (2) It had governmental functions in that it issues legal tender: it safeguards the international value of the currency: and it acts as a banker and a financial adviser to the government. (3) Its affairs are under a great deal of government control in that the Federal Executive Council may overrule the board of directors on monetary and banking policy and on internal administrative policy. (4) It acts as banker for other banks in Nigeria and abroad, and maintains accounts with other banks. It acts as banker for the states within the Federation, but has few, if any, private customers. (at 560F-H)

Yet, despite what seems to be a preponderance of evidence (even a criminal standard) in favour of the Central Bank being a government department and entitled to claim immunity, Lord Denning decided it was not a governmental department. It is not for us to reason why. One can only conclude that again, it may be as difficult to characterise an entity as an alter ego of a state as it is to characterise an act as commercial. What then are the solutions?

Solution 1: Rethink the common law[2]

It is important to remember that sovereign immunity concerns jurisdiction. One is immediately confronted with the international principle that states have jurisdiction to prescribe rules of law within their territory, and that foreign states do not have such jurisdiction in another state's territory. If an act of a foreign sovereign falls within the exclusive jurisdiction of the foreign sovereign to prescribe its own law, then it is the legal system of that sovereign which should have jurisdiction over the dispute. Similarly, if an act of a foreign sovereign falls within the exclusive jurisdiction of the forum state, it should make no difference that the defendant is sovereign because the forum state has exclusive prescriptive jurisdiction over the dispute. If the act of a foreign sovereign falls concurrently within both jurisdictions according to international law, then a problem arises which could be solved by simply extending the forum state's Crown Proceedings legislation to the foreign sovereign. This should create no problems at international law since either state could take jurisdiction. One might consider precluding immunity under Crown Proceedings legislation if the foreign sovereign commits an act in breach of both international law and the law of the forum. This solution emphasises one of the bases of sovereign immunity, territorial jurisdiction, which has been ignored in the quest to preserve sovereign equality, and which could provide a solution much less inconsistent and easier to apply than the restrictive theory laden with all of its subjective characterisation baggage.

In order to apply domestic Crown Proceedings legislation to the Crown and foreign states alike, one has to be certain that there are no different policy aims pertaining to each which might justify differential treatment of foreign states. The Supreme Court of Canada had cause to consider this issue recently (in the context of federal-provincial relations) in *Alberta Government Telephones v Canadian Radio-television and Telecommunications Commission* [1989] 2 SCR 225. In that case it was argued inter alia that the AGT, as an agent of the Alberta provincial Crown, was immune from federal legislation requiring it to provide facilities for the interchange of telecommunications traffic between itself and a federal agency. The Court held (Wilson J dissenting) that the AGT was entitled to claim Crown immunity because the federal legislation was not expressed to bind a provincial Crown. The Court did however consider an argument that the AGT lost its immunity by operating as a commercial entity. Although Canadian Courts had never adopted the restrictive sovereign immunity doctrine vis-a-vis foreign states (one of the reasons why the State Immunity Act, RSC 1985 c. S-18 was passed), the Supreme Court considered, then dismissed, the analogy between foreign states and domestic provinces on rather dubious grounds:

> Arguably, an analogy might be drawn between sovereign immunity in public international law and Crown immunity. It seems that the general trend in the international sphere is toward a restrictive immunity doctrine which accords immunity for "governmental" activity, but not for commercial activity . . . . It is far from clear that any analogy with sovereign immunity in international law is a direct one . . . . This is perhaps not surprising. The same considerations which call for mutual respect of activities of both levels of government within the confines of a single federal state . . . do not necessarily arise in the international sphere. If a foreign state seeks to carry out commercial activities abroad as an element of state or public policy, it cannot expect immunity from foreign laws and judicial processes . . . . But as Professor Swinton[3] makes clear . . . , the public policy dimension of governmental commercial activities within Canada's borders is entitled to presumptive effect:
>
> > . . . The reason for government involvement in many of these activities, such as transportation or resource development, is to meet specific public policy objectives, with profit-making at most a secondary motivation.

In any event, assessment of the desirability of a commercial

exception [to Crown immunity] is for Parliament to make . . .

Of course, any country thinking of making foreign states subject to its own Crown immunity legislation would also have to consider how its Courts interpret that legislation. If, like the Supreme Court of Canada, they were unwilling to draw an analogy between foreign states and a domestic Crown on the basis of an argument which applies as well to foreign states as to domestic provinces, or they were unwilling to read in a commercial exception to legislation silent on the matter, or they drew a distinction between commercial and governmental acts by applying a "purpose" or "motive" test, there may well be little point in extending merely the coverage of existing Crown immunity legislation to foreign states. A more comprehensive rewrite seems to be required.

Solution 2: Pass an Act

A statute which contains a list of acts for which a state will not be immune from the jurisdiction of other Courts at least provides more certainty than the common law, even if it does not try to resolve the inherent contradictions of the restrictive theory. The question becomes, which Act should New Zealand adopt? The Law Commission is in the process of recommending a modified version of the Australian Foreign States Immunities Act 1985, which was the culmination of an extensive review of the law contained in Report No 24 *Foreign State Immunity* (1984) by the Australian Law Reform Commission.

All the statutes start with the principle that foreign states are immune except in certain commercial transactions. The American Foreign State Immunity Act 1976 (FSIA) falls into the trap of merely restating the common law test in general terms. As we have seen, the commercial/governmental distinction is easily enough stated, but difficult to apply. Section 1605(d) states that

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Understandably, this action has not stemmed the flow of litigation determining whether or not a state has immunity from jurisdiction. Section 1603(a) includes an "agency or instrumentality of a foreign state" in the definition of a foreign state. Section 1603(b) states that:

> An "agency or instrumentality of a foreign state" means any entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . .

Quaere whether a state-owned enterprise would fall within this definition. All the statutes more or less follow this definition, which centres on control, but which would not necessarily exclude an inquiry into the functions performed by the entity.

The United Kingdom's State Immunity Act 1978 is much more successful than the American version in cutting down litigation. This is becaue it recognises that it is impossible to define "commercial activity" in any way that provides certainty. It opts instead for a series of specific provisions which reflect more precisely when immunity will be withheld. Section 3(1) states that

> (1) A State is not immune as respects proceedings relating to — (a) a commercial transaction, entered into by the State; or (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom . . .

It contains sections dealing with membership of bodies corporate, contracts of employment, patents and trademarks, personal injuries and damage to property. It also contains, in s 3(3), a much more specific "basket clause" which defines "commercial transaction" as

> (a) any contract for the supply of goods or services;
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; . . .

Section 14 of the United Kingdom Act includes the sovereign, the government and government departments within the scope of state immunity, and excludes "separate entities" which are "distinct from the executive organs of the government of the State and capable of suing or being sued." These entities *are* immune if the proceedings relate to anything done by them "in the exercise of sovereign authority" *and* if the act were done by the state rather than the entity, the state would have been immune. This rather unhelpfully restates the common law position. The statute first excludes entities from immunity but then includes them if they are performing sovereign function, whereas the American Act first includes entities in the scope of immunity but then excludes them if they are too remotely controlled by the state. It is submitted that the American version, in this respect, is more certain in its application, and more consistent with the general approach of the Act in first giving immunity and then taking it away in certain circumstances.

The State Immunity Act 1978 was most recently considered by the House of Lords in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969 (also reported as *Maclaine Watson & Co Ltd v Department of Trade and Industry* at [1989] 3 All ER 523). (The case is perhaps most notable for the appearance of 24 counsel including 14 QCs taking 26 full days of argument which prompted Lord Templeman to state that "the length of oral argument permitted in future appeals should be subject to prior limitation by the Appellate Committee.") The nub of the sovereign immunity argument

lay in the reluctance of member states of the International Tin Council to accept liability for the ITC's debts which were claimed to amount to £150 million. Following its collapse, the ITC and its 24 member states were sued by eleven London Metals Exchange brokers and six banks, including the ANZ. Strictly speaking, the immunity dicta were obiter, as the plaintiffs based their cases on four main arguments:

(1) The ITC had no separate existence as a legal entity apart from its members, so that contracts concluded in the name of the ITC were contracts of the member states;

(2) The ITC was a separate legal entity, but its members were directly liable, jointly and severally, by analogy with laws concerning "mixed entities" in Scotland, Germany, France, Puerto Rico, Jordan and elsewhere;

(3) The ITC was a separate legal entity, but its members were directly liable on the basis of a rule of international law (not found to exist by the Court of Appeal) that members of international organisations incur such liability unless it is expressly disclaimed by the treaty establishing the international organisation;

(4) The ITC was a separate legal entity, but by the treaty establishing it, it was only authorised to contract as agent for the member states.

Both the Court of Appeal and the House of Lords dismissed all four submissions largely on the fairly fundamental principles that no one is liable on a contract except the parties to the contract, and treaty rights and obligations are not enforceable in domestic Courts unless they have been incorporated into domestic law by statute. The immunity arguments were thus made otiose and were expressly not considered in the House of Lords. In the Court of Appeal however ([1988] 3 All ER 257 at 315) Kerr LJ stated that

> . . . if I had held in favour of the plaintiffs on any of their submissions, I would have decided, as a preliminary issue under the 1978 Act, that none of the member states were immune from the jurisdiction of the Court.

Indeed, it is obvious that *if* the plaintiffs were successful in their first submission, s 3(1) of the Act would have made member states not immune, and s 3(2) would have applied to the rest of the submissions. The case does not add much that is enlightening to the substance of the State Immunity Act. During argument however, an interesting procedural point arose. The plaintiffs contended that they only had to show a "strong case for argument" in relation to a contested issue on immunity in order to proceed to the merits. In support, the plaintiffs argued that all foreign states would have been served under RSC Ord 11 (service *ex juris*) where an arguable case against immunity would already have been established, making it "cumbersome and somewhat surprising if this were then merely the precursor to a formal preliminary issue on immunity" in the present proceedings ([1988] 3 All ER 314b). On the other hand, the member states argued, and the Court agreed, that immunity had to be treated as a full-blown preliminary issue before the case could proceed to merits, because if only a strong case had to be made out, states would be forced to take steps in the proceedings to defend the substantive claims, thereby submitting to the jurisdiction and effectively waiving immunity before the merits of the immunity claim had been decided. Apart from this procedural titbit though, the *ITC* cases do not add much to interpretations of the State Immunity Act, which perhaps indicates that the Act works well.[4]

The Australian Foreign States Immunities Act 1985 arguably improves on both the British and American models. It defines "commercial transaction" in the following terms:

> 11(3) In this section, "commercial transaction" means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes—
> (a) a contract for the supply of goods or services;
> (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
> (c) a guarantee or indemnity in respect of a financial obligation.

The Act goes on to detail specific provisions relating to patents, personal injury etc as does the UK Act. It defines "separate entity" as a natural person, body corporate or corporation sole which

> (a) is an agency or instrumentality of the foreign State; and
> (b) is not a department or organ of the executive government of the foreign state.

Separate entities are treated as foreign states with a few exceptions (section 22). This definition is much closer to the American version and is much less susceptible to uncertainty concerning the meaning of "sovereign authority". It is also consistent with the approach of granting immunity except in certain circumstances. It is on the whole a superior Act which New Zealand would do well to adopt.

Conclusion

There are no doubt problems associated with drafting a suitable definition of the circumstances in which immunity will be withheld from foreign states, including a large area not dealt with here, that of meshing sovereign immunity with diplomatic immunity, especially regarding enforcement of judgments. On the other hand, the problems inherent in the common law are obvious, not least because of the question-begging character of the common law tests which result in uncertainty. Judges are also bound by precedent and an unwillingness to acknowledge changes in international law which have not been transformed into domestic law. A statute, if properly drafted to encompass as many specific circumstances as practicable (the definitional nature of the

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Jurisdiction to avoid interest on sums to be determined by arbitration

By Derek Firth, LLB, FCI Arb, of Auckland

The author questions the correctness of the decision of Henry J in Angus Group Ltd v Lincoln Industries Ltd *[1988] BCL 1071 allowing an arbitrator to fix interest on a sum that was only fixed in the arbitration itself, that is on unliquidated damages. The jurisdictional question apparently was conceded and not argued. Mr Firth suggests that the question is still an open one and that a subsequent case might be decided the other way. He warns that practitioners should include an express provision on the point in any arbitration clause.*

The decision of Henry J in *Angus Group Ltd v Lincoln Industries Ltd* [1988] BCL 1071 raises a matter of such importance that it warrants wider consideration and discussion. It did not go to appeal. It touches upon the scope of s 87(1) of the Judicature Act 1908. Not only does this section determine the jurisdiction of the High Court to award interest but it usually determines the jurisdiction of arbitrators. This is because it is an implied term in a reference to arbitration, unless stated otherwise, that an arbitrator shall have the same jurisdiction in that regard as the High Court.

Entitlement to interest upon sums to be determined by arbitration can arise in many ways. The best known instances are rent reviews, share valuations, or, under a sale and purchase agreement where the valuation of plant is determined by arbitration. Of course there are many other examples but these suffice to make the point that the issue arises regularly.

Regrettably, Henry J was not much assisted during the course of argument because counsel, upon whom fell the burden of arguing that there was no jurisdiction to award interest in the given circumstances, conceded that there was jurisdiction. This may have misled the learned Judge into jumping the wrong way.

The relevant facts may be simply stated. The plaintiff (purchaser) and the defendant (vendor) entered into an agreement for the sale and purchase of assets including plants, dies and tools which were to be purchased "at the value determined in accordance with the attached terms of reference". The terms of reference provided for independent valuations and that should the valuers be unable to reach agreement "they should refer the matter to an umpire in accordance with the provisions of the Arbitration Act".

After an unfortunate start which was subsequently aborted by an earlier High Court hearing, the umpire published an interim award valuing the plant and, at a later date a final award dealing with the issue of interest. He held that the amount of the award in so far as it was unpaid should carry interest calculated at the rate of 23.5% per annum (down to the date of the award). The reference to arbitration made no express mention of the question of interest.

The concession by counsel for the plaintiff is recorded by His Honour in the following terms:

> (Counsel) accepted that it could not properly be contended that the terms of reference prohibited the umpire from awarding interest on any amount found by him to be due and owing to Lincoln. That

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sovereign immunity tests make a more general approach unhelpful), would at least provide guidance to Judges and would encourage more predictability in the law's application. It would also mean that persons would be much less reluctant to enter into often lucrative commercial transactions with foreign states. □

1 *The Schooner Exchange*, 11 US (7 Cranch) at 137-141; *Anderson v NV Transandine Handelmaatschappij*, 28 NYS 2d 547, aff'd 289 NY 9; but see *Bank voor Handel en Scheepvart v Slatford* [1956] 1 QB 248 (CA).

2 This part relies heavily on Singer, "Abandoning restrictive sovereign immunity: an analysis in terms of jurisdiction to prescribe" (1985) 26 *Harvard International Law Journal 1-61.*

3 K Swinton, "Federalism and Provincial government immunity" (1979) 29 UTLJ 1, 28-29.

4 Readers keen to follow the saga of the ITC through the English Courts may find the judgments subject to appeal at the following cites:
High Court (Millett J): *JH Rayner (Mincing Lane) v DTI* [1987] BCLC 667, *Maclaine Watson v DTI* [1987] BCLC 707, *Re International Tin Council* [1987] Ch 419, *Maclaine Watson v ITC* [1988] Ch 1, *Maclaine Watson v ITC (No 2)* [1987] 1 WLR 17711; Court of Appeal (Kerr, Nourse, Ralph Gibson LJJ): *Maclaine Watson v DTI* [1989] Ch 253; House of Lords (Lords Templeman, Oliver, Keith, Brandon and Griffiths, with the first two giving the leading judgments: *(JH Rayner (Mincing Lane) Ltd v DTI* [1989] 3 WLR 969. On the admissibility of ITC documents: *Shearson Lehman v Maclaine Watson* [1988] 1 WLR 16 (HL).
On contractual waiver of immunity: *Standard Chartered Bank v ITC* [1987] 1 WLR 641 (Bingham LJ).

> being so, the only bar to an award disappeared, the trend of authority now accepting that an arbitrator in general does have that power.

His Honour then referred to the well known decisions on this topic which, in brief, imply a term in a reference to arbitration (which is otherwise silent on the issue that an arbitrator has the same jurisdiction as the High Court to award interest.

The jurisdiction of the High Court is governed by the provisions of s 87(1) of the Judicature Act 1908:

> In any proceedings in the High Court or the Court of Appeal for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given, interest at such rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment.

(A word of warning about English authorities on interest. The equivalent legislative provision in England is almost identical but there is no "prescribed rate" and English Judges are free to award interest at full commercial rates if they wish.)

The prescribed rate in New Zealand is 11% and, having been persuaded that jurisdiction existed, His Honour had little difficulty in substituting 11% for the rate which had been allowed by the umpire.

It is immediately apparent that the critical words in s 87(1) are "... recovery of any debt or damages ...".

For the High Court (or an arbitrator) to have jurisdiction, the money in question must be the recovery of any debt or damages.

His Honour noted that no issue of breach of contract arose and that the price to be paid was not determined until the arbitration was completed. He concluded the relevant passage of his judgment with these words:

> I comment that this result does highlight the unduly restricted nature of s 87, which in general will operate only in favour of a defendant who has had the use of the funds properly payable to a plaintiff.

Clearly the fixing of new rent or determining the valuation of plant is not "damages".

Is it a "debt"?

In a very general sense it might be said that retrospectively determined rent or share value or plant value is a debt. However a claim for an amount which is uncertain cannot be legally called a "debt": *Ogdens Ltd v Weinburg* (1906) 95 LT 467 HL per Lord Davey. The word "debt" is defined in Strouds *Judicial Dictionary* as "a sum payable in respect of a liquidated money demand, recoverable by action". In Canada it was recently held "... the word 'debt' has a well-defined judicial meaning as a sum payable in respect of a liquidated money demand. It does not include an unliquidated claim ...". (*Pizzolati and Chittaro Manufacturing Co Ltd v May* [1971] 3 LR 768, 770.) Liquidated means a determined amount. An unliquidated amount is one which requires more than nominal investigation — *Paterson v Wellington Free Kindergarten Association Inc* [1966] NZLR 468, 471.

In the context of s 87(1) of the Judicature Act 1908 as a whole, a reasonable argument can be advanced to the effect that the phrase "debt or damages" does not include the fixing of a new rent or the valuation of shares or property until the amount is determined. This is because the new rent or the valuation is not a liquidated amount and cannot be paid until it has been fixed and prior to the award there was no defined amount. In other words the fixing of the rent (or valuation) is a condition precedent to the liability of the lessee or purchaser to pay.

Wisely or unwisely the author committed these views to print in the *New Zealand Valuers' Journal*, vol 27, September 1986 and concluded: "If this view is correct (and one cannot be sure until it is tested in Court) then there is no jurisdiction to award interest on the arrears of a rent increase".

The issue is one of considerable importance because of the frequency with which it arises. It is therefore disappointing to find that when it came for a decision in the High Court it was not fully addressed by the Court because the point had been conceded and was therefore not fully argued.

Counsel for the plaintiff may have been right to make the concession and Henry J may have been right when he said that "... *in general* (s 87) will operate only in favour of a defendant who has had the use of funds properly payable to a plaintiff." (Emphasis added). However, this is not a view which parties to commercial agreements can accept, at present, with confidence.

Unquestionably, it would be just if the person adversely affected by the delay in fixing a rent or value may recover interest. Unquestionably, it was right for the Court to strain for an interpretation of s 87 which would give that result. If, at a later date, the Court of Appeal takes a contrary view then it would be right for Parliament to widen s 87 to have the desired effect.

In the meantime lawyers drafting commercial documents which provided for valuations of rent, shares, plant, or other property or entitlements, would be wise to include in the arbitration clause an express provision entitling the valuers or arbitrators to award interest. □

Lawyers and books

The lawyer had to be a man of law, but, to reach the highest ... standard of performance in his profession, he had also in some ... degree to be a man of letters. Words were the raw material of the profession of the law. The popular condemnation of the "jargon" of the law was not altogether just. What was not altogether ... recognised was that the law must aim at something quite drab in ... order to achieve lucidity. Words had a magic of their own, and they could divert the mind in the most extraordinary way. The lawyer, ... however, had to avoid this, to achieve precision and lucidity. That was the explanation of the phrasing of many legal documents. Not only did the draftsman have to draw up a document so that a ... person reading it in good faith could understand it; he had also to ensure that it was not capable of being misunderstood when it was ... read in bad faith.

Mr Justice Birkett