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Of lives and language for lawyers

One of the greatest cultural calamities in European history occurred actually in Egypt. In 48 BC, while Julius Caesar was fighting to secure Cleopatra on the throne of Egypt, the great library at Alexandria was razed by fire. Thus perished a unique record of the Mediterranean civilisations of the ancient world. Indeed, the Library of Alexandria was a cultural artifact in itself and not just a record.

Recently, in Umberto Eco's *The Name of the Rose*, we have had as the central "character" of a novel, a great imaginary mediaeval library and the plot concerned its eventual destruction by fire. Then, too, we have had Jorges Luis Borges' great work *The Labyrinth* in which the whole universe is symbolised as a gigantic library. It is our own age, indeed, that is unique in history in thinking of itself as being, above all else, the information age.

Inevitably there are two sides to our attitude to books. On the one hand, they are revered for the information, the knowledge they contain. Even greater libraries are being built, and more and more books are being published, in a flood that overwhelms even the specialist reader. Books, though, can be essential, indeed they are the specifically essential tools for the legal profession. A lawyer and his books is a phrase that is inevitably as accurate and commonplace as law and order, or truth and justice. Two reference works just published are not specifically legal books, but they should nevertheless be included in any worthwhile legal library. The first is volume one of the proposed multi-volume work, *The Dictionary of New Zealand Biography* (1990, Allen and Unwin, $120.00). The second is the 8th edition of *The Concise Oxford Dictionary* (1990,Oxford, $39.95).

The Dictionary of New Zealand Biography

This work was edited by W H Oliver with Claudia Orange as Assistant Editor. This first volume makes it clear that this will be, in every good sense of the word, a monumental publication. Volume 1 covers the period 1769 to 1869 and contains 572 essays of varying length about the people who, in that period, could be said to have flourished – a term that is to be understood as meaning "first made a mark". The only exception to the time span is Abel Tasman, who was, after all, a young contemporary of Shakespeare and was born when Elizabeth I was still Queen of England.

Any work of this nature and of such scope can be subjected to criticism, and a general one will be made at the end of this review. What must be said first, however, is that this is a great work. It is invaluable for reference, and a ready guide to information about an extraordinary variety of people. The entries are written to a pattern, with details where known of parentage, date and place of birth, marriage, offspring, occupation, date and place of death, and place of burial. In many cases, perhaps most, a brief assessment of the personality is attempted with greater or less success. A fine example is Claudia Orange on the difficult James Busby, harshly treated by fate and apparently most unfairly treated by his superiors. *The Dictionary of New Zealand Biography*, Volume 1, is an essential reference publication for any library that purports to be comprehensive. It will be an invaluable tool of trade for many occupations, including the profession of the law.

One of the most noteworthy and unique aspects of the publication is the Categories Index. There are 24 categories from Administration to Visual Arts and Crafts, and including such topics as Community Service, Exploration, Politics, Religion and Tribal Leaders. One of the categories is Law and Law Enforcement. That, in its turn, is subdivided into Accused (4 entries), Assessor (31 entries), Bailiff (1 entry), Convict (5 entries), Criminal (5 entries), Gaoler (2 entries), Judge (8 entries), Lawyer (12 entries), Magistrate (17 entries) and Police (16 entries).

There is some doubling-up. Many of the Judges and Magistrates also appear as lawyers. Three of those listed as Judges were Judges of the Maori Land Court and not Judges of the Supreme Court. The most noticeable list, however, is that of the Assessors. They appear out of proportion to the importance of the office they held in the Maori Land Court, and of their own personal significance. Many of them would seem to be there just to increase the number of Maori entries. This was the result of a policy decision which is, dare one say it in this day and age, at least questionable.

It has been estimated that between a quarter and a third of the entries concern Maoris, and about one-fifth deal with women. Sometimes it makes for interesting, if depressing, reading, as with the life stories of the three prostitutes Jessie Finnie, Anne Swift and Barbara Weldon. They are put in the category of Commercial Activities and not of Community Service! Many of the women listed were, of course, goodly and godly as with the very first

entry for Caroline Abraham who appears in her own right as an artist, and immediately precedes her husband, Bishop Charles Abraham, for simple alphabetical reasons. In other cases there is a single entry for both husband and wife where their contribution has been as a team. That this sort of distinction is a valid one can be seen in terms of a 20th century English analogy of the total unsuitability of treating Sylvia Plath and Ted Hughes in a single entry, but the total suitability of writing of the Webbs, Sidney and Beatrice, as a single entity. Examples in this volume of joint entries are for Agnes and Hector McDonald.

The entries for women range widely to include Jessie Crawford, a Barrack-matron in Dunedin; Mary Cecilia Maher, a nun in Auckland; and Margaret Lynch, a domestic servant. The biographical note about Jessie Crawford is interesting because of the incidental picture it gives of the practicalities of immigration. Single young women came out on the sailing ships and were put up at barracks run by the Provincial government until they could be found work as servant girls. Apparently, not all were girlish in their ways.

Margaret Lynch came to notice because of the record of a Court case. She was sacked and accused of theft by her employer, whom she then proceeded to sue for non-payment of wages. A charge of theft was then laid, and she was convicted. This led to a public outcry and petition, and she was pardoned by the Governor. She subsequently recovered her wages. Should this be regarded as the earliest case of unjustified dismissal? The entry on the prostitute, Jessie Finnie, makes a passing reference to the underside of Auckland life in the 1850s and 1860s.

> The Finnies were part of a criminal sub-culture. They mixed with individuals such as William Wilson, a thief, who was convicted of keeping a "bawdy house" along with the Finnies; Richard Dawkins, a well-known thief and robber, with "a countenance of true bulldog pattern", whom Jessie Finnie (mother) prosecuted in 1862 for the theft of some of her property; and James Sullivan, proprietor of the Crown Hotel, West Queen Street, and William Lamb, of Chancery Street, who seem to have acted as pimps.

The variety of those chosen for selection, and the emphasis placed on biographies of Maoris and women, is justified by the editor in his Introduction. He argues that it is now clear that tensions relating to race, sex, class and what he calls "generation", are not aberrations, but ingrained social characteristics of New Zealand. Many, such as George Steiner in *Antigones*, pp 231-232, would suggest they are merely an inherent part of the human condition. What Steiner wrote is worth recording as an antidote, or at least a balance, for the sometimes implicit assumptions about New Zealand society behind this work.

Steiner's general reference to the inherent tension between the individual and society would also, of course, apply to minority and ethnic groups in relation to majorities, and for the individual within a minority group.

> It has, I believe, been given to only one literary text [Sophocles' *Antigone*] to express all the principal constants of conflict in the condition of man. These constants are fivefold: the confrontation of men and women; of age and of youth; of society and of the individual; of the living and the dead; of men and of god(s). The conflicts which come of these five orders of confrontation are not negotiable. Men and women, old and young, the individual and the community or state, the quick and the dead, mortals and immortals, define themselves in the conflictual process of defining each other. Self-definition and the agonistic recognition of "otherness" (of *l'autre*) across the threatened boundaries of self, are indissociable. The polarities of masculinity and of femininity, of ageing and of youth, of private autonomy and of social collectivity, of existence and mortality, of the human and the divine, can be crystallized only in adversative terms (whatever the many shades of accommodation between them). To arrive at oneself — the primordial journey — is to come up, polemically, against "the other". The boundary-conditions of the human person are those set by gender, by age, by community, by the cut between life and death, and by the potentials of accepted or denied encounter between the existential and the transcendent.

The extraordinary thing about New Zealand is the relatively moderate extent to which these tensions have been present in New Zealand society. They are, of course, still problems and have to be addressed, but one wonders about the balance as shown in this work. The arguments for the inclusion of the disadvantaged is stated by Dr Oliver at pages viii, ix and x of the Introduction.

> The disadvantaged have claims upon the past as well as upon the present; these should be heeded, both as an act of justice and in something of the spirit of an experiment. While the conventions of this literary genre require the presence of major figures, their unavoidable weight may be balanced by a sizeable representation of those who were not in their lifetimes imposing presences, but who might, given the nurture of research and writing, become memorable historical presences.

> For these reasons, it was decided to cast the net widely: to draw in common soldiers as well as their officers, community leaders as well as politicians, matriarchs as well as patriarchs, followers as well as leaders, entertainers as well as painters, bullock drivers as well as engineers, missionary wives as well as their husbands. A number of those who would, it was hoped, come up from under through research failed to do so. But a good number did, and they are here.
> . . . .
> A biographical dictionary is a way of looking at the past through the lives of some of its people. Selection, research and writing are carried on in that profitable field of stress between the evidence left by the past and the questions put by the present. Neither are static; new questions turn up fresh evidence which in turn prompts further questions. This volume is the result of an effort to modify the traditional character of such publications by directing questions to the condition (and the significance) of the powerless as well as the powerful, the victims as well as the victors, the poor as well as the rich, the obscure as well as the eminent. A novelist might devise plausible answers to such questions; history, though perhaps the supreme fiction, has to find

them. Where they could be discovered – and it is sobering to reflect how often they were not very far below the surface – they have found a place in the lives of many hitherto obscure people.

Judges, lawyers and criminals tended not to be obscure, and consequently get fair coverage – although with one extraordinary exception. There is a fine essay by George Barton QC on the first Chief Justice, William Martin; and Judith Bassett with J G H Hannan does a reasonable piece on the third Chief Justice, James Prendergast. But inexplicably there is nothing on the second Chief Justice, George Arney. Not only does he deserve recognition for the office he held for 18 years from 1857 to 1875, but he was as a person more influential than many who have been included. To leave him out is, to say the least, an error of judgment if it was done on purpose, and an unfortunate lack if it was due to oversight or difficulty in obtaining manuscript from an author. If eventually there is to be a supplement, which inevitably there ought to be, this is one matter that must be corrected. A short, but adequate, note on the second Chief Justice will be found in Volume 1 of the 1966 publication *An Encyclopaedia of New Zealand*, and a longer piece appears at pages 39 to 43 of *Portrait of a Profession*.

The essay on James Prendergast, as noted above, is a reasonable and fair one, except in one particular. The essay gives a misleading account of the famous, or infamous, decision of the Chief Justice in *Wi Parata* (1877) 3 NZ Jur (NS) SC72, and an equally misleading assessment of Prendergast personally. An alternative interpretation of the decision in the *Wi Parata* case is given in this issue of *The New Zealand Law Journal* by E J Haughey at [1990] NZLJ 230.

Little need be said of the entries about the other Judges considered: Henry Chapman in and out of politics between periods on the Bench here and in Australia; Christopher Richmond, politician and man of letters; and Thomas Gillies, the first of our Supreme Court Judges to have qualified for the Bar by New Zealand examination. Nor can exception be taken to there being no entry for the other four Judges active in the period covered – Stephen Sidney, Daniel Wakefield, Henry Gresson and Alexander Johnston, although the family names of the latter two were to figure again in New Zealand history.

This volume concludes with the sadly tragic case of Joseph Zillwood (1804-1854), policeman, farmer and innkeeper. His son died in 1853, his second wife left him in 1854, he had lost his job as a policeman, was heavily in debt and as heavily into drinking. He shot himself with his service revolver. The entry contains an interesting description of the onerous duties of a policeman in the early 1850s. After referring to his financial plight, the entry states:

> Nor did additional duties as Akaroa's postmaster sufficiently augment his salary. His policing tasks were taxing: for a time he was Banks Peninsula's (and thus Canterbury's) only regular civilian policeman, his colleague having been transferred to Port Victoria (Lyttelton). Police at this time had no days off, were typically on duty from 7 am to 11 pm, and also had charge of lock-ups, and of hard-labour gangs which frequently comprised dangerous criminals.

At the end, the author of the piece comments:

> A coroner's jury duly found that he had "feloniously voluntarily and of malice aforethought himself killed", and his body was "interred at night, without funeral rites, pursuant to the Coroner's Warrant". The property owners whose interests he had been employed to protect thus delivered a final, posthumous blow to Zillwood's dignity.

This entry, like many others such as that one on Prendergast C J mentioned before, is marred by a judgmental arrogance that says much about 1980s' political, social, and moral views, but displays a lack of ability to make an assessment of institutions or people in terms of their own historical context.

Ecclesiasticus contains the famous phrase, taken by James Agee as the title for one of his books, "Let us now praise famous men" and goes on to refer to them as our forefathers in this land. Although there is some, there is really little praise of our forefathers in this work, unless the subject is a woman or a Maori. However George Grey gets a grudging acknowledgment from Keith Sinclair that he was "one of the most remarkable people who have lived in New Zealand". It is perhaps amusingly ironical that a work devoted to our forefathers should, by alphabetical accident, being with the surname of Abraham; and not so amusing, but still ironical, that it concludes with a suicide. The brief assessments of the various characters can all be argued for, and the restrictions of space necessarily make for short, sharp judgments. It is to be feared, however, that many of the judgments, reflecting the attitudes of the 1980s, will all too soon become outdated.

The Concise Oxford Dictionary

Holmes J was quoted in *Read v Lyons* [1947] AC 156 at 175 as having said: "The life of the law has not been logic: it has been experience." This is true enough, but it is also true that the life of the law is language. Semiotics (and poetry) has turned language and meaning into a game, and from a game into a farce, and from a farce into a nightmare. Whatever the intellectual linguistic gymnasts get up to, however, for lawyers and Judges words must be given meaning, for on those meanings depend the rights of individuals, the security of life and property, and the protection of our liberties.

Dictionaries are therefore an indispensable tool for the profession of the law. Essentially we rely on *Websters*, the *Shorter Oxford* and finally the great, if still flawed, *OED* itself, so recently brought up-to-date in the second edition published in 1989. For practical daily use, however, most of us – and our secretaries – rely on something smaller, like *The Concise Oxford Dictionary* of which the 8th edition has just been published. The advertising material describes this new 8th edition as the 8th wonder of the world, and hails it as "the new edition for the 1990s". Puffery is permissible, as the *Carbolic Smoke-ball Company* case [1893] 1 QB 256, decided so long ago, even though the modern consumer movement and its attendant legislation might suggest otherwise.

Obviously it is not possible for one who is neither an etymologist nor a lexicographer to review a standard dictionary in any academic sense. The question is rather whether the work seems to be useful, and of course this new edition does seem to be. A quick comparison with the fifth edition of 1964, which is the one I have kept on

my desk these many years, shows how much more extensive the new edition is. For instance, to open the two books quite arbitrarily, between "bulletin" and "bullion" which followed one another in the 5th edition, there are now six additional entries from "bulletproof" to "bull-headed". The publishers claim that by comparison with the 7th edition published in 1982, there are 7,000 new words requiring 20,000 new entries, making a total of 120,000 entries altogether. A simple check would also indicate that it is quite up-to-date with "fax" given as both a noun and a verb, for instance.

For those who are obsessed with such school bike-shed questions, the work contains the standard obscenities, as that word is defined in the dictionary itself; but they are described most genteelly in the Introduction as words that "may not be regarded as particularly 'educated' ". The editors go on to say that this vocabulary and usage "must have its place (appropriately identified) in the record." Is it prissy (defined as prim, prudish) to ask why? No justification is offered. Ho, hum!

Leaving this issue of the degradation of taste and sensibility aside – although it is a very serious one with considerable implications for the law in the area of sexual behaviour – the question remains whether this new edition is a useful reference book. From a cursory examination as indicated above, the answer must be yes. The editor claims that *The Concise Oxford Dictionary* is among the most famous books of the world. He describes it as being, in fact, an institution. What he then goes on to say in the Preface would seem to be fair comment.

> When I and my colleagues began the work of writing this edition we were faced, essentially, with the task of producing a dictionary for the 1990s without making it totally unrecognizable as the *Concise*. The result is a completely redesigned edition with clarity and ease of use as the paramount aims yet retaining and enhancing the authority and thoroughness on which its reputation depends.

P J Downey

Case and Comment

Failure of the wonders of modern science

In *Cook v Cook* (High Court, Invercargill; AP No 4/90; 23 February 1990), Tipping J had an unusual problem before him in a matrimonial property context. It was one of procedure rather than of substance, as will become apparent.

The case had come before Judge Aubin in the Family Court. He had had to consider a submission that extraordinary circumstances were present and that, in consequence, s 14 of the Matrimonial Property Act 1976 should be applied so as to give a division of two-thirds to the husband and one-third to the wife; to deal with a number of detailed matters pertaining to chattels, and to determine whether the husband owed certain money to his mother or whether the funds advanced by her to him constituted a gift to him. The primary issues were evidently decided against the husband. Values of chattels, together with allied points, were also determined by Judge Aubin. As regards s 14, he decided that extraordinary circumstances were not present. On any view of the arithmetic, however, the husband would inevitably be paying the wife $10,000 or, possibly, a little more.

The husband, being dissatisfied with the decision, appealed as of right to the High Court.

The evidence in the lower Court was, primarily, affidavit evidence, as is usual. There was, however, "significant cross-examination both ways". Counsel for the husband informed Tipping J that, in his cross-examination of the wife, matters had emerged which he regarded as advantageous to the husband and that he (counsel) had elected not to cross-examine other witnesses called for the wife.

The procedural puzzle was this: all the cross-examination on both sides was, somehow or other, "unhappily" (the adverb used by Tipping J) wiped from the tape which was playing to record it.

Counsel for the husband contended that it was not now possible for the appeal to be conducted without the transcript of the evidence. As the Court readily appreciated, he would not have taken detailed notes of cross-examination. It was not possible to reconstruct it so as to provide an accurate note for the present appeal.

In these circumstances, counsel for the husband saw two possible solutions: (a) remission of the whole matter for a de novo hearing in the District Court, which was possible by virtue of the combined effect of s 77 of the District Courts Act 1947 and s 39(1) of the 1976 Act, and (b) (less preferable, as being less likely to lead to a quicker resolution) a whole or partial rehearing in the High Court pursuant to s 39(4) of the 1976 Act. (In the context of (a), counsel and the Court had discussed *Karamea Panelling Co Ltd v Johnson Bros*

Transport Ltd [1988] BCL 1621.)

Counsel for the husband indicated to His Honour that the areas he wished to attack on the appeal were (i) the finding that s 14 was inapplicable; (ii) the decision that the money advanced by the mother was a gift from her which thus did not have to be repaid to her, and (iii) matters of valuation and allied matters relating to a caravan and a trailer. As to this last, Tipping J was able to hold that these matters had been satisfactorily determined by the lower Court and that availability of the notes of evidence would be unlikely to shed much light on that Court's assessment. Thus any rehearing that he might order should not include these points.

Counsel for the husband took a further point, viz, that the Court below had ordered the former matrimonial home to be sold on the assumption that the husband might not pay out the wife within the time permitted – a time which had, in the event, already passed by. It was put to His Honour that the husband could be disadvantaged in that, if the home were sold for less than the agreed value, he still had to pay half the agreed value and would be at risk for interest at 15%.

Counsel for the wife explained to the Court, inter alia, the efforts made to reach an agreement between the parties as to what should be done in the circumstances. No agreement had proved to be possible. She adverted to the point that the cross-examination was not by any means the only evidence, as the Court indeed acknowledged. She also correctly pointed out that s 39(4) of the 1976 Act required the Court to consider the interests of justice and that those interests "work both ways".

Tipping J solved the matter as follows in the course of his oral judgment:

> (a) A rehearing of some only of the issues in the Family Court should be ordered, for which reason the formal orders made by Judge Aubin must be set aside. Counsel for the husband would doubtless address the Court rehearing the case upon the ultimate orders to be framed and particularly upon the problems appertaining to the matrimonial home.
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> (b) If the High Court were to try and determine the appeal without the notes of evidence, there would "always be a lurking feeling, at least on the part of the appellant husband, that the Court had not had all the material before it and therefore justice had not been done."
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> (c) Terms should be imposed under s 77(1)(a) of the District Courts Act limiting the ambit of the rehearing thus: (i) as to whether or not s 14 applied and (ii) whether the money advanced by the husband's mother was a loan to him or a gift to him.
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> (d) since the husband had not persuaded the Court that he could not borrow $10,000 and had to face up to the fact that he would owe his wife at least that sum, the sooner he paid it the better and fairer would it be. Thus, he would be ordered to pay her, within four weeks of the date of judgment, $10,000 on account on pain of paying 15% interest thereon from the date of judgment until the date of ultimate payment. The husband was to pay such interest if he did not make prompt payment of the capital sum irrespective of whatever lump sum the rehearing Court might find him liable to pay – the interest, of course, being limited to interest on $10,000.

In addition Tipping J gave certain ancillary directions, chief of which were that as much priority as possible should be given to the scheduling of the rehearing; that the rehearing should be a de novo exercise; that the decision of Judge Aubin should be removed from the file (merely so as not to distract the rehearing Court); that the affidavit evidence should stand and that the rehearing should, in essence, be a rehearing of the cross-examination.

One can only say that this was an elegant extrication of all concerned on His Honour's part and that, just as we have been counselled by the Psalmist against putting our trust in chariots or in horses, so we have been apprised of the perils of placing absolutely blameless faith in tape recorders.

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Enforcing restraint of trade clauses — problems of form and substance

The case of *Landzeal Group Ltd v Kyne and Moynan* [1990] BCL 578 reveals some of the problems that may be encountered in trying to enforce contractual provisions in restraint of trade if the relative contractual positions of the parties are not clearly stipulated and monitored. The case concerned an attempt by Landzeal Group Ltd (trading as Stripes and Graphics Inc Specialists), a firm specialising in the provision of self-adhesive vinyl decorations and other fittings for automobiles, to enforce restraint of trade provisions against two individuals who had formerly done work on contract for the plaintiff but now were allegedly acting in competition with it. The plaintiff failed against one defendant but achieved a limited success against the other. The issues involved as against the two defendants were quite different. In relation to the first defendant the primary issue was whether the contractual document was binding on the defendant as a matter of substance – the defendant succeeded on a plea of *non est factum*. The case against the second defendant turned on the reasonableness of the restraint of trade clause, and here the plaintiff was granted an injunction to enforce a modified form of the restraint. Both aspects of the judgment are interesting and worthy of comment.

The first defendant — non est factum

Although the facts were disputed, Gallen J found that the first defendant, Kyne, had signed a contract embodying a restraint of trade clause but had signed the document unaware that it contained such a provision. On the facts as found by the Judge, Kyne had been given, and had perused, a form of contract prepared by the plaintiff. However, the document given to him was a collation of provisions from various drafts prepared by the plaintiff and its legal adviser, and contained various omissions from the version intended to be final. In particular, there was no restraint of trade provision included. Later, after discussions as to other matters, notably the rate of commission or remuneration under the contract, the defendant signed a contract which did

contain the restraint of trade provision relied on by the plaintiff. The contract signed differed in typeface from the one previously examined by the defendant, but was otherwise similar in length and the number of clauses. The defendant's evidence, which was accepted, was that he did not read over the contract before signing it and he had believed it to be substantially similar to the document he had already seen.

In these circumstances, the defendant had to establish two matters before a plea of *non est factum* could succeed – the first being that the document signed was sufficiently different from the one the defendant believed he was signing, and secondly that he was not "careless" or "negligent" in signing the document without being certain of its contents. (As to the probanda for *non est factum,* see *Saunders v Anglia Building Society* [1971] AC 1004.) Gallen J held that the first requirement was satisfied. He reasoned that since a restraint of trade clause was prima facie void, but could be justified on the grounds of reasonableness ". . . the nature of a restraint of trade clause and the attitude of the law to it, is such that a contract of employment which contains one may properly be said to be radically different from one which does not". No authority was cited for this proposition, and Gallen J did not consider any of the other cases in which the degree of difference in a document had been discussed.

The judgment on this point may be open to question. There is clearly a conceptual difference between a contract which limits the freedom of action of one party after the termination of the contract and a contract which does not do so. The real question is whether the two are sufficiently different for the plea to be available. The most cited formulation of the test in *Saunders v Anglia Building Society* is that of Lord Reid ([1971] AC 1004 at 1016), who stated that the documents must be "substantially" or "radically" or "fundamentally" different. He noted also that the plea cannot be available to a person whose mistake is really as to the legal effect of the document. Lord Wilberforce referred to the plea being available ". . . when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended" (see [1971] AC 1004 at 1026). Both passages were cited with approval by McMullin J, with whom Woodhouse P concurred on this point, in *Conlon v Ozolins* [1984] 1 NZLR 489 at 502.

There must be room for doubt as to whether the facts of the instant case satisfy the tests indicated in those cases. On the one hand, the mistake as to the existence or otherwise of the restraint of trade could be considered to be a mistake as to the legal effect of the document signed – the contract of employment. On the other, it might be thought that although there is some difference between a contract of employment which has a restraint of trade clause and one which does not, the two are still essentially the same – they are both contracts of employment. While the point taken by Gallen J that, prima facie restraint of trade clauses are void, provides a rationale for holding that there was in this case a sufficiently "substantial" difference, it must be observed that this was as to only one part of a comprehensive document setting out the respective positions of the parties. While the restraining clause was to assume importance, it may be doubted that it rendered the employment contracts essentially different. While the Judge's reasoning is attractive, and may well have led to an appropriate decision on the merits, it may be that it is open to challenge in some future case on a fuller consideration of the relevant authorities. For completeness, it must also be noted that in some cases, though not in the instant one, a sufficient difference might be found in the significant financial effects that a restraint clause may have (see *Z v Z,* CA 55/89, judgment 16th August 1989).

The second point, as to whether there had been carelessness by the defendant disentitling reliance on *non est factum* caused Gallen J more difficulty. It is clear that in *Saunders v Anglia Building Society,* the House of Lords was concerned to restrict the availability of the plea so as to avoid prejudice to third parties. Gallen J held, with some expressed hesitation, that in the circumstances the defendant had not been careless in signing the contract without reading it through to verify that it corresponded with the document he had seen earlier. As he observed, the requirement of a lack of negligence may be somewhat relaxed in cases where only the parties to the original contract are involved in the litigation and there is no third party who may be prejudiced (see *Petelin v Cullen* (1975) 132 CLR 355 and *Conlon v Ozolins* [1984] 1 NZLR 489). Gallen J however may have gone somewhat further than the earlier cases in the way he had regard to the plaintiff's conduct as a source of the defendant's mistaken belief as to the provisions of the contract. Although not relying on a formal estoppel arising from the plaintiff's conduct, Gallen J held that he should have regard to the fact that it was the plaintiff who produced two allegedly similar but in fact very different documents and that this contributed greatly to the defendant's mistaken belief. On that basis, *non est factum* was made out, and the plaintiff's action failed.

It is noteworthy that in *Petelin v Cullen* the High Court indicated that the lowered threshold of reasonable care should apply because the person seeking to enforce the document either knew or had cause to suspect that the document was signed under a misapprehension as to its effect (see (1975) 132 CLR 355 and 360). Here the plaintiff clearly had neither knowledge, nor cause to suspect, that the defendant was mistaken as to contents of the document signed. It may therefore be that Gallen J's reliance on behaviour which *unintentionally* leads to a mistake, while perhaps producing a fair result on the particular facts, goes further than the authorities warrant. In cases where one party accidentally leads the other into error as to the effect of a document produced for signature, it may be the safer course to formally plead and rely on an estoppel arising from the misleading conduct.

The second defendant — reasonableness of the restraint of trade provision

In relation to the second defendant, Moynan, there was no difficulty in establishing that there had been assent to the restraint of trade provision. The initial difficulty for the plaintiff was in establishing the time from which it ran. The only contract which could be proved in evidence had been signed in

December 1987, and was expressed to run for one year, when it could be reviewed "and may be terminated by either party at will or continued for a further period of one year or such other period as the parties may agree on in writing". The restraint of trade provision was to operate for 12 months from the termination of the contract. There had been no review of the contract after one year, and the parties continued in a contractual relationship until the defendant terminated the contract in October 1989. The defendant advanced the argument that the restraint only ran from the expiry of the 12 months provided for in the contract; the plaintiff argued for the restraint to operate from the date of actual termination. Gallen J, in dealing with what can only be described as a difficult provision, preferred to construe the provision as meaning that if there was no review, it would continue for 12 months or such other period as was agreed on by the parties. As there had been no alternative period agreed, there was no right of termination by the defendant before December 1989 and the restraint of trade provision ran from that time. Again, with respect, this appears to have been the only way of reconciling the clause as drafted with the actual behaviour of the parties. It is however illustrative of the difficulties that can arise if contractual provisions are not adequately monitored by the parties.

Having held that the restraint of trade provision extended to the time in which the conduct complained of had occurred, Gallen J had then to decide whether the restraint was itself proper. The defendant contended that there was no interest justifying a restraint, and that, if there was, the restraint was unreasonable in extent and duration. Gallen J held that there was a valid interest to be protected. He considered that there were some grounds for a restraint because some skill and learning was necessary for profitable operation of the trade but preferred to rely on the fact that a contractor in the defendant's position was working in a direct relationship with the plaintiff's customers "as a result of which detachment of the customer becomes simple and indeed almost likely".

With respect, it is suggested that the fact that the occupation required some acquisition of skill and learning is not a valid ground for upholding a restraint of trade provision. An individual is entitled to use the skills and experience gained while working for an employer in later life – even in competition with his or her former employer – *Stenhouse Australia Ltd v Phillips* [1971] AC 391, at 400.

Commonwealth Law Conference

The tapes of the sessions at the Commonwealth Law Conference have now come to hand and are being transcribed. It is hoped to publish extracts of the proceedings of some of the sessions in the *New Zealand Law Journal* over the next few months.

No such difficulties attach to justification of a restraint of trade on the basis of protection of a trade connection. Although no authority was cited by Gallen J, it is has been clear since *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 that protection of a trade connection – what is, in this context, really the continuing goodwill of existing customers – may be protected by an appropriate restraint on former employees or agents. However, such a restraint can only be justified if it is designed to prevent the former employee from using a position of influence over the customers, rather than his or her knowledge of who the customers are. It may be compared with the position in relation to restraints on vendors of businesses from competing with the business sold. In such cases the Courts have had reference to the concept of a derogation from the value of the goodwill sold (see *Trego v Hunt* [1896] AC 7). The vendor may not seek to attract his or her former customers to the new business, but is not obliged to turn away custom offered by a former customer (*Graphic Holdings Ltd v Dunne* (1988) 2 NZELC 95,721). In essence a restraint protecting a trade connection is to be considered valid where it restrains a person from abusing a position of advantage gained while in the employment of the person, or running the business, with whom that person has covenanted not to compete.

In all the circumstances, Gallen J held that the period and the nature of the restraint was too broad. He took the view that a contractor would take only two or three months to acquire the skills necessary for success in the trade, and then some time must be allowed for a contractor to build a relationship with the customer. In the circumstances a period of six months, rather than one year was appropriate. Gallen J went on to hold, however, that although the geographical limitation (the Wellington area) was not too wide, the restraint was too broad in that it prevented the defendant from doing any work which could be in competition with the plaintiff's business. He held that the restriction should be confined to work done for customers of the plaintiff. That a restraint which is only justifiable because it threatens the trade connection of the plaintiff should be so limited seems, as a matter of impression, a proper and sensible result. It is an innovative use of the powers of modification given to the Courts by the Illegal Contracts Act. As such, it contrasts notably with the admittedly different position indicated in relation to vendors of businesses. It will be interesting to see in future cases whether orders of this type are seen to be appropriate.

Jeremy Finn
University of Canterbury

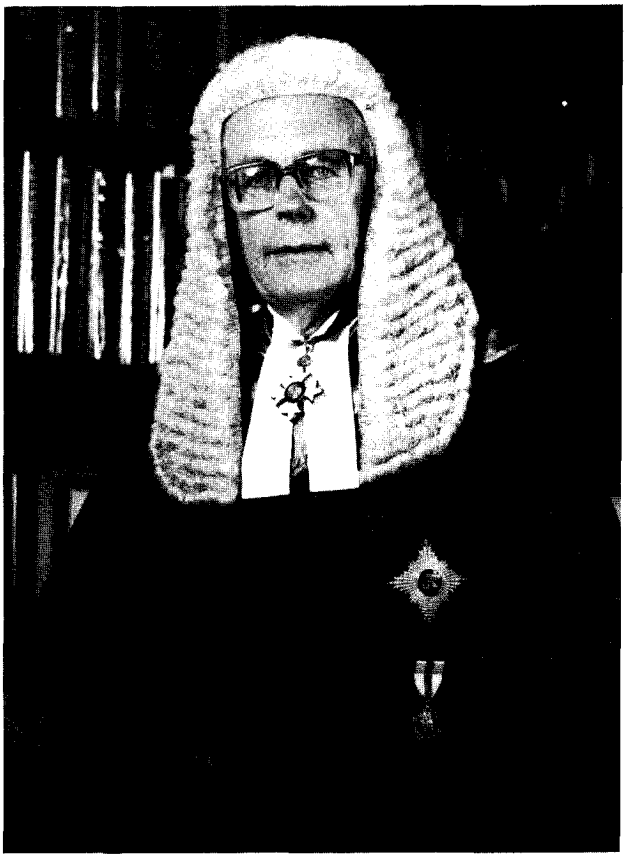
Sir Robin Cooke honoured in England

This brief article was supplied on request when it was learned indirectly of the honorary degree conferred on Sir Robin Cooke in June by the University of Cambridge.

New Zealand Court of Appeal President, Right Hon Sir Robin Cooke, who is spending his sabbatical leave in England as Visiting Fellow at All Souls College, Oxford, was honoured on two very special occasions recently.

The first involved a return to his alma mater, the University of Cambridge, where he graduated MA, PhD in 1954 and became an Honorary Fellow of Gonville and Caius College in 1982. At a special Congregation held in the Senate-House at Cambridge on Thursday 14 June, the degree of Doctor of Laws (honoris causa) was conferred upon Sir Robin by the Chancellor of the University of Cambridge, His Royal Highness the Duke of Edinburgh.

This ceremony is held annually, with honorary degrees being conferred upon a number of eminent persons. Among the seven recipients this year were the Bishop of Liverpool (and former England test cricketer) the Right Reverend David Sheppard; the Roman Catholic Archbishop of Liverpool, the Most Reverend Derek Worlock; former South African Parliamentarian and anti-apartheid campaigner, Mrs Helen Suzman, Hon DBE; and French historian M Georges Duby.



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The Congregation itself began with a procession around the Senate-House Yard of Honorary Graduands, attired in robes of scarlet, led by the Chancellor. Also taking part in the procession were the heads of colleges and professors. After entering the panelled Senate-House to the strains of Dukas' *Fanfare for Brass Quintet*, the ceremony, the pattern for which was established some 400 years ago, began with the thirteenth century Worcester Acclamations (in Latin) sung by the choirs of King's College and St John's College. Each graduand was then in turn led to a point just below the dais in front of the Chancellor, while the Orator made a speech of presentation about each in Latin. The audience, composed in the main of relatives and friends and which for this occasion included Lady Cooke and their son, Francis, had been provided previously with copies of this text both in Latin and English. Each presentation is of course personal to the recipient, with subtle touches of humour throughout. For the benefit of *Law Journal* readers whose Latin may be a touch rusty, Sir Robin's presentation is reproduced in English in the box on p 229.

With the words, "Praesento uobis uirum admodum honorabilem, Excellentissimi Ordinis Imperii Britannici Equitem Commendatorem, Magistrum in Artibus, Doctorem in Philosophia, Iudicii Appellationum in Noua Zelandia Praesidem, Collegii

Gonuillii et Caii honoris causa Socium, Robin Brunskill Cooke", the Orator then escorted Sir Robin to the Chancellor. His Royal Highness conferred the Degree using a short Latin text, after which Sir Robin took his place on the dais amid his fellow graduands and the heads of colleges.

The ceremony concluded with choral music by Bruckner and da Victoria, along with the singing of the National Anthem, before graduands joined the academical procession through the streets of Cambridge. Sir Robin and Lady Cooke then joined other honorary graduands and their spouses at a luncheon hosted by the University's Vice-Chancellor.

The week following, Sir Robin was guest of honour at a dinner held at the Inner Temple, London, where Sir Robin is an honorary Bencher. Billed as the 1990 UK–NZ Lawyers' Dinner, this was hosted jointly by the Lord Chancellor, Lord Mackay of Clashfern, and the Attorney-General, Right Hon Sir Patrick Mayhew, QC.

Replying to the speech given by the Attorney-General, Sir Robin said he regarded himself as cipher for New Zealand lawyers as a whole.

The dinner – in Sir Robin's words "a simply splendid occasion" – was attended by about 70 people. Guests were members of the House of Lords and of the Court of Appeal – including the Master of the Rolls – High Court Judges, and barristers and solicitors, with a good New Zealand representation amongst the latter.

Dale Densem
Associate to the President
of the Court of Appeal

ANCESTRAL *virtue blazes forth*
From noble sire to noble son.

We welcome a judge from the Antipodes, head of the highest court in his land, who has equalled and surpassed the judicial distinction of his father and his grandfather, and now transmits the virtues of his line to a son who is reading Law among us. On his first visit he won the Yorke Prize and a Research Fellowship at Caius. And if proof is needed that Cambridge is still his second home, does he not keep his personal pewter tankard hanging in the Eagle? His professional skill is administrative law; his hobby is solving the crossword in 'The Times'. *And so there is no one more fitted than he to resolve the complex puzzles of New Zealand society. A hundred and fifty years ago, by the Treaty of Waitangi, the Maori chieftains ceded sovereignty to the British Crown, in return for the protection of their 'lands and estates, forests, fisheries, and other treasures'. The ideals of the Treaty have been tarnished by time; and a culture and its traditions are in danger of extinction.The enlightened and liberal judgements which he has delivered, sometimes in the face of public and political opposition, like a modern Jupiter,*

Who holds aloft the finely balanced scales
And sets in either pan the rival claims,

have ensured him a place in the history of his country and have captured the attention and respect of the legal community worldwide.

There is a name which the Maoris gave to New Zealand. This name means 'Land of the long white cloud'; for that is how the land first appears when you have crossed a thousand miles of Pacific by canoe. Let us despatch him home with this blessing on his fellow New Zealanders, both civic and kiwic, ringing in his ears: 'Long Live Aotearoa'.

I present to you The Right Honourable

Sir ROBIN BRUNSKILL COOKE, KBE, MA, PHD,

President of the Court of Appeal of New Zealand, Honorary Fellow of Gonville and Caius College.

A vindication of Sir James Prendergast

By E J Haughey MA, LLM, a former Judge of the Maori Land Court

The continued importance of issues involving the Treaty of Waitangi emphasises the significance of past judicial decisions as well as present ones. In this article, Mr Haughey looks at the decision in 1877 of Mr Justice Prendergast in Wi Parata's *case. The question considered in that case was whether the Treaty was an instrument that purported to cede sovereignty and if so, to what extent was this valid. Mr Haughey draws attention to the legal distinction between "territorial" ownership which is an attribute of state sovereignty and ordinary "proprietary" ownership which relates to the general right of private property. It is the author's contention that the views of the Chief Justice in 1877 were correct and are still applicable.*

In recent times Sir James Prendergast, who was Chief Justice of New Zealand from 1875 to 1899, has been extensively criticised for his historic pronouncement in respect of the Treaty of Waitangi in *Wi Parata's* case in 1877.(1877) 3JR (NS) SC 72, 78. It is the purpose of this article to refute that criticism by showing that not only has the pronouncement in question been misunderstood but that it also represents the real truth about the essential nature of the Treaty.

It has been stated repeatedly that in this pronouncement Prendergast asserted that the Treaty (meaning the Treaty document as a whole) was "a nullity"; but what he did say was this:

> *So far as that instrument purported to cede the sovereignty* . . . it must be regarded as a simple nullity. No body public existed capable of making cession of sovereignty nor could the thing itself exist. (emphasis added)

In making this pronouncement (which was implicitly concurred in by his colleague, Mr Justice Richmond, who also heard the case) Prendergast appears to have had primarily in his mind Article 1 of the Treaty rather than the Treaty as a whole, for he immediately went on to say:

> So far as the proprietary rights of natives are concerned the so-called Treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown in the circumstances of the case.

It appears that in all the controversy about the true interpretation of the Treaty of Waitangi too little attention has been paid to the legal distinction between "territorial" ownership, which is an attribute of State-Sovereignty, and ordinary "proprietary" ownership, which relates to the general right of private property; and to the inherent nature of these two entirely separate and distinct concepts.

There has always been a great deal of controversy about the precise means by which sovereignty over New Zealand was acquired by the British Crown. In the first article of the Treaty of Waitangi the Maori signatories to it purported to "cede" to the Crown all "the rights and powers of sovereignty exercised or possessed by them" over their respective territories as the sole sovereigns thereof. It is reasonably clear, however, when the relevant authorities are examined, that the Maori chiefs in question were not juridically competent to do this as any such "cession" of sovereignty would have been in direct conflict with, and completely repugnant to, the well-established rule and doctrine of International Law that native tribes are incapable of exercising sovereignty. In these circumstances Prendergast was accordingly led to declare that in this respect Article I of the Treaty, if it was to be regarded as being technically a treaty within international law at all, was *pro tanto* "a simple nullity". It also follows that the title to British sovereignty over New Zealand rested on some basis other than the Treaty of Waitangi – a matter the discussion of which is, however, outside the scope of this article.

The remaining provisions of the Treaty (including in particular the crucial second article thereof) are however free from the taint of "nullity" which affects Article I; and should accordingly be treated as being "severable" from that article.

Article II was specifically designed to protect the *proprietary* interests of the Maoris in their lands and other natural resources as they stood in 1840. By this article the Crown confirmed and guaranteed to the Chiefs and Tribes of New Zealand, and to the Maori people generally, the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries and other properties which they might collectively or individually possess, so long as it was their wish and desire to retain the same in their possession.

This article, however, then went on to provide that the Chiefs yielded to the Crown the exclusive right of pre-emption over such lands as the proprietors thereof might be disposed to alienate at such prices as might be agreed upon between them and the persons appointed by the Crown to treat with them in that behalf.

Although the Treaty of Waitangi has itself never been incorporated in the ordinary law of New Zealand and is consequently not directly enforceable in the Courts, the provisions of this important second

continued on p 231

The law of children's surnames

By J L Caldwell, Senior Lecturer in Law, University of Canterbury

Two social changes are raising the question of the importance of the appropriate use of children's surnames. In the past this has been the patronymic. With the extent of marriage breakdowns with the mother usually having custody and sometimes reverting to her maiden name, there is an obvious difficulty. The second change is the feminist movement which sometimes leads to questioning of the use of the patronymic surname in any event. This article considers the present legal position and possible future developments.

Introduction

The issue of a child's surname is likely to arise for parents on two particular occasions. First, and inevitably, upon the child's birth and registration; second, and possibly, upon the breakdown of the parents' marriage or de facto relationship. Because a surname has psychological significance in providing a sense of self-identity and family belonging, the issue has the potential to become one of considerable difficulty and tension if the parents should be in disagreement.

At present, *registration* of a child's name upon birth is dealt with by the provisions of the Births and Deaths Registration Act 1951 (foreshadowed for repeal by the Births, Deaths, and Marriages Registration Bill 1989). A *change* of the child's surname (normally coming into question upon the breakdown of a marriage or parental relationship) can at present be formalised, if the guardians should agree, by way of deed poll (s 17A of the 1951 statute, as inserted by s 2 of the Births and Deaths Registration Amendment Act 1953); if the proposed provisions of the 1989 Bill are ultimately enacted in their present form, then a change of name will in the future be formalised by way of a statutory declaration (cl 22 of the 1989 Bill). When a guardian does not agree to the proposed formal change of name, then under both the present and proposed legislation the applicant guardian may apply alone, and the Family Court has the statutory discretion to grant consent to the change and subsequent registration.

The aforementioned statute and Bill deal with *formal* changes of name. However, upon the breakdown of marriage, a child's surname is sometimes changed *informally*, and unilaterally, by the custodial guardian. If the change should become known to the other guardian(s), and it should lead to dispute, a non-custodial guardian may then seek judicial directions from the Family Court under s 13 of the Guardianship Act 1968 (the question of surname being, without doubt, one of guardianship).

Whatever the context of the change-of-name dispute, and whether the issue concerns a proposed formal change or an

continued from p 230

article thereof have in particular been legally implemented by the great mass of legislation which has from time to time been enacted by Parliament in respect of Maori land and related subjects — a matter which has been adverted to by the Courts on a number of occasions.

In the Rotorua Lakes case in 1912, Mr Justice F R Chapman, pointed out:

> From the earliest period of our history the rights of the Natives have been conserved by numerous legislative enactments . . . . The various statutory recognitions of the Treaty of Waitangi mean no more, but they certainly mean no less, than these recognitions of native rights.
>
> The due recognition of this right or title by some means was imposed on the Colony as a *solemn duty* (emphasis added). That duty the legislature of New Zealand has endeavoured to perform by means of a long series of enactments culminating in the Native Land Act 1909. [later the Maori Affairs Act 1953]. (*Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321, 355)

It would appear that this judicial statement provides a most appropriate touchstone for determining the nature and extent of the obligations which the Government and people of New Zealand have towards the Maori section of the community.

Having regard to the considerations set out above it is reasonably clear that Prendergast's view of the Treaty of Waitangi was well-founded both in law and in fact. He was particularly well qualified to express an authoritative opinion on this important matter. For ten years prior to his appointment as Chief Justice he was the Government's Chief legal adviser, holding the Office of Attorney-General, not as a politician, but on a permanent professional basis. During this period he would have become widely acquainted with, and gained a deep insight into, the various legal and constitutional problems which faced the new colony in those difficult and troubled years in its early history.

The enduring validity of Prendergast's viewpoint on the Treaty has not become impaired with the passage of time. It remains a matter of major importance for the nation at large. It should be of special interest and concern to all New Zealanders at the present time when we are commemorating the sesqui-centenary of European government in our country. □

already adopted informal change of surname, the paramountcy of the child's welfare is undoubtedly the general controlling principle in the Court's determination. (See the discussion by the authors of the *Butterworths Family Law Service* 6551-6557.) The purpose of this discussion is therefore to consider the present legal context in which judicial determination on children's surnames is made, and to consider how the paramountcy principle is actually applied by the Courts.

History of surnames

It would seem that the adoption of surnames in England can be dated from the time of the Norman conquest. Certainly by the time of the 13th and 14th centuries, with society becoming increasingly complex and commercial, Christian names no longer provided satisfactory individualisation. The practice of identifying surnames (perhaps of occupation or residence or personal characteristic) thus became fairly common!

The trend towards the usage of the patronymic as a surname received judicial explanation from Justice Newman in the Supreme Court of California in *Re Marriage of Schiffman* 620P 2d 579 (1980) at 581. The learned Judge there suggested that the usage was a response to the medieval legal system that vested rights of ownership of marital property in the husband, and which allowed bequests of property to be contingent upon an heir retaining the surname associated with the property. The Judge also observed that Henry VIII had required parish recordation of the births of children, and he suggested that this had provided a further impetus to the custom of naming children after their fathers.

In New Zealand, there was an observation by Vautier J in *H v J* [1978] 2 NZLR 623 to the effect that the registration of the paternal surname of a child following birth had become something more than custom. His Honour argued that the matter was ". . . governed by the common law of England, wherein the surname of the child has, for centuries past, been recognised as being that of the father" (at 630). This, however, was according too much weight to an admittedly widespread practice. thus in *S v C* (1981) NZFLR 13, 19-21 Thorp J observed that the use of the patronymic upon registration was within the control of the guardians, and that the practice of registering patronymics, where the parents were married, was simply one of convention. It was not, he said, derived from a rule of law prescribed by the common law.

This latter approach of Thorp J was confirmed as correct by Somers J in the interesting decision of the Court of Appeal in *J v Registrar-General of Births and Deaths* (1989) 5 NZFLR 483. Somers J declared that the recording of a paternal surname upon birth was ". . . not a matter of law but rather one of convention". It was, he said, ". . . essentially a concomitant of guardianship" (at 489). Similarly, Cooke P, citing a dictum of Buckley J in *Re T* [1963] Ch 238, 240, indicated that a person's surname might be said to be a conventional, assumed name, which formed no part of that person's true legal identity (at 488).

Moreover, in *J v Registrar-General of Births and Deaths* both Somers and Gallen JJ were of the clear, if unanticipated, view that the provision in the registration-of-birth form for the registration of the child's surname was not in fact authorised by the Births and Deaths Registration Act 1951 or relevant regulations. Cooke P inclined to the opinion that inclusion of the child's surname was a permissible addition. Happily, though, all Judges reached the unanimous conclusion that the registration of a surname did not render the registration, or subsequently issued birth certificates, invalid.

The 1989 Bill, introduced some 10 months after the Court of Appeal decision, now expressly requires the registration of a child's surname upon birth (cl 18). But, in the opinion of both Gallen J and Somers J in *J v Registrar-General of Births and Deaths*, when Parliament enacted the 1951 legislation it had deliberately omitted provision for the registration of surnames (and for statements of surnames in birth certificates). Examining the history of both the 1951 legislation in New Zealand and the common law, Gallen J stated:

> [a] possession of or entitlement to a surname, was a matter of use and evidence rather than law . . . there is nothing to suggest that the Acts contemplated the registration of a surname and the fixation of a name which would have resulted from such a step, would have been directly contrary to established practice (at 496).

Similarly, Somers J noted the past conventions whereby a child of married parents would, upon birth, assume the paternal surname, and whereby an ex-nuptial child would acquire a name dependent ". . . upon the usage of those who had care of the child" (at 489). (This usually meant, of course, that an ex-nuptial child would take the maternal surname.) Somers J argued, and here Cooke P was in essential agreement, that these existing conventions and assumptions explained the failure of Parliament in 1951 to include any specific provision for registration of surnames.

Clearly, though, society had undergone fundamental changes since 1951. Whilst the need for accuracy in identification in such matters as taxation remained, society had become more computerised, people were more mobile, Government and corporate life was more complex, and personal and family relationships were subject to more overt change.

If a graphic example of the phenomenon of changing personal relationships was needed, it could be found in the narrative of facts delivered by Cooke P in *J v Registrar-General of Births and Deaths*. Here, the respondent, 40 years old, had children by four different men; the appellant, 38 years old, had children by three different women; (and, strikingly, the 29-year-old mother of the appellant's third child had herself four other children of different fathers). The problems of identity for children in situation such as these needed no stating.

Thus the historic indifference of both the common law and Parliament to the adoption of surnames on birth had become patently inappropriate for today's society; and this was judicially recognised both in *J v Registrar-General of Births and Deaths* (supra, per Cooke P at 484, and Somers J at 489) and *S v C* (supra,

at 19 per Thorp J). The current legislative proposal to require the stipulation of a surname upon registration could not be termed surprising.

Change of the child's surname

Whilst the Births, Deaths, and Marriages Registration Bill 1989 proposes to formalise the initial registration of surnames, it does not attempt to commit the guardians (or child) to retention of that name. Formal notification of any abandonment of the name will not be required. On the contrary, cl 22(1)(f) of the Bill presently contemplates that a statutory declaration of a change of name may be made where the ". . . names most recently included in the registration of the person's birth have been previously abandoned and . . . some other names have been adopted for the person".

In other words, a statutory declaration of change (as with the present system of change by deed poll under s 17A of the 1951 statute) will essentially provide public evidence of the renunciation of an old name and assumption of a new one. A surname may already have been informally changed by usage; if so, a statutory declaration (or deed poll), will then authenticate, reinforce and ". . . perpetuate the evidence of . . ."[2] that change.

Under the present legislation, a person aged under 20, who has not been earlier married, is not able to formally change his or her name by deed poll; under the proposed legislation that age limit will drop to 18. Until the requisite age is attained, the child's parents and guardians, if in agreement, have the power under both present and proposed law to change the child's name formally — though cl 22(4) of the Bill will require the written consent of a child over the age of 16. If one guardian does seek to change the name formally, and the other (or others) disagree, the Family Court does, as earlier mentioned, have the power to grant consent (see the proviso to s 17A(2)(f) of the statute, and also cl 22(2)(c) of the Bill).

However, because these statutory mechanisms are essentially facilitative, and supplement rather than exclude the common law, it is possible for the custodial parent or guardian (normally the mother)[3] to change the name of the child unilaterally, and often effectively, on an informal basis. For just as an adult may assume and use any surname at common law ". . . as long as its use is not calculated to deceive and cause pecuniary loss . . ." (per Somers J in *J v Registrar-General of Births and Deaths* supra, at 489), so too a custodial parent can change a child's name at common law, in the absence of fraudulent intent, by simply ensuring that the new name is used for a reasonable length of time. In such a situation, the authors of *Butterworths Family Law Service* point out:

> . . . the onus is effectively put on the father to discover what the mother is doing and to take legal action, because otherwise the mother will achieve her objective informally and the children will become known by her name. (at 6553. This assumes, of course, that the mother is the custodial parent.)

To some extent, then, the law's flexibility with respect to informal changes of name (based now on the paramountcy of the child's welfare) is to arm the custodial guardian with "the laws of inertia". (Bisset-Johnson "Children in Subsequent Marriages" (1980) 11 RFL (2d) 289, 301). Certainly there are a number of dicta in New Zealand cases stating that the custodial parent has "no right" to permit a child to be called by a name different from that registered at birth, unless he or she has obtained the other guardian's consent or the approval of the Court (*H v J*, supra at 627; *S v C*, supra, at 19, 22; *L v C*, supra at 197 cf, though, the dictum of Gallen J in *J v Registrar-General of Births and Deaths*, supra, at 496). But if the child's informally changed name has been used for any length of time, albeit improperly, the non-custodial guardian could be faced with a difficult task if he or she seeks a direction from the Court under s 13 of the Guardianship Act ordering the abandonment of the changed name. For, as the authors of *Butterworths Family Law Service* again point out, in such circumstances another change of name (back to the original) could well be perceived harmful, confusing and contrary to the child's interests. (*Butterworths Family Law Service* at 6533. And see also *Y v Y* [1973] 2 All ER 574 where the name had been used for four years.)

Moreover, where, as is normal, it is the father who is the non-custodial guardian, then a countervailing principle has also often come in to play. This is the principle, supported for example by Thorp J as recently as 1981, to the effect that ". . . where the father has a meaningful relationship with his child that child should in the normal case, bear his name" (*S v C* at 21).

Such a principle, when adopted, poses obvious problems for the custodial mother if she should seek the Court's consent to a formal change of name under the statute; it is also likely to tip the scales in the father's favour if he seeks to challenge, under s 13 of the Guardianship Act, a child's informally, newly-adopted name.

Presumption of the patronymic?

The historical explanation for the presumption of a paternal surname is probably that proffered by Thorp J in *S v C* (supra, at 19-20): until late in the 19th century the father was effectively the sole guardian of his children in marriage; nomenclature was a matter of guardianship; the father's choice of name was therefore, in practice, paramount.

Such an explanation is obviously far from satisfying today, with joint guardianship being a fundamental aspect of our Family Law. And, not unexpectedly, in 1988 the strong presumption in favour of the paternal surname (where the father had a good relationship with his children) was described by Judge Kendall in *L v C* (1988) 5 NZFLR 193, 195 as "no longer good". Yet the judgment of Judge Kendall reveals that when the Court's consideration of the child's welfare is focused on the protection of the father-child relationship, then this focus may also lead, almost ineluctably, to a judicial direction in favour of the paternal surname.

Essentially two reasons emerged from the judgment of Judge Kendall as to why in the case before him, concerning a four-year-old girl, the child's interest were best served by the use of the patronymic, rather than by the use of the stepfather's name (which had allegedly been used informally by the child and others for some time).

First, His Honour indicated, the Courts are anxious to preserve the relationship of non-custodial father and child, and are anxious not to misrepresent, by way of an awarded surname, the true position concerning parentage. Obviously enough, a good relationship with the non-custodial parent is normally very important for a child's healthy emotional, psychological development, and one English Judge expressed his concern that "[i]f the name is lost, in a sense, the child is lost. That strong patrilineal feeling we all to some extent share": *D v B (otherwise D)* [1979] 1 All ER 92 at 99 per Ormrod LJ. Similarly, some overseas Courts have been concerned that if a paternal name is lost, a father may lose interest in visiting his child and paying maintenance. (See, for example, the discussion of BSS "Like Father, Like Child: The Rights of Parents in their Children's Surnames" (1984) 70 *Va LR* 1303, 1330-1334.)

Secondly, His Honour indicated, any embarrassment faced by a child in bearing a name different from that of the custodial mother and stepfather would not be as acute in today's society when reconstituted families are so common; besides, the Judge argued, a child might also be embarrassed at bearing a surname which does not reflect his or her true paternity.

Reasoning similar to that advanced by Judge Kendall in *L v C* can be found in cases from overseas jurisdictions, and the judicial leaning in favour of the father's name is probably even stronger if the issue involves the issue of racial or cultural identity. For example, in *Douglas v Wharepapa* (1986) 2 FRNZ 644 there was a consent order that the mother, a pakeha, should have custody of her five-year-old son and that the father, who was Maori, should have liberal access. By consent, there was also a direction under s 13 of the Guardianship Act that the boy should bear his father's surname – with the mother's surname being included as a forename. Judge Inglis QC dismissed the possiblity that the boy would feel embarrassed at school in bearing a different surname from his custodial parent, and asserted that his Maori patronymic was ". . . an important part of his identity" (at 646).

The cases of *S v C*, *L v C*, and *Douglas v Wharepapa* all concerned very young children, aged five to six years old. Where the child is older, say eleven or twelve years old, more weight is likely to be paid to the child's wishes – for at such an age the child might be expected to have a greater understanding of the significance of the alternative names. This greater deference to the older child's wishes is consistent with s 23(2) of the Guardianship Act 1968, and is consistent with the thrust of the important decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. Inded, if the Court directs the adoption of the paternal surname against the wishes of an older child (who may, for example, wish to identify fully with the stepfather), the judicial direction could in fact damage rather than preserve the father-child relationship (see, for example, *Neil v Ottosen* (1988) 4 NZFLR 701 at 704 per Judge Robinson, concerning an eleven-year-old boy; *B v B* (unreported, High Court, Christchurch Registry, D 756/75, 5 November 1982 per Cook J concerning 17-and 13-year-old brothers; also *R v R* [1982] 3 FLR 345 at 349 per Dunn LJ, concerning a young 7-year-old girl). By way of contrast, it can be noted that in *W v A* [1981] 1 All ER 100, 106 Dunn LJ though it "entirely right" not to attach decisive importance to the views of 12-and 10-year-old children who, emigrating to Australia their stepfather and family, wished to hold their stepfather's name.

Finally, two further reasons occasionally advanced by the Courts in favour of the patronymic should be noted. First, it has been said that if a child changes his or her name to the name adopted by the custodial mother on remarriage, then this may lead to future uncertainty and confusion of identity if the new marriage should fail and the mother changes her name yet again (see dicta in *H v J*, supra, at 636; *Putrino and Jackson* (1978) FLC 90-441; *In the Marriage of Chapman and Palmer* (1978) FLC 90-510; and *In the Marriage of Skrable and Leach* (1989) FLC 92-016). Such an argument cannot apply, of course, if the mother consistently retains her birth name.

Secondly, reliance is sometimes placed on the general custom of patronymics. In 1978, Vautier J suggested "[t]he convention and right of a child to use his or her father's name is firmly established in our law": *H v J*, supra, at 630. His Honour did concede that ideas on the subject may be changing, but he concluded ". . . why should this little girl, without any proper understanding of the subject be put among the avant garde when she may well, when more mature, prefer to be among the conformists" (at 637). In the Supreme Court of California, Justice Clark, dissenting, even suggested it might be elitist to reject longstanding custom on paternal surnames: *Re Shiffman*, supra, at 587. And, according to Vautier J, this longstanding custom applicable to children born in wedlock now applied, by virtue of s 3 of the Status of Children Act 1969, to ex-nuptial children as well (*H v J* at 630).

Perhaps the traditional judicial thinking on patronymics is best expressed by McClelland J in *C v S* (1980) FLC 90-846 (a decision of the Supreme Court of New South Wales, with which Somers J expressed his agreement in *J v Registrar-General of Births and Deaths*). McClelland J, stating his disagreement with the degree of legal weight accorded by Vautier J to the paternal surname declared:

> The better view in my opinion is that . . . there is a rebuttable presumption (whether of law or fact . . .) that a child is known by the surname of his father, at least where his father and mother are married and the mother has herself taken the name of the father (at 75, 343).

It might also be noted that the cases favouring use of the patronymic have been cases where the father has been of apparent good character, and has maintained an interest in his child.

Criticism of the presumption

Judge Bisphan trenchantly attacked many of the assumptions underlying the presumption of patronymics in *M v M* FLN - 10(2d). His Honour, noting the advent of working couples, house-husbands, and the large numbers of solo mothers, suggested that the presumption reflected patriarchal

values of the past. The Judge felt that the view expressed in cases such as *S v C* had been made ". . . without the backing of research or study". His Honour did accept that a father might be disaffected by his child's use of a different name, but said that if the father-child relationship was to subsist, it would have to rest on stronger foundations than the use of the same surname.

Such sentiments contain some telling truths. There also appears to be considerable force in Justice Newman's observation in *Re Shiffman* that:

> [i]n recognising a father's right to have his child bear his surname, Courts largely have ignored the impact a child may have on the mother-child relationship (at 584).

But while it is tempting to explain the presumption in favour of patronymics as being no more than a reflection of male thinking, emanating from an almost exclusively male judiciary, this may be just a little too simplistic an explanation. Justice Newman himself noted that the emphasis on the father-child relationship could be justified more objectively; for the mother of a child is normally awarded custody, and so can maintain a psychological relationship with the child, without the need of a bond that a common surname provides.

Judge Newman himself, though, noted that this reasoning obviously cannot apply where the father is the custodial parent. Furthermore, the issue does become more complex where the custodial mother continues to carry her birth name into a new relationship — for then the choice of surname is not simply between the names of two men (the stepfather and father).

Additionally, it must always be remembered that the maternal surname can be readily registered at birth, assuming, of course, that the guardian or guardians of the child agree (*M v M*, supra). It has not been seriously suggested that adoption of the maternal surname at birth would hinder the establishment and development of a good father-child relationship during the child's life. Should, then, the patronymic be so crucial upon the breakdown of marriage?[4]

Alternative solutions for changes of name

Judge Robinson, apparently adopting dicta in *Chapman and Palmer's* case, has suggested that some parents place far too much importance on the issue of their children's surname, which they sometimes regard as almost a "proprietary" matter. His Honour expressed concern that "[t]he fact that the parents are haggling over the surname can of itself engender insecurity and confusion in the child's mind" (*L v C*, supra at 195).

The absence of specific legal guidelines relating to the issue may be seen as causative of uncertainty, and of consequent intensification and prolongation of the parental argument.[5] Given that the welfare of the child is the sole consideration of the Court, it might then be argued that a judicial presumption in favour of the paternal surname is desirable, for such a presumption would at least provide a solid starting point for the disputing parents. However, in today's social climate a gender-based presumption is clearly unacceptable, and it would surely be more sensible for the Courts to propound a gender-neutral guideline to the effect that where there is a good relationship with the non-custodial parent, then a child should normally bear his or her name.

The solution of duality of surnames is also worthy of serious consideration. In *Neil v Ottosen* (1988) 4 NZFLR 701, for instance, Judge Robinson approved of the practice whereby the child was known by his stepfather's name when he was with his mother or at school, and was known by his father's surname when with his father. Although the duality of surnames compromise (legal and informal) was rejected by Thorp J in *S v C* (supra, at 22) as being "unnatural" and likely to cause an unnecessary confusion of identity, it has been evident in overseas cases such as *Crick v Crick* (1977) 7 Fam Law 239 and *Wintermate v O'Sullivan* (1985) 48 RFL 276. There is also a strong common law basis for allowing more than one surname,[6] and it is, in any event, virtually impossible to prevent the adoption of a second, informal surname in the private, family context.

Another possibility to be considered is the use of a hyphenated or compound surname. This is an option which Vautier J considered as creating "considerable awkwardness" (*H v J*, supra, at 637); but it has been favoured by at least one American commentator on the subject. (See BSS (1984), supra.) Similarly, the surname of one of the parent's surname could be included as a forename, as occurred in *Douglas v Wharepapa*, supra.

Overall, it must be said that any statements about the psychological effects of names on children are essentially conjecture, and that an individual child's future needs and feelings simply cannot be predicted with any degree of confidence. It is now judicially recognised that the issue of a child's surname is one of some importance,[7] and it is thus not surprising that the Courts have in the past tended to lean towards adoption of the paternal surname where there is dispute. In the past, use of the patronymic has been the norm at registration of birth and later life, and promotion of the norm could be seen as the option most likely to promote the child's welfare. But as family relationships become more heterogeneous, and as feminist thinking becomes more pervasive, it is difficult to imagine the presumption continuing to carry such weight. The statutory recognition of surnames at the time of registration of birth is welcome and long overdue; now a little legislative guidance on changes of surnames might also be desirable. □

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1 See generally the Introductions to the *Penguin Dictionary of Surnames* (1967) and Reaney *A Dictionary of British Surnames* (1958); also see Thornton "The Controversy over children's surnames" (1979) *Utah LR* 303 at 305-306, and the discussion by Justice Newman in *Re Schiffman* 620 P 2d 579 (1980) at 581.

2 See the dictum of Buckley J in *Re T (otherwise H) (An Infant)* [1963] Ch 238 at 240.

3 Maxwell "Paternal Custody" (1989) 2 *Butterworths Family Law Bulletin* 35.

4 The point made by JMT "Change of Child's Name" (1981) 97 *LQR* 197, 200.

5 The need for certainty was expressed by Bradbrook "The Right of a Mother to Change her Child's Name Unilaterally" (1977) *ACLD* 111, 115; and Vautier J expressed his agreement with this view in *H v J* [1978] 2 NZLR 623 at 637.

6 *Coke on Littleton* 3(a); but cf Blackstone *Commentaries* Vol 1 p 447.

7 See *W v A* [1981] 1 All ER 100, adopted by Thorp J in *S v C* (1981) 1 NZFLR 13 at 22.

Public welfare/Regulatory offences:

Judicial criteria for definition and classification (I)

By Janet November, Judges' Clerk, District Court, Wellington

Strict liability is of considerable interest and concern. The distinction between "truly criminal" and "public welfare" offences is now of significance. This article seeks to analyse the meaning of public welfare offences, and the consequences of this categorisation.

Introduction

In "Unreasonable mistakes and mens rea" published at [1990] NZLJ 130 which is a reply to Elisabeth Garrett's "Mistaken mistakes" [1989] NZLJ 355, I discussed the three-fold classification of offences by the Court of Appeal in *Millar v Ministry of Transport* [1986] 1 NZLR 660, in relation to class 1 (mens rea) offences. This and the following article will cover classes 2 and 3, the public welfare/regulatory classes of offences, and will show, I think, that the "regulatory offence" category is in no danger of obliteration as Ms Garrett suggested might be the case since *Millar*, [1989] NZLJ at 357.

But the judgments also demonstrate that the boundaries between classes of offence are somewhat nebulous and further clarification of the conceptual basis of categorisation is required.

Public welfare/Regulatory offences

As discussed in my earlier article at [1990] NZLJ 130 the Court of Appeal in *Millar* (supra) emphasised the overriding principle that mens rea is an ingredient of every offence. So the majority of offences should be in class 1.

However, the presumption of mens rea may be rebutted, particularly when an offence is of the public welfare/regulatory type.

What then is a public welfare offence? Is it possible to clearly distinguish it from a "truly criminal" offence where the presumption of mens rea is the general rule?

In *Sherras v de Rutzen* [1985] 1 QB 918 Wright J had listed examples of acts which are "not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty" – possession of adulterated tobacco, the sale of adulterated food, unknowingly receiving lunatics in an unlicensed house, innocent possession of game by a carrier and public nuisances, inter alia.

Richardson J in *CAD v MacKenzie* [1983] NZLR 78, following the Canadian Supreme Court in *R v City of Sault Ste Marie* [1978] 85 DLR (3d) 161, noted that Dickson J had endorsed this distinction between "truly criminal" and "public welfare" offences. The latter, said Richardson J:

> . . . reflect the need in the complexities of a modern society to maintain high standards of public health and safety. Such offences are not criminal in any real sense and might well be regarded as a branch of administrative law to which principles of criminal law have but limited application . . .

In *Sault Ste Marie* Dickson J said:

> Public welfare offences relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws and the like. (at 165)

Sault Ste Marie was concerned with pollution, which was found to be a public welfare offence in the strict liability class.

This seems clear enough. Public welfare offences are thus:

> . . . typically offences of negligence created to promote higher standards of care in business, trade and industry and higher standards of respect for the environment . . . (Law Reform Commission, Canada, Working Paper 1974, cited by Dickson J in *Sault Ste Marie* at 178)

Such offences involve "a shift of emphasis from the protection of individual interests to the protection of public and social interests" (per Dickson J at 172).

So obviously offences like murder, theft and assault (quaere an offence like dangerous driving causing death, see *R v Jones*, [1986] 1 NZLR 1) and other Crimes Act offences are "true crimes", and offences like polluting the environment and selling impure food are "public welfare offences". But not all offences are so easy to classify. Transport Act offences for example may be on the mens rea/strict liability border.

Class 2: Strict liability

In *Millar* (supra) the Court described the strict liability class as follows:

> There are a significant group of statutory provisions aimed at

regulating the carrying on of various trades and activities where in defining offences Parliament or the regulation maker has not gone so far as to impose absolute liability in clear terms or by necessary implication, yet it may be unreasonable to read in the ordinary implication of mens rea. Or it may be unreasonable to suppose that the prosecutor will be able to acquire any accurate knowledge of the workings of the defendant's business or organisation. The object of this type of provision is best served by imposing liability prima facie if the defendant or its servants or agents are shown to have committed the unlawful act, while allowing exculpation if the defence can prove total absence of fault. Typical instances of this *MacKenzie* class of case arise when the provision creating the offence is directed at conduct having a tendency to endanger the public. Examples are the offence of operating an aircraft in such a manner as to be a cause of unnecessary danger to any person or property (*MacKenzie* itself), or of discharging waste into natural water (*Hastings City Council v Simons* [1984] 2 NZLR 502), or of operating a motor vehicle in such a condition, as to be liable to cause annoyance to any person (*Ministry of Transport v Burnetts Motors Ltd* [1980] 1 NZLR 51). Unreported High Court decisions were drawn to our attention in argument in which the principle has been applied to driving with excess breath or blood alcohol and to operating a vehicle overweight or without a warrant of fitness.

While this extract is of assistance in clarifying the strict liability category of offence and giving examples, the problems of classification and of the boundaries between the categories remain.

Borderline mens rea (Class 1) Strict liability (Class 2)

Transport Act (and Regulations) offences, though regulatory by nature and designed to promote public safety have often been held to require an element of mens rea! As already noted they are illustrative of the border between class 1 and class 2 offences and unfortunately show that categorisation is difficult where an act is not obviously a true crime (like an assault) or a traditional public welfare offence (such as pollution).

An early decision following *MacKenzie* was *Browne v Auckland City Council*, [1985] BCL 1453, in which Chilwell J found that the offence of operating a vehicle without a warrant of fitness under reg 85(1) Traffic Regulations 1976 was a public welfare rather than a mens rea offence and was of strict liability. He gave his reasons for choosing the *MacKenzie* category as follows:

(1) The gist of the offence is the safe condition of motor vehicles on roads.
(2) The penalty provided for breach is relatively light (a fine not exceeding $200 and optional disqualification).
(3) The policy behind the enactment would appear to be to ensure that there is widespread compliance with an objective standard of conduct.
(4) Most defendants are likely to be in a far better position than the prosecution to know how the breach occurred and what steps had been taken to avoid it.

Having held this to be in the public welfare category Chilwell J said it was prima facie of strict liability and the mere fact that the meaning of "operating" in the regulation included "causing" or "permitting" did not overturn the presumption. Since the Court of Appeal's decision in *Millar* the overriding presumption would be that mens rea was an ingredient of the offence and the fact that "operating" included "causing" or "permitting" could add weight to this presumption, especially as Chilwell J said both words have been generally held to import mens rea; (but, see Dickson J in *Sault Ste Marie* who would disagree with this statement, at 183). However, for the reasons Chilwell J gave it seems the presumption of mens rea has been rebutted and that operating a vehicle without a warrant of fitness is a public welfare/regulatory offence in the *MacKenzie* category.

In more recent cases since *Millar* Judges should always approach the task of classification by looking first at the question of whether the presumption of mens rea has been rebutted but not all have done so. Partly as a result of this and partly because of the availability of the *MacKenzie* defence some offences which previously required mens rea are now in the strict liability category.

In *Ministry of Transport v Strong* [1987] 2 NZLR 295, Sinclair J held that driving under the influence of alcohol contrary to s 58(1)(c) of the Transport Act was an offence of strict liability and the prosecution had only to prove the defendant was driving on a road to the extent that he was incapable of control, but the defendant was able to avail himself of the defence of total absence of fault. In concluding that the offence was one of strict liability Sinclair J followed judicial precedents, notably Gallen J in *O'Neill v Ministry of Transport* [1985] 2 NZLR 513, who found s 58(1)(b) created an offence against public welfare for which absence of fault (in the case proof of an element of involuntariness in consuming alcohol) was a defence. Gallen J so held "with some reservation and hesitation", noting the penalty seemed to suggest the normal criminal category. The District Court Judge had followed *Flyger v Auckland City Council* [1979] 1 NZLR 161 when McMullin J had decided the offence required mens rea. The hesitation of Gallen J is understandable when it is remembered that the only offences which can fall into the *MacKenzie* category are those which would otherwise be absolute.

However, *O'Neill* was one of the High Court decisions tacitly approved in *Millar* and in following *O'Neill* in *Strong*, Sinclair J was also influenced by McGregor J in *Pearson v Police* [1966] NZLR 1095, who had said that the section is intended to protect the safety of the public and "undoubtedly driving under the influence is a potentially unsafe activity", and by Holland J who in *Rooke v Auckland City Council* [1980] 1 NZLR 680 had noted the public welfare basis of the legislation (although he followed *Flyger*, as did Quilliam J in *Barrett v Ministry of Transport*, 17 December 1984, High Court, Wellington, M 478/84).

Sinclair J's approach was taken by Tipping J in *Ministry of*

Transport v Crawford [1988] 1 NZLR 762. Driving with excess blood alcohol was held to be an offence of strict liability, following *O'Neill* as approved in *Millar* and the defendant's only "quite narrow escape route" was to prove total absence of fault, ie involuntary consumption of alcohol (for example, laced soft drink or ingestion through paint fumes).

So it seems that driving under the influence of alcohol is now a class 2 offence on the authorities of *O'Neill, Strong* and *Crawford*. The Judges appear to have been most influenced by the purpose of the legislation which is undoubtedly to protect the safety of the public. No doubt that purpose could be sufficiently weighty to displace the presumption of mens rea. But it is a bit disturbing that an offence which three previous High Court judgments had in effect decided was a category 1B (*"Strawbridge* without reasonable grounds") offence should have been allowed to be "downgraded" to class 2 when class 2 was specifically created for offences which would otherwise be absolute.

Of other transport offences a failure to stop under reg 22(1) of Traffic Regulations 1976 was held to be a class 2 offence and the *MacKenzie* defence available, by Hardie Boys J in *Parsons v Ministry of Transport*, 13 April 1989, High Court, Christchurch, A 16/89.

Likewise in *Delamere v Napier City Council* [1989] BCL 1902, a failure to give way at an intersection contrary to Regulation 9(4) of the Traffic Regulations 1976 was thought by McGechan J to be a strict liability offence, although he did not finally decide the issue. This would modify the approach in *Police v Creedon* [1976] 1 NZLR 571 where the burden of proving negligence remained on the prosecution. McGechan J suggested:

> Perhaps on the revised *MacKenzie* approach the regulation should now be approached on the basis there is a burden on the defence to establish on the balance of probabilities, the existence of total absence of fault.

Whilst the strict liability category may be appropriate for a prima facie regulatory offence such as a failure to give way, such classification would now involve a "downgrading" from class 1 to class 2. And is a failure to give way any more of a "regulatory" offence designed to promote public safety than a failure to stop at the request of a traffic officer, presently an offence in class 1B of the *"Strawbridge* without reasonable grounds" type? (*Tibble* [1985] BCL 1934.)

More difficult to categorise is an offence like the one at issue in *Bevin v Police* [1987] BCL 838, 855, *AP 18/87*, where the defendant was convicted of hunting a wild animal without the authority of the owner contrary to s 8(2) of the Wild Animal Control Act 1977. This is not obviously a public welfare type of offence. However, Doogue J decided it fell into that class, without unfortunately giving his reasons for so concluding.

The above cases show that since its inception in 1983 the *MacKenzie* category has certainly been utilised by the Courts for regulatory offences. There appears to be no reason why the Court of Appeal's decision in *Millar* should reverse this, except in so far as Judges should ensure, when classifying an offence, that the presumption of mens rea is the overriding principle and must be rebutted before there is any question of strict or (in the final resort) absolute liability.

If the Court decides that the presumption of mens rea has been rebutted in a particular case, probably because of the regulatory or public welfare nature of the legislation the next question is whether the offence is of strict or absolute liability.

As the Court of Appeal put it:

> The next inquiry is whether the statutory purpose and the interests of justice are on balance best served by allowing a defence of total absence of fault with the onus on the defendant. *(Millar* at 668)

This is a question of legislative intention, so involves an exercise in statutory interpretation.

In *MacKenzie*, Richardson J adopted the Canadian "no fault" defence as applying to public welfare offences in general, "except where the legislation has made it clear that guilt follows proof of the prescribed act . . ."

One purpose of adopting the strict liability class of offences was to allow Courts to "accord sufficient weight to the promotion of public health and safety without at the same time snaring the diligent and socially responsible."

Thus where an offence is in the public welfare category and would otherwise be absolute the *MacKenzie* defence should be available generally, to allow a defendant to show that he exercised all possible care or due diligence, unless the legislature has clearly indicated that the offence is to be of absolute liability. In other words public welfare offences are prima facie of strict liability.

Borderline Strict Liability (Class 2) Absolute Liability (Class 3)

Blair v Department of Labour [1988] BCL 1310, is a recent Court of Appeal decision in which the Court followed *MacKenzie* and found that being a prohibited immigrant who unlawfully landed in New Zealand contrary to s 5(1)(a) of the 1964 Immigration Act, now superseded, was an offence of strict liability. After referring to the general approach outlined in *Millar*, that the first inquiry is whether there is anything weighty enough to displace the presumption of mens rea, and the second is whether the statutory purpose and interests of justice would be served by allowing a defence of total absence of fault, the Court analysed the scheme of the Immigration Act and then considered judicial precedents. *Kumar v Immigration Department* [1978] 2 NZLR 553 had decided that honest and reasonable mistake was a defence under s 15 of the same Act in respect of entering New Zealand. There therefore was:

> No justification under the legislation for refusing to allow an absence of fault defence in respect of landing but allowing it in respect of the next and associated step of entering.

A defence of total absence of fault should be available to a charge under s 5(1)(a) to be in harmony with s 15(5) to avoid inconsistency. This was the case although the language of s 5(1)(a) implied an

absolute prohibition.

It is interesting that the Court did not actually discuss the first question in *Millar* – whether there was anything weighty enough to overthrow the mens rea presumption, although posed by Barker J in the High Court for determination on appeal. Presumably this was because the offence was clearly a public welfare/regulatory type so the only issue was then whether it was of strict or absolute liability – or as Barker J put it, whether a defence of total absence of fault was available.

Other class 2 strict liability offences have included pollution as already mentioned. *Hastings City Council v Simons* [1984] 2 NZLR 502 concerned a prosecution under s 34(b) of the Water and Soil Conservation Act 1967. A total absence of fault defence was allowed as the case "fell squarely within the public welfare category recognised in *CAD v MacKenzie*". However, another early post-*MacKenzie* decision in the water pollution area was *Waikato Carbonisation Ltd v Waikato Valley Authority*, 4 September 1984, High Court, Hamilton, M 220/84, a judgment of Barker J who did not find the issue of which category so clear-cut. This was an appeal against conviction for discharging waste into natural water, in England an absolute liability offence (although termed strict liability in that jurisdiction) as the House of Lords confirmed in *Alphacell Ltd v Woodward* [1972] AC 824. Barker J's judgment in the *Waikato* case is useful as he spells out his reasons for choosing the *MacKenzie* category, as follows:

(1) There is an absence of clear legislative intention to create absolute liability.
(2) The penalties (a fine of $2,000 plus $100 per day for a continuing offence) indicated the offence was a serious one (no doubt a reason for choosing strict rather than absolute liability).
(3) The mischief aimed at by the section (s 34 of the Water and Soil Conservation Act 1967) could also be the subject of other prosecutions.
(4) The Act clearly intends to promote social welfare – keeping rivers and streams free from industrial pollution (the subject matter of the Act indicating a public welfare rather a truly criminal offence).
(5) A very similar offence had been considered in *Sault Ste Marie* and held to be of strict liability. This was the "clinching consideration".

It is of interest that Barker J thought the fines showed the offence was a serious one (and thus the *MacKenzie* defence should be available). In *Sault Ste Marie* Dickson J had thought that penalty was one of the primary considerations which determine whether an offence falls into the second or third category.

In *Tawa Meat v Department of Trade and Industry*, 26 September 1984, M 542/83, Wellington, High Court, Jeffries J thought maximum penalties of $5,000 (for failure to comply with Price Freezing Regulations 1982 under the Economic Stabilisation Act 1982) were "not great". This could have been because he was rebutting a presumption of mens rea (although he did not so express it) whereas Barker J was essentially giving reasons why discharging waste into natural water should not be an absolute liability offence.

Jeffries J did not analyse why the offence in *Tawa Meat* should be in class 2. He simply said it was a public welfare regulatory offence – "an offence constituted in an Act concerned with the regulation of the economy and commerce."

He then continued:

> Prima facie then this is an offence which falls in the second category. There are no words such as wilfully or knowingly which indicate mens rea was intended, nor is there any indication that absolute liability was intended.

The provision did contain the words "without lawful justification or excuse" which Jeffries J said "might be of some relevance" to the fact that there was no indication absolute liability was intended. Such words do indeed seem to indicate a strict liability offence was the intention of the legislature.

It has become apparent that some sections of the Road User Charges Act 1977 are a borderline strict liability/absolute liability area, and there are two reported conflicting High Court decisions on s 23 of the Act.

In *S M Savill Ltd v Ministry of Transport* [1986] 1 NZLR 653, Ellis J held that a total absence of fault defence was available to a charge of operating an overloaded vehicle under s 23.

After discussing the three-fold classification of offences accepted by the Court of Appeal in *MacKenzie* and Lord Reid's universal principle (the presumption of mens rea) Ellis J said the question was whether the present offence fell into the second or third category of offence.

He then went on to state that in cases of public welfare offences the total absence of fault defence should be available unless clearly excluded – per Richardson J in *MacKenzie*. He considered the scheme of the Road User Charges Act and found that it was basically a revenue statute on the user-pays principle and that there was nothing in that to suggest absolute liability. The legislature did not intend to penalise conscientious operators, therefore a defence of due diligence should be available. He also quoted Graham's *Law of Transportation* noting the potentially high penalties that could be imposed ($15,000 fine for the most serious offences) which indicated that the offence should not be absolute.

However, in *McLaren Transport v Ministry of Transport* [1986] 2 NZLR 81, Hardie Boys J took a different view which I will discuss in the next and final part of this article. □

1 For example, *Police v Creedon* [1976] 1 NZLR 571; *Jones* [1986] 1 NZLR 646; *Cameron v Ministry of Transport* [1987] 2 CRNZ 646.

The bottom step

The burnishing of what occasionally proves to be the bottom step of the stairway of appeal is part of the daily round of Masters, the "charwomen of the judicial system" (D F Dugdale "Techniques of Judicial Reasoning" 9th Commonwealth Law Conference Papers (April 1990) p 95).

The Credit Contracts Act and the reluctant Judge

By R D G Burt, an Auckland practitioner

This article considers the situation existing under the Credit Contracts Act in respect of the obligation of disclosure. It is the view of the author that the Act goes too far in its disclosure requirements particularly in view of the quite draconian provisions in the Act by way of penalties for non-disclosure.

A Judge's lot is not always a happy one. Anderson J had the misfortune to be the Judge called upon to decide the issues in *Clark v Bishop Nominees Ltd* [1988] BCL 639. He had to wrestle with the "deficiencies in the [Credit Contracts] Act now disclosed by the ingenuity of an experienced Auckland practitioner".

The story begins in Patetonga. Mr and Mrs Clark owned a farm there. They were in a "parlous financial situation", and they were in default under all four mortgages on their property. Events took their normal course and a date was fixed for a mortgagee sale under supervision of the Registrar.

The day before the sale, Mr Clark consulted "an experienced solicitor in Auckland". At about 4 pm that day, the mortgagee's solicitors received a request for disclosure under s 19 of the Act. The address specified in terms of s 20 was "John P Clark" care of the solicitor's post box number. When disclosure is made by post, it is, in terms of s 20(2) deemed to be made on the 4th working day after the documents are posted. Section 24 then forbids the enforcement of any contract or security before due disclosure has been made.

The mortgagee's solicitors chose not to use the post. They had the disclosure documents delivered to the office of the Auckland solicitor prior to the sale. He took the documents under protest, saying that he had no authority to receive them.

The sale went ahead at the appointed time, and Mr Schouten was the buyer. He bought in good faith, but he was then faced with a hearing in which the Clarks claimed an interim injunction to prevent registration of his transfer on the grounds that the enforcement of the security was invalid under the provisons of s 24.

Anderson J was

> constrained to hold for the purposes of this interim application that disclosure was not in fact made in terms of the requirements of the Act. I come to that view with great reluctance because it is perfectly plain to my mind that the request, although having the justification of legal entitlement, was in reality a sham calculated to thwart the mortgagee's sale.

Towards the end of his judgment, the learned Judge expressed the hope that the other mortgagees involved with the property could exercise their powers of sale

> so that the inconvenience to Mr Schouten or any other purchaser might be diminished. The result will be that this Court will have acknowledged the constraints of section 24 of the Credit Contracts Act but the lenders to Mr & Mrs Clark may not be unduly disadvantaged in the event beyond their present level of understandable impatience.

How Mr Schouten was going to feed his stock in the meantime remained his problem.

No doubt the best way to expose the flaws in a statute is to enforce it as it is written. In this case we end up with the absurd result that a piece of legislation designed to act as a shield for the unwary borrower ends up as a weapon in the hands of a defaulter exploding in the faces of an unfortunate lender and an even more unfortunate purchaser!

Think again

Many of us sat through seminars about the time the Credit Contracts Act came into force amazed at the range of transactions which could be classed as "credit contracts" and bewildered by the intricacies of calculating finance rates. Was this major change in conveyancing practice going to clog up the whole process of borrowing and lending? Then, after a few months, it seemed not too bad after all. It just needed a changed mind-set, and new forms. It was business as usual — with a small additional charge for the borrower to meet.

Clark's case forces us to think again. Perhaps in the matter of disclosure, the Act does too much.

Have another look at the ordinary initial disclosure requirements for a loan secured over land. Most of the terms will hardly come as shattering revelations to the borrower. He surely knows who his lender is and how much he is borrowing. And how often have we laboriously calculated payments on a loan through a three year term with the sure and certain knowledge that the interest rate will change within the first twelve months, and it is mainly wasted effort? And has anyone ever known a borrower to

cancel his deal in terms of s 22 once he has disclosure in his hand? The one thing he wants is his cheque.

There is one valuable item in the disclosure statement – that is the finance rate. We shall come back to that. But the "protected" consumer is, I suggest, paying for a lot of unnecessary paper work.

Big teeth

The penalties for non-disclosure under the Act are amazing. As well as s 24, which can render the security unenforceable, we also have s 25 under which the lender can lose *all* his interest. The Court has power under ss 31 and 32 to moderate the severity of these penalties, but the Act certainly contains teeth – teeth of crocodile proportions.

Judges have clearly been impressed with the size of those teeth. So, in every case which I am aware of, in which it has been held that disclosure was inadequate, the lender has been penalised to some degree. And that even although it has been held that the borrower has suffered no prejudice.

An experienced businessman

The first of these cases is *Anderson v Burbery Finance Ltd* [1986] NZLR 20. The judgment of Gallen J was upheld on appeal, reported in [1988] 2 NZLR 196. Mr Cameron was an experienced businessman. He borrowed money at 42% per annum and a penalty rate of 84% per annum. The loan contract was subsequently varied. The basic interest rate remained unchanged, but the penalty rate came down to 54%. At each stage a disclosure statement was given to the borrower, but there were errors both times arising out of discrepancies in the loan documentation. Mr Cameron was accidentally killed, and his executors attacked the transaction both on the ground of oppression, and also on the ground of inadequate disclosure. The Judge held that the contract was not oppressive in all the circumstances, but that the disclosure requirements of the Credit Contracts Act had not been satisfied. There was, however, no intention to deceive and Mr Cameron was not misled "except to the most minimal degree". In this case, "the non-disclosure was technical and arose from errors in drafting". The Judge therefore gave relief under s 32, but deprived the lender of any penalty interest. It is not clear from the judgment how much this might have amounted to, but on the penalty rates applying, it could have been a sizeable sum.

Using the creditor as a banker

Gallen J delivered his judgment on 23 August 1985. On 11 December 1985, Holland J gave judgment in *Patrikios Holdings Limited v United Fisheries Limited* [1986] BCL 220. United Fisheries Limited was a wholesale fish supplier. It sold fish at auction to retailers. The plaintiff was one of these retailers. The terms of sale called for payment in cash within seven days of the auction. On 1 April 1980, United Fisheries sent a circular letter to its customers saying that all purchases not settled within seven days would bear interest at 0.4% per week. Patrikios acknowledged receipt of the letter. It continued to buy fish at auction, but its account continued to be in arrears. It made payments from time to time in reduction of the account but consistently traded on United Fisheries' credit.

United Fisheries was registered as a moneylender under the Moneylenders Act 1908 at the time it issued its circular. After the Credit Contracts Act was introduced, the company received some conflicting advice, some of which suggested that the interest arrangements were not subject to the disclosure provisions of the Act. No disclosure document was, therefore, given to the debtor.

The learned Judge rejected the company's arguments as to why disclosure provisions of the Act should not apply. The question then to be decided was what relief, if any, the company should have under s 32. The Judge was satisfied that there was no deliberate intention of non-disclosure. He did not consider the plaintiff had been prejudiced to any great extent. Rather, "the plaintiff was effectively using the defendant as a banker and knew it".

Nevertheless "it is clear that the intention of the legislature was that the Act should be self-policing and that creditors should be encouraged to observe the provisions of the Act because of the financial consequences which would follow from failure to comply". In the result, the Judge decided to relieve the defendant of one-third of the penalty.

Innocent assignee

Next in order is *Emus Holdings (Auckland) Limited v Pither* [1987] BCL 11. The mortgage concerned had a stated interest rate of 16% per annum, but there was a discount factor which took the finance rate to 28.8%. In negotiations, the finance rate was stated to be 29%. The initial disclosure document, however, showed a finance rate of 25.5%, and there were also discrepancies between the disclosure statement (monthly payments) and the mortgage document (quarterly payments) as to the frequency of interest payments. Almost immediately after registration of the mortgage, it was assigned to the plaintiff. The learned Judge was prepared to infer "that there was no intentional attempt to mislead or defeat the purposes of the Act". He specifically found that the borrower had not been prejudiced. In terms of s 25, interest to a total of $50,218 stood at risk. Acting under s 32, the Judge reduced the penalty to $15,000. A relevant factor in fixing the penalty was that the plaintiff itself had not given the disclosure statement, but had innocently fallen heir to the problem.

The common feature in all these cases is that the Court found no deception or moral failure on the creditor's part. In no case was the debtor found to be prejudiced. Yet in view of the strong terms in which the Act requires disclosure, the Court has in each case found itself obliged to impose a significant penalty.

Commercial morality

The consistent message of the cases, therefore, is that a debtor astute enough to detect an error or omission in his disclosure statement has a grand gold-digging opportunity presented to him. Errors are bound to occur. That is life. But should a debtor, who has suffered no prejudice then be entitled to escape up to two-thirds of his interest liability? As Gallen J says, "the Act is not a reflection of commercial morality". (*Anderson v Burbery Finance Ltd*, p 28) Indeed it is not. I suggest that

it is plainly unfair in the way its disclosure provisions work in practice. It is perpetrating a form of commercial immorality.

This arises first, because the disclosure requirements are too cumbersome, and secondly because the penalties for non-disclosure are outrageously severe. Can we then preserve the benefits which the Act has undoubtedly brought, and yet reduce the unfairness which has become apparent?

Workable disclosure

The long title to the Act says that one of its objectives is to "ensure that the cost of credit is disclosed on a uniform basis in order to prevent deception and encourage competition". The "cost of credit" in percentage terms is the "finance rate". It is only fair to the consumer that he knows how the lender's application fees, front end loadings and other variables really affect his borrowing costs. The lender will normally have it all worked out — and the accruals tax regime will further encourage the lender to do his sums. To require disclosure of this important information has been one of the achievements of the Act.

Is it not sufficient, however, simply to require the finance rate to be specified in the loan document itself? If the rate quoted is inaccurate and misleading, that would presumably constitute misleading or deceptive conduct under the Fair Trading Act, and separate sanctions under the Credit Contracts Act are unnecessary.

Then I suggest that it is reasonable to require a copy of the loan documents themselves to be supplied to the borrower. A limited sanction — say up to one month's interest — could be imposed for failure to do so. That is all the disclosure that is needed.

Did Mr Patrikios need to know any more than the circular letter from United Fisheries Limited told him? The interest rate quoted said it all. And is it not sufficient to set out the terms of payment of principal and interest in the mortgage document, without doing it all over again in a disclosure statement?

Lenders are normally anxious to get *all* their interest. Even the loss of one month's interest should be sufficient persuasion to encourage copies of documents to be provided. If an unscrupulous lender deliberately withheld copies so that his borrower could be misled about the transaction, that would surely be caught by s 9 of the Fair Trading Act as misleading or deceptive conduct.

I also question whether guarantors need to be supplied with copies. The most common guarantee situation is that of directors guaranteeing advances to a private company. How often have I solemnly handed piles of photocopied documents to directors in such situations, well knowing that the precious documents are simply en route to the waste paper basket. Whoever the guarantor is, he will not be incurring the liability unless he has a very close relationship with the principal debtor. Is it not enough, then, for the debtor to have a copy, and a guarantor may obtain his own copy, if he asks for it, on payment of an appropriate charge?

We were well rid of the old Moneylenders Act. In many respects the Credit Contracts Act is working well. But the Act has gone too far, I suggest, in its disclosure requirements. Anderson J's "reluctant" decision in *Clark v Bishop Nominees Limited* highlights the absurdity of disclosure provisions which are over zealous to protect the naive borrower. The result has been to tip the scales too heavily against the lender. The cases put a spotlight upon a few of these unfortunate lenders. But every borrower (at least those dealing through solicitors) pays a penalty. He meets the additional cost of achieving compliance with unnecessarily cumbersome disclosure requirements. In the end it remains true, as it has since the days of King Solomon, that the borrower is servant to the lender. □

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1 Anderson J was presented with a similiar fact situation in *Martin v Holland Beckett & Co Nominees Limited* [1989] BCL 159. In that case, however, the transfer in favour of the purchaser had already been registered, and it was therefore protected by the indefeasibility provisions of the Land Transfer Act. This was so even although the mortgagee itself bought in at the sale.

New Zealanders in a London firm

Clifford Chance is now the biggest law firm in Great Britain following the amalgamation of Clifford-Turner and Coward Chance in May 1987. There are nearly 1,000 lawyers in the new firm either as partners or solicitor-clerks.

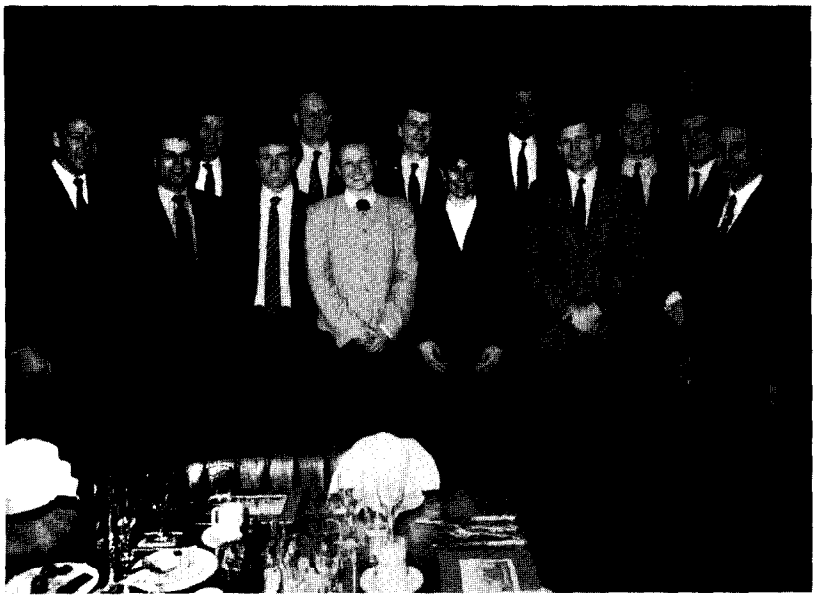
Mr Tony Willis, who previously was with the Wellington firm of Perry Wylie Pope and Page, is one of the two joint Managing Partners of Clifford Chance. He had a direct responsibility for the practical side of bringing the two firms together into one working unit. While the principles at issue on amalgamation might seem the same, it is unlikely (to use a modest sounding word) that everything went as smoothly as could be expected of a merger of two two-partner firms in say Stratford — or even of two large firms in Auckland and Wellington, as seems to have been the recent fashion.

There are some 25 New Zealanders now working with Clifford Chance. A list of these 25, with their New Zealand university *alma mater* and the New Zealand law firms they previously worked for, has been supplied, and is reproduced below.

CER with Australia is one thing; but having 25 New Zealand lawyers working in one London firm almost looks like a reverse legal take-over is in the offing! But then 25 out of 1,000 or so hardly amounts to a dangerous proportion. The international nature of Clifford Chance's activities means that not all of the 25 work in London. There is, it will be noted, one in the Singapore office and another in the Tokyo office.

Earlier this year, a dinner was held

for the New Zealanders working in the firm. Not all of the New Zealanders could attend, but 13 were able to. A photograph of this group, taken at the dinner, is reproduced on this page and on the cover of this issue of the *New Zealand Law Journal*. According to report, it was a very pleasant occasion for those attending. □



Joe Bulaitis

From left to right:
Audley Sheppard; Andrew MacCuish; David Mayhew; David Lockie; Tony Willis; Jane Bawden; Neil Hamilton; Michelle Duncan; Richard McGrane; Cameron Mander; Jon Wain; Ian Gault; Peter Goodman.

New Zealand Lawyers with Clifford Chance

Dept	*Name*	*New Zealand University*	*New Zealand firm*
Litigation	Jane Bawden	Auckland	Russell McVeagh
Singapore	Sam Bonifant	Canterbury	Lane Neave & Co
Banking	Michael Dickie	Victoria	Phillips Nicholson
Banking	Mark Douglas	Otago	Russell McVeagh
Litigation	Michelle Duncan	Otago	Bell Gully
Litigation	Ian Gault	Victoria	–
Property	Peter Goodman	Canterbury	–
Company	Neil Hamilton	Auckland	Simpson Grierson
Property	Janelle Hartstonge	Auckland	Russell McVeagh
Tokyo	Peter Kirk	Canterbury	Harper Pascoe
Banking	Paul Larkman	Victoria	Rainey Collins
Banking	David Lockie	Victoria	Rudd Watts & Stone
Litigation	Andrew MacCuish	Auckland	Buddle Findlay
Litigation	Cameron Mander	Victoria	Luke Cunningham
Banking	Mary Matson	Victoria	Bell Gully
Litigation	David Mayhew	Otago BA	Ross Dowling Marquet & Griffin (Dunedin)
			Russell McVeagh
Litigation	Richard McGrane	Auckland	Simpson Coates
			Russell McVeagh
Banking	Gina Rudland	Waikato	
		Auckland	Chapman Tripp
			Russell McVeagh
Banking	Neil Russ	Victoria	Buddle Findlay
Banking	Tony Shea	Canterbury	–
Litigation	Audley Sheppard	Victoria	Bell Gully
Shipping	Jon Wain	Auckland	Russell McVeagh
			Holmden Horrocks
Banking	Malcolm Webb	Victoria	Bell Gully
Priv Cl	Ian Whiteford	Canterbury	Wynn Williams & Co
Litigation	Tony Willis	Victoria	Perry Wylie Pope & Page

Frederick Chapman: Industrial conciliator and arbitrator (1899-1906)

By P R Spiller, Senior Lecturer in Law, University of Canterbury

The Chapman family played an important role in the early legal history of this country. This article deals with the role of Frederick Chapman, the son of Henry Chapman. As with several other distinguished legal families this was a case of father and son who were both members of the Supreme Court Bench. This article looks particularly at the time when Frederick Chapman was Chairman of the Otago Conciliation Board and then subsequently President of the Court of Arbitration. The author has had access to the Chapman family papers and this article represents part of the research work that he has done.

During the 1890s, New Zealand's system of industrial relations was born. The Industrial Conciliation and Arbitration Act of 1894 introduced a network of Conciliation Boards, an Arbitration Court and the process of compulsory arbitration. The first disputes heard by the Conciliation Boards and the Arbitration Court occurred in 1896. Over the ensuing ten years, there were no significant strikes in New Zealand, the Colony prospered, and so successful did the new system of industrial relations appear to be that it became "an object of colonial pride, an example of New Zealand leading the world". (J Holt, *Compulsory Arbitration in New Zealand*, 1986, 49)

A central figure in the emergent process of conciliation and arbitration was Frederick Chapman (1849-1936). Chapman was born in Wellington, the son of Henry Chapman (the first resident Supreme Court Judge of Wellington). He spent most of his childhood in Australia, completed his education in England and Europe, and was called to the English bar in 1871. He returned to New Zealand in 1872, and practised at the Dunedin bar until 1903, when he was appointed to the Supreme Court Bench. The focus of this article will be on Chapman's role as Chairman of the Otago Conciliation Board (1899-1902) and as President of the Court of Arbitration (1903-1906).

Chapman J: Industrial Conciliator (1899-1902)

In terms of the Industrial Conciliation and Arbitration Act (14 of 1894, replaced by Act 51 of 1900), the Colony was divided into districts, each with a Board of Conciliation. Each Board consisted of an equal number of persons elected by employers and by unions of workers, and the elected members together elected "some impartial person, not being one of their number, and willing to act, to be Chairman of the Board". (s 32(4), Act 14 of 1894) Any industrial dispute might be referred for settlement to a Board, and until the dispute had been finally disposed of by the Board no strikes or lockouts were allowed to the parties to the dispute. The Board was required to inquire "carefully and expeditiously" into the disputes referred to it, and take steps to induce the parties to come to a "fair and amicable settlement" of the dispute. Failing such agreement, the Board was to make a recommendation for the settlement of the dispute according to the merits and substantial justice of the case. In terms of the Act of 1900, if no application for referral of the dispute to the Arbitration Court was lodged within one month of the Board's recommendation, the recommendation became enforceable as an industrial agreement. (s 58(1))

Chapman was generally opposed to the measures of the Liberal Government of the 1890s, which he saw as being "socialistic", facilitating state intervention, and producing legislation "in favour of employed at the cost of employers" which had the effect of "crush[ing] out industry in our fast-declining towns". (*Otago Witness*, 21.7.1894, 28.9.1894 and 13.10.1894) At the same time, he was alive to the damage of "industrial war", and suggested that "sensible people ought to find means to deal with strikes and lockouts". (*Otago Witness*, 9.12.1893) He therefore supported the introduction of Conciliation Boards, and suggested that if there were elected to the Boards "men of high character, sound judgment, unlimited patience, and above all, sound temper, great things may be accomplished". (*Otago Witness*, 15.2.1896)

It was, then, with a positive frame of mind and with the ideal of the Board as a conciliatory body displaying judicial qualities, that Chapman, in May 1899, entered upon his duties as Chairman of the Conciliation Board for the Industrial District of Otago. During his three years in office, he and his board negotiated and recommended numerous industrial agreements between employers and workers' unions (ranging from the Dunedin Bakers and Pastry Cooks' Union to the Otago Coalminers' Union). These agreements cover such matters as rates of wages, hours of

employment, overtime, holidays and apprenticeships. One of the most contentious issues was that of preference of employment for union members. Preference was commonly allowed in recommended agreements, subject to the rules of the union allowing "persons of good character and sober habits" in the field being allowed membership of the union at a reasonable fee; provided that there were members of the union equally qualified with non-members to perform the particular work required and who were ready and willing to undertake it; and subject to existing engagements being respected. Further, it was often stipulated that where both union and non-union members were employed together, there would be no distinction between them, they would receive equal pay for equal work, and would "work together in harmony". (*Book of Awards* (1900) 260-1)

Difficult cases

Certain of the matters before the Board proved to be extremely time-consuming and difficult, and involved unsatisfactory evidence and strongly competing interests. At times the Board felt obliged to recommend agreements that were limited in time or in scope. In a dispute involving the Otago Tramways' Union, the Board made no recommendation on the claim "to allow smoking at out-stations", as this was a matter which came exclusively within the authority of the local body, and there was evidence that, if this was allowed, the men might not "keep time-table". Further, the Board thought that the tramway proprietors should not be bound to give preference to unionists, as "the proprietors are all carriers of passengers largely in the public interest". (*Awards*, (1901) 636-7). At other times the Board felt obliged to report that it could make no recommendation of agreement.

This occurred in the matter of the Dunedin Tailoresses' Union, where the employers were willing to pay the rate of remuneration asked by the employees, provided that the same rate was fixed for other parts of the Colony, notably Auckland. Following the first reference of the dispute in 1899, the Board adjourned the matter to establish whether a uniform rate of wages could be brought about in the Colony. However, finding that the Government did not propose promoting legislation on the matter, the Board recommended that the parties carry on under their existing system until the Auckland agreement expired. The Board made it clear that it was "of opinion that wages and conditions of labour should be uniform throughout New Zealand, unless it can be shown that local circumstances give rise to necessary differences". (*Awards* (1899) 426). Nevertheless, the Auckland agreement was renewed, and in 1900 a fresh reference was filed with the Board by the Dunedin Tailoresses. At this stage the Board did not consider that it was "constituted to settle questions of the competition between localities", and so reported that it had "failed to bring about a settlement of the dispute satisfactory to the parties". (*Awards* (1900) 459; see also *Awards* (1901) 667).

Chapman, as Chairman of the Otago Board, was also asked to settle detailed disputes in the working of awards. Here Chapman generally adopted a cautious approach, and preferred interpretations of awards which were "in accordance with the grammatical structure of [sentences] consistent with the rule as a whole". (*Awards* (1901) 602). He also exhorted the parties involved to make greater efforts to agree on minor points. In the matter of the Allendale Coalminers' Union, where Chapman was asked to define a "wet place", he said that "to attempt a definition would create rather than get rid of difficulties", and that "the common understanding of miners and managers ought to be able to settle this in individual cases". (*Awards* (1900) 254).

Respect

Chapman appears to have won respect from both employers and workers for the "impartiality and practical sense" with which he carried out his duties as Chairman of the Otago Board. (*Evening Star*, 10.9.1903 and *Otago Witness*, 16.9.1903) He later recalled that visitors from Europe and the United States showed a deep interest in the proceedings of the Board, were "struck with the good feeling which prevailed during the forensic contests", and at times showed some admiration for the method pursued (though the advances in wages agreed to were far in excess of those which European industries felt able to afford). (*Observations*, unpublished manuscript, Rosenberg Collection (RC)).

In May 1902, after Chapman had left office, the Minister of Labour thanked him for the "very efficient manner" in which he had carried out his duties, and said that his "firm guidance and wise conduct" had made the Dunedin Board the model for other Boards. (W Hall Jones to F Chapman, 9.5.1902, RC). However the unfortunate fact was that by this stage Conciliation Boards throughout New Zealand were in a state of permanent decline. It had become generally observed that very little direct negotiation went on between the parties before the Boards, "each side battling only to convert the chairman". Employers and workers thus came to hold that the Boards were "merely inferior Courts with less powers, less knowledge and experience", and with functions insufficiently different from those of the Court of Arbitration to justify a two-tier system. (Holt, 50)

The result was the passing of the provision in the Arbitration Amendment Act 37 of 1901, which allowed parties to by-pass the Boards, and go directly to the Arbitration Court. (s 21) This was opposed by Chapman as a "retrograde step", which greatly increased the work of the Arbitration Court and did away with the preliminary hearing before the Board "which was a great help in clearing the way to ascertain the really substantial points in difference". (*Observations*) But, as Chapman himself observed, parties (especially employers) largely availed themselves of this amendment, and as a result the Conciliation Boards languished. After Chapman's departure, the Otago Board itself sat for only "five or six days in the [ensuing] five years", (*Otago Daily Times* 12.10.1907) and in 1908 the Boards were replaced by Conciliation Councils. Thus, Chapman's able Chairmanship of the Otago Conciliation Board was unable to secure the long-term future of the Board. Nevertheless, it proved to be sufficient to establish his own reputation in the handling of industrial affairs. In September

1903, he was appointed Judge of the Supreme Court, principally to act as President of the Court of Arbitration.

Chapman J: Industrial Arbitrator (1903-1906)

The Industrial Conciliation and Arbitration Act 51 of 1900 (replaced by Act 32 of 1905) established one Court of Arbitration for the whole Colony. The Court comprised a Judge of the Supreme Court, as President, one member appointed on the recommendation of the industrial unions of employers and one on the recommendation of the industrial unions of workers. The members held office for three years. The Court had jurisdiction for the settlement and determination of any industrial dispute referred to it by registered industrial unions and employers, and it exercised this jurisdiction "as in equity and good conscience it [thought] fit". (s 76, of Act 51 of 1900).

In entering upon his duties as President of the Arbitration Court, Chapman had ambivalent views as to the merits and effects of the arbitration system. Writing in 1903, he commented that "it is by no means obvious to fair minded residents in New Zealand on which side the best of the argument lies as to its usefulness". On the one hand, Chapman acknowledged the beneficial effect that the arbitration system had had in "rooting out sweating" (the exploitation of labour) and doing away with strikes. He also applauded what he considered to be the best feature of the conciliation and compulsory arbitration system, which was that "it compels every disputant to open his heart and bring the whole of his grievance into daylight and tends to do away with those lurking half concealed suspicions which cause so many misunderstandings between employers and employees".

Further, Chapman indicated that he was sympathetic to at least some of the views of workers. He observed that clauses giving preference of employment to unionists had "not proved objectionable and [were] not open to the criticism that [they were] tyrannical", and he recognised that "it is undoubtedly the case that some employers have a standing objection to union officials and . . . are reluctant to take them on".

On the other hand, Chapman had grave reservations about the cumulative effect which the creation of unions, counteracting employers' combines, rises in wages and increase in costs of production had on the cost of living. In his view, colonial workmen (unlike Englishmen) were accustomed to high, ever-increasing wages, and they attached "far less importance to measures which tend to reduce the cost of living". He pointed out the effects of this attitude on those who built houses and on "every housewife in the towns of New Zealand" who bought bread and meat. Further, he suggested that if the rise in wages and costs resulted "only in satisfying the present generation while rendering it more difficult to get the next into employment, the working classes themselves will be the greatest sufferers". (*Observations*)

Administering justice

Chapman J's exercise of jurisdiction was dictated by his belief that the Court of Arbitration was "a Court of Justice which, while invested with extensive powers and furnished with elastic procedure, administers justice upon the same principles as are applicable to all Courts of justice under our Constitution". (*Awards* (1904) 187). This approach was evident, not only in the nature of the remedies granted by the Court, but also in Chapman J's insistence that proper legal procedures should be adopted. In the Auckland Butchers' case, Chapman J declined to hear a dispute referred by the union, as the members of the union had not approved the reference in the manner prescribed by the Act, and stated:

> We have been urged to overlook this defect on the ground that it is an error in form only, and that this Court does not stand on form. I can only regard it as a failure to do something which the Legislature has clearly prescribed as essential. . . . There is in this country happily no difference between Courts of law and Courts of equity, and, however this Court may be classed, not a word can be found in its constitution to suggest that in a manner affecting its jurisdiction it can, under the name of dispensing with mere formalities, set aside the expressed will of Parliament. (*Awards* (1905) 110).

A major part of the jurisdiction exercised by the Arbitration Court under Chapman J was the settlement of an ever-increasing number of awards. The increase in disputes referred for settlement during Chapman J's tenure was due to the growth in the number of trade unions (particularly those representing less-skilled workers) taking advantage of the arbitration system, the return of unions for subsequent awards, the gradual extension of the arbitration system to provincial centres, and the by-passing of the Conciliation Boards after the amendment of 1901. (Holt 57-67). In the Southland Timber Yards and Sawmills' award, Chapman J remarked that the Court had sat at Invercargill and Orepuki, had "visited the mills at several points and saw the operations both in the bush and at the mills", had examined thirty-eight witnesses, and had gone into the case "with great minuteness". (*Awards* (1905) 420). The difficulties of the Court were at times exacerbated by the widely-diverging stances of the opposing parties and the poor presentation of cases (for example, in the form of a "mass of undigested matter"). (*Awards* (1906) 241, 467, 562).

In the framing of awards, Chapman J's Court expressly tried to achieve settlements that were, as far as possible, acceptable to both parties, workable, and free from anomalies and sources of disagreement. (*Awards* (1904) 94, 353, (1905) 71, (1906) 241). In the Otago Federated Seamen's Union case, he declared that the Court did "not settle the wages on a profit-sharing basis, as that might in many industries involve the necessity of fixing a differential rate as between employers, and would certainly lead to confusion". (*Awards* (1906) 60).

Cautious attitude

The Court generally adopted a restrained and cautious attitude in relation to its jurisdiction and the nature of the awards it ordered. In the Wellington Tailors' award, the union and master tailors joined in asking the Court to protect the tailoring trade against the competition it had to meet from the makers of ready-made garments. Chapman J declared that the tailors had asked for "a protective measure

which the Legislature can grant if it thinks fit, but which cannot be dealt with by the Court as arising out of an industrial dispute between employers and employees in this case". He stressed that "we are forced to recognise the limits of our jurisdiction". (*Awards* (1906) 40).

In the Rimu Gold Miners' award, which was one of the rare occasions that the Court was asked to review a recommendation of the Conciliation Board, Chapman J remarked that the Board had "all the advantages derived from local knowledge", and that "we do not think that we ought to alter a Board decision on a question unless some good reason is shown us for so doing". (*Awards* (1904) 96). In the Auckland Electric Tramways' award, Chapman J said that the Court had "thought it best to make the award for one year only, as this is the first occasion on which an award has been made in connection with an extensive system of electric tramways". It was considered desirable to do this "in case any of the provisions operate detrimentally to either party, as it will give the Court an opportunity of reconsidering such provisions". (*Awards* (1904) 106).

Again, in the Southland Timber Yards and Sawmills' award, where "the union sought to establish the complaint which the Court now hears in every part of the colony, of enhanced cost of living", while the employers called evidence to show increasing competition, Chapman J said that the Court had decided that the wages had to remain "as at present for a term subject to minor adjustments". (*Awards* (1905) 420. In the West Coast Coal and Gold Miners' dispute, Chapman J reported that the Court, after considering the interests of all parties concerned, including "the workmen not directly concerned, but involuntarily affected" and "the public of the colony", was unable to grant an award reducing the hours of men working in the mines. Such an award, Chapman J claimed, would materially increase the cost of production and diminish the output of mines, which in turn "would stimulate competition from abroad, diminish employment in New Zealand, and operate detrimentally to the interests of the colony" and ultimately the workers themselves. (*Awards* (1905) 39).

Innovative

On occasions, however, the Court was innovative and formulated new clauses which were designed to make awards more satisfactory and effective in their operation. (*Awards* (1905) 71). A notable example of this was in the Nelson Carpenters' award, where Chapman J announced that a new "more workable" clause would be inserted in relation to "under-rate men" (workers who, because of some handicap, were allowed to be employed at a lower wage). This allowed those seeking a permit to be classed as "under-rate" workers to go directly to the Chairman of a Conciliation Board, by-passing union officials. Further, Chapman J specifically explained that the permit would cover, not only those who were old or infirm, but also partially qualified workers, whom the craft unions were concerned to debar from tradesmen's work. Chapman J claimed that there was insufficient work for "first class tradesmen", and a special rate was needed for the many partially qualified carpenters in the district. *Awards* (1904) 368-9).

Enforcement and interpretation of awards

Chapman J's Court also spent much time considering applications for the interpretation or enforcement of existing awards or agreements. In relation to applications for enforcement, initially, a union which believed that an employer was not complying with an award took the case to the Arbitration Court itself. But, in 1903, an Amendment Act charged factory inspectors with the duty of "seeing that the provisions of any industrial agreement, or award, or order of the Court, are duly observed". (s 7). Chapman J considered it "preferable that prosecutions should be conducted by inspectors instead of by the unions, because in the end there was less likelihood of friction arising out of prosecutions conducted by inspectors".

In 1904, he noted that, in every place where the Court had sat since the system of inspection had come into operation (particularly Auckland, Christchurch and Dunedin), the Court had found that the inspectors "were doing their duty efficiently and in a perfectly reasonable way". However, the new system resulted in a considerable increase in prosecutions before the Court, as in many cases the inspectors had instigated proceedings even in small cases "really in the nature of a caution, so as to induce people to study their awards and obey them". Chapman J acknowledged that "these small prosecutions were at a certain stage necessary, but the Court hoped that in time they would disappear". (*Awards* (1904) 222; also (1905) 384).

In reviewing existing awards, Chapman J was emphatic that "it was the duty of all parties to awards to use due care in ascertaining the conditions and to comply with them strictly". (*Awards* (1903) 333). He repeatedly condemned employers for "dealing with [workmen] in an unauthorised way without taking the trouble to read the instrument under which they are working and to which they have made themselves parties". (*Awards* (1904) 141). He pointed out that the observance of awards and industrial agreements, notably in preventing the payment of lower wages than those agreed upon, was "not merely in the interests of employees, but in the interests of the employers in the same trade". (*Awards* (1904) 142).

At the same time, Chapman J acknowledged that it was "not every apparent infringement of the letter of a law that constitutes a breach of it according to its object and intention", and that employers had to "be allowed considerable latitude in dealing with emergencies". (*Awards* (1904) 304). In the Wellington Seamen (Australasian) case, he dismissed the charge that the Union Steamship Company had failed to pay overtime, as he held that the steamer was still on her voyage during the waiting hours. He claimed that:

> were we to decide otherwise we should be doing something which would tend to hamper masters by interfering with their authority and responsibility with reference to navigation and the safety of their ships. (*Awards* (1904) 326).

Again, in the Otago Coal Miners' case, Chapman J rejected the charge of dismissing a miner for the purpose of injuring the union, and remarked that it was "of first importance that the responsible manager should retain undisputed authority in matters of management

and discipline", "in the employer's interests, [and] that of the men working in the mine". (*Awards* (1905) 236).

Many of the applications for enforcement or interpretation involved detailed analysis of the meaning of the Arbitration Act and of binding awards and agreements. Chapman J considered that the Court was bound by the "true grammatical meaning of a clause when that is unambiguous", and that it was "usually the safest course to give an enactment . . . its literal meaning" (*Awards* (1903) 363, (1904) 62). However, he recognised that there were cases in which this would defeat the intention of the enacting body, and that to avoid this the Courts "have at times been forced to give a restricted meaning to words". (*Awards* (1905) 404). Indeed, Chapman J held that "a literal construction of an Act of Parliament is the worst possible construction if it can be used to effect something that Parliament manifestly never intended, especially if that something be a palpable injustice". (*Awards* (1904) 191, (1903) 364). In deciding on the meaning to be given to awards and agreements, Chapman J made use of the intention of the "whole instrument", evidence of the custom of trades, previous Court decisions, and discussions he had with Judges of the Supreme Court. (*Awards* (1904) 194, 265, 300, 382).

Where the Arbitration Court found that an award or agreement had been breached, it was empowered to impose a penalty on the offending party. Chapman J confessed that "we have not in the decisions of this Court been quite so astute to discover reasons for refusing to award penalties as the Courts which have decided some of [the building contracts cases]" (*Awards* (1904) 148). Heavier penalties were imposed where the breach was seen to have been flagrant: in the Wellington Tailoresses' case, the Court found that the failure to pay agreed wages was committed with full knowledge and so was a "deliberate breach", requiring a fine on each count of £10 to be paid to the union. (*Awards* (1903) 340). Generally, however, the Court "found it more conducive to harmony to inflict moderate penalties than to inflict severe ones", particularly where the breach did not involve unfairness or hardship or arose out of a new agreement. (*Awards* (1903) 336, 393, (1904) 57). In the Wellington Tailoresses' case, Chapman J reported that "the question was largely one of interpretation; the breach had been admitted", and the Court ordered a penalty of £2 with costs. (*Awards* (1904) 328).

Balancing interests

Chapman J's "lawyerly" approach and his conscious efforts to balance out the interests of workers, employers and the general public won him mixed reviews. Following his retirement from the Arbitration Court, the Christchurch *Press* paid tribute to his "inflexible care and impartiality, fine legal training and strong common sense", and commented on how "easy it is to see how strongly the determination to do justice to all ruled his decisions". (*The Press*, 12.1.1907 and *Awards* (1906) 503). But his approach did not endear him to unionists and those sympathetic to the workers' cause. His decision on the Nelson Carpenters' award in 1904 produced union outrage and resulted in a legislative amendment requiring union consultation in "under-rate" permit applications. (Act 56 of 1905, s 13; Holt, 61). In 1906, at the Annual Conference of the Trades and Labour Councils, delegates questioned Chapman J's fitness for the Presidency, denounced his awards as unsatisfactory, and even suggested that if he was allowed to remain as President "the end of arbitration was not far off". (*Hansard* (1906) 567-8).

Later in the year, in the Legislative Council, John Rigg, MLC, condemned the recent administration of the Court as being characterised by one-sided awards and "legal subtleties and legal absurdities". He regretted that a "wider conception of the functions of the Court has not been exhibited in recent years", as "the intention of the Act was really to provide a fair standard of competition and trade, and . . . secure some proper distribution of the products of industry as between the employer and the worker". (*Hansard* (1906) 568).

In Chapman J's defence, it is evident that he had to work in very difficult circumstances. The Judges of the Arbitration Court of the 1890s were seen to have treated workers generously, but this was chiefly because they had granted first awards and increased workers' wages from previously unacceptable levels. Analysis of Chapman J's treatment of first awards indicates that it was no less generous. However, Chapman J and other Presidents of the early 1900s increasingly faced second and third awards, with unions resting their claims for even better wages and conditions on less than reliable data, and arguing in the face of much more effective opposition from employers. (Holt, 65-67). In these circumstances, it would have taken "an angel from heaven to fill the [Presidency] in such a manner as to please everybody". (J B Callan to F Chapman 27.7.1907, RC). Nevertheless, it is clear that union perception of Chapman J as a Judge unsympathetic to workers was a direct cause of the limited series of strikes in 1906-7, and helped to set the scene for the important reform of the Conciliation and Arbitration system in 1908.

Conclusion

However, Chapman J's performance as an administrator, in efficiently and tirelessly expediting the business of the Court, was generally acknowledged. He inherited a Court encumbered with a huge backlog of work, and for most of his Presidency the increasing volume of business (and the competing demands of his Supreme Court work) forced him to work with arrears of accumulated cases. John Rigg himself paid tribute to the industry of Chapman J's Court, which had "at all times done as much as it was possible for any one to do to overtake the arrears of work". (*Hansard* (1906) 570).

By the time he retired, Chapman J had overtaken the arrears and "disposed of all cases that were ripe for hearing up to the time of the sittings in each district". (*Evening Post*, 13.12.1906). Furthermore, Chapman J worked effectively behind the scenes, suggesting to the Government ways of improving the arbitration system and the administrative running of the Court. (R J Seddon to F Chapman 23.7.1905, RC). These suggestions found expression in such legislation

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International Law Association Conference (19-25 August 1990)

In 1873, the International Law Association (ILA) held its first conference in Brussels. Since then, there have been sixty-three conferences all over the world and during 19-25 August 1990, one hundred and seventeen years later, the 64th ILA Conference will be held in Australia at the Gold Coast in Queensland.

A registration brochure or more information (on a no obligation basis), is available from Mr John Moller of Moller Consulting [tel: (07) 221 2762; fax: (07) 220 0231; address: PO Box 226, Aspley, Queensland 4034].

In some ways the name "International Law Association" is a misnomer in that it might appear that the ILA Conference will deal purely with public and private international law. Originally, in 1873, the ILA was concerned with those disciplines and it was known then as "The Association for the Reform and Codification of the Law of Nations" (the name was changed to "International Law Association" in 1895).

In 1990, the ILA's scope of activities will cover a wider spectrum and deal with a range of issues of transnational interest. Just as the world has become a smaller space since 1873, due primarily to the improvements in travel and communication, the ILA's scope of activities has developed to include more issues of professional interest to non-government lawyers and business.

The programme for the Australian Conference is made up of special events, workshops and committee sessions.

Full details of the programme are set out in the registration brochure. Special events planned will deal with Dispute Resolution in International Commercial Matters (chaired by Sir Laurence Street AC, KCMG); the Regulation of International Capital Markets (chaired by United States securities expert Professor Cynthia Lichtenstein of Boston College Law School and New York Attorneys Milbank, Tweed, Hadley & McCloy); the Single European Market as a Model for other Regional Economic Arrangements (chaired by Sir Leon Brittan QC, Vice-President of the Commission of the European Communities).

ILA committee sessions will report on a variety of topics including securities regulation, legal aspects of extraterritorial jurisdiction and legal aspects of inter-country adoption. Environmental considerations will be dealt with in the session run by the committee reporting on the legal aspects of long distance air pollution and at a special two day seminar being conducted in Cairns during 17-18 August, 1990.

Australia's expertise in the field of cultural heritage law will be internationally recognised by the inaugural meeting of the cultural heritage law committee chaired by Professor Patrick O'Keefe of University of Sydney Law School. Professor O'Keefe and Dr Lyndal Prott (also of University of Sydney Law School) are world leaders in their field and will be actively participating in the session. Cultural heritage law is concerned with the protection and recovery of treasure and artifacts. It is interesting legally, and for anyone interested in history and indigenous cultures.

Other features of the Conference will include lunchtime speakers Sir Leon Brittan, HE Dr J M Ruda (President of the International Court of Justice) The Right Hon Sir Ninian Stephen (Australian Ambassador to the Environment) and The Hon Sir Anthony Mason (Chief Justice of the High Court of Australia).

One topical aspect of the Conference will be the presence of members from the USSR and Eastern European nations (the ILA has branches in, what may be called colloquially, the USSR, Poland, Bulgaria, Hungary, the German Democratic Republic and Yugoslavia). The President of the ILA today is Professor Jerzy Makarczyk, who is Deputy Foreign Minister of Poland. At the Conference, participants may learn firsthand of the extraordinary changes happening behind what only this time last year was called the "Iron Curtain". It may be that there are commercial opportunities available in those countries which may subsequently come to light on learning something of those developments.

For many, one of the attractions of the Conference will be its location at the Gold Coast, one of Australia's most popular resorts. The Conference venue is the Conrad Hotel and Jupiter's Casino, which is a five star establishment and, as one of the focal centres of the Gold Coast, is easily accessible from other hotels and the city itself. Delegates staying at the Conrad during the Conference will pay the conference rate of $140 per night for a double room. As an alternative, the new Seaworld Nara Resort Hotel is on the Broadwater at Main Beach and adjoins the Seaworld theme park. Studio rooms with self-catering facilities are available there as well as more usual hotel room accommodation. A complimentary bus service links the Nara to the conference venue and the rate starts at $90 per night. For those who prefer, more competitively priced accommodation is available in the area, of varying prices and types. Arrangements may be able to be made for "billeting" student delegates, who prefer to stay with a local family rather than in hotel accommodation, and student delegates interested in billeting

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as the Amendment Acts 56 of 1905 and 40 of 1906 (the latter providing for a full-time President of the Court and the appointment of a Registrar). (*Hansard* (1905) 732, and F Chapman to R J Seddon October 1905, RC). In the light of this contribution, it was rightly said that the condition of the Arbitration Court on Chapman J's retirement was "a monument to his industry and energy". (*The Press*, 14.1.1907). □

The Labour Court's power to order joinder in personal grievance proceedings

By Emeritus Professor Alexander Szakats, formerly of Otago University, and now practising in Wellington

A problem can arise where a worker employed by a primary employer effectively works in the premises of and under the supervision of a secondary employer. If the worker is dismissed by the primary employer at the insistence of the secondary employer can the Labour Court join the secondary employer in, for instance, a personal grievance case to enable an effective remedy to be provided? The author contends that the Labour Court can do so under its equity and good conscience jurisdiction, can make a compliance order against the secondary employer, and enforce such an order.

In recent cases the Labour Court was faced with the problem of what may be called "the seconded employee". This means a situation where the employer of the worker, a small enterprise (referred to as "the primary employer"), has a contract for services as an independent contractor with a large enterprise (referred to as "the secondary employer"), and the employees of the primary employer work within the plant, and under the supervision of, the secondary employer. Such workers are seconded to the secondary employer but remain in the employment of the primary employer. When the primary employer dismisses such workers, and the grievance committee after finding no justification orders reinstatement, can the Labour Court compel the secondary employer to permit the return of these workers onto its premises? It has had no direct contractual relations with these workers, and consequently is not a party to the grievance proceedings.

The views expressed in Court decisions and in the relevant provisions of the Labour Relations Act 1987 ("the Act") will now be examined to find the answers. The following particular questions may be posed:

1 Can it be argued that despite no employer-employee relationship the right of supervision and control ceded by the primary employer to the secondary employer placed it in the position of a "master"?

2 Has the Labour Court under the Act power to make an order of joining the secondary employer as a party to the grievance proceedings?

3 What other procedures are available whereby the Labour Court can assume jurisdiction to order the secondary employer to comply with the decision given in the grievance proceedings?

The Refractory Employees' Case

In *New Zealand Carpenters etc IUW v Refractory Construction Company Limited* CLC 15/89; CLC 15A/89, Refractory had a contract for services, as independent contractor, with the New Zealand Smelter Limited, (referred to respectively as "the Union", "Refractory" and "Smelter"). Two employees of Refractory worked for and on the site of the Smelter at Tiwai point. One of them had been working there for 12 years, the other for 10 years. The two Refractory employees had the duty to drive other Refractory employees also working for Smelter to and from the workplace in two vans. One day the two workers drove side by side on the road within the Smelter area. There was no other traffic, and no accident occurred. This parallel driving lasted only for few seconds but a Smelter manager saw it. Smelter management forbade the two employees to work on the following day, and called in their foreman to discuss this incident. The workers were not questioned, and the union delegate was excluded from the discussion. No further investigation took place, the passengers were not requested to give statements. Smelter management advised the workers through their foreman that they were banned from its site. As a result, or for the reason connected with this incident, the two workers were dismissed by their employer, Refractory.

The Union commenced grievance proceedings claiming unjustified dismissal on behalf of the dismissed workers. The grievance committee, as the members did not reach settlement, authorised the chairman, a mediator, to give a decision. The chairman found that the dismissal was unjustified on grounds of procedural unfairness, and also on the merits as the alleged conduct was not sufficiently serious to warrant dismissal. He ordered immediate reinstatement. Smelter received a copy of the decision, but refused entry of the two men on the site, thereby frustrating the order. The employer, Refractory, applied to the Labour Court for an order joining Smelter as a party to the proceedings and for a compliance order.

Judge Palmer referred to "the exercise of the discretion" under s 317(1)(a) of the Act and considered joining Smelter as a party but on information that the two workers had been reinstated by Refractory declined the joinder, and in respect of the compliance order adjourned the proceedings sine die. The reinstatement, however, as contended by Counsel, and

recognised by the Court, did not extend to the workers' employment on Smelter's site.

Smelter continued refusing entry and submitted that the Labour Court had no jurisdiction to join it in the grievance proceedings, as Smelter never had been the employer; there were no contracts of service between Smelter and the two workers, only between Refractory and the workers. On this ground, it argued, Smelter could not be a party to any grievance proceedings for unjustified dismissal.

Examining the facts further, it is important to note that conduct on the site is regulated by a booklet drawn up by Smelter. The mediator in the grievance application found that Refractory and Smelter had joint control and supervision in disciplinary matters. The very facts that after the incident Smelter management prohibited the two workers to start work on the following day clearly show Smelter's control and supervision over their work and general conduct; that the foreman (supposedly employed by Refractory) was requested to meet Smelter's management, and Smelter took action after such meeting without giving an opportunity to the workers of presenting their case are sure signs of assuming of supervisory and disciplinary powers. Presumably Refractory acted in dismissing the workers under the order, or at least on the suggestion of Smelter.

Contrasting judgments: The question of jurisdiction

The earlier decision of the Arbitration Court in *Northern Caretakers and Cleaners etc IUW v Securitas Limited* [1987] NZILR 312, Arb Ct, concerned a situation similar to that in the *Refractory* case. A security officer, Mrs Brownlee, working on the Huntly Power Station site was dismissed. She allowed an employee of the NZ Electricity Department, personally known to her, accompanied by another person not known to her, to enter the site for picking up scrap metal. They picked up a load of scrap steel and were permitted to leave after the security supervisor established that the purchase was in order. On complaint received from an officer of the NZED that the vehicle in fact had no authority to enter, the operations manager for the Hamilton branch, after questioning the security officer, informed her that she had been in breach of the standing orders and suspended her. Finally she was dismissed. The Union commenced grievance proceedings. The Court found the dismissal unjustified and ordered reinstatement.

Electricorp, as the NZED had become, refused to allow Securitas to reinstate Mrs Brownlee, in defiance of the Court's order. Considering the application for compliance order Judge Castle stated:

> To say that the situation which has now developed is unsatisfactory is a gross understatement. While it is accepted that Electricorp is not a party to these proceedings, and cannot be bound thereby, its considered decision to effectively nullify an order of the Arbitration Court can only be of the gravest possible concern from the viewpoint of maintaining well established principles of industrial law. *In the absence of any power or jurisdiction to join the employer of a subcontractor in personal grievance proceedings, any direction or order of this Court requiring reinstatement of employment with a subcontractor can be, as has happened in this case, an exercise in futility.* In this instance we have no grounds to suspect the bona fides of Securitas. We observe, however, that this type of situation by conspiracy or co-operation between the subcontractor and the head employer can nullify any order for reinstatement by this Court. We have now had the opportunity of discussing this whole matter with the advocates for the parties. We are informed and accept that there is no suitable job available for Mrs Brownlee at Securitas in the Hamilton area. It appears that the Court is now placed in a situation, not of the choosing of the parties themselves, where two courses are available to it. The first is to leave the issuing of the final decision in abeyance and consider the application under s 48(2)(c) of the Act [Industrial Relations Act 1973] for an order of compliance with the interim decision. The second is to grant relief for Mrs Brownlee by way of compensation and to vacate the order for reinstatement pursuant to the interim decision.
>
> Having considered the practicalities and observing that the Court (under s 48(2)(c)) is under no mandatory obligation to hear an application for an order for compliance, we decline to consider that application. We cannot see how any such order could be practically implemented in this instance. We therefore adopt the second course and deal with relief to be granted to Mrs Brownlee by way of compensation, observing that this course could have been taken in the first instance. (*Northern Caretakers and Cleaners IUW v Securitas Ltd* [1987] NZILR 312, Arb Ct, at 315-316; emphasis added)

The important expressions are "in the absence of any power or jurisdiction to join the employer of a subcontractor in personal grievance proceedings" and "exercise in futility".

Was there really no jurisdiction? Although the *Securitas* decision was made by the Arbitration Court, as distinct from the Labour Court, under the now repealed Industrial Relations Act, upon comparing the two statutes, the same powers can be found. Section 317 of the present Act is the re-enactment of s 299 of the former statute. Section 279 has re-enacted s 48 with significant additions, subs (4) referring to equity and good conscience. The Arbitration Court also had "all the power inherent in a Court of record" granted by s 32 now found in s 278.

With respect, the learned Judge was in error as the Arbitration Court had the same jurisdiction regarding joinder as the Labour Court has. The jurisdiction existed and exists now at the discretion of the Court. There was and there is nothing anywhere in either Act which would exclude grievance proceedings from the exercise of such power.

The judgment of the Labour Court in *New Zealand Workers IUW v Sheridan* WLC 115/88 quoted the Securitas decision but because of different facts did not follow it. The dismissal of two workers of Sheridan was caused by

an employee of NZ Timberlands Limited which had a contract for services with Sheridan to perform certain silviculture work. Following an argument with an employee of Timberlands, the workers were banned from entering its site, and Sheridan dismissed them. In the grievance proceedings commenced by the union the Labour Court held the dismissals justified. Chief Judge Horn said:

> There is no way that this Court can place any blame upon the employer. The head contractor, in effect, caused the dismissal . . . and, for the time being at least, the revocation of the contract between Timberland Limited and the employer. We are unable to see how under these circumstances the employer could have acted differently. For that reason, therefore we must hold this dismissal . . . justifiable.

Significant differences between the *Securitas* and *Sheridan* decisions should be noted: in *Sheridan* the pressure of Timberlands terminating the contract for services with Sheridan (though later resumed) was considered sufficient justification for dismissing the workers, while in the *Securitas* case the Court found the dismissal unjustified, and granted a sizeable sum of compensation.

Further judgments of the Labour Court deserve brief comments. In *Otago Clerical Workers IUW v Taieri Job Experience Trust and Department of Internal Affairs*, CLC 45/89 in appealing against the decision of a grievance committee chairman the union applied to the Labour Court to join the Department of Internal Affairs as a second respondent on various grounds particularised at length. The Court, however, accepted the counter arguments advanced by the Crown that:

(a) there was no contract of employment between the grievant and the Department;

(b) the Department never was the employer of the grievant;

(c) in case there is a finding in favour of the grievant remedies can be imposed against the employer;

(d) if the grievant wishes to pursue any issue of accountability of the respondent in relation to funds supplied by the Department that would be a separate matter to be pursued in a jurisdiction other than the Labour Court;

(e) the grievant or the Union are not entitled to any of the relief claimed against the Department.

Accordingly the joinder was refused.

Another judgment worth noting is the *NZ Airline Pilots' Assn IUW v Registrar of Unions*, WLC 38/89 an application under s 299(2) for leave to be represented. Chief Judge Goddard at the outset commented:

> These applications are generally combined with application under s 317(1) for an order under that subsection to direct the applicants to be joined as parties. If leave is given under s 299(2) no order is necessary under s 317(1) because by virtue of s 299(3) any person represented pursuant to leave granted or an order made under subs (2) is deemed to be a party to the proceedings.

Further His Honour stated:

> There are two legs to s 299(2). The first is that the Court may allow to be represented any person who applies for leave and who, in the opinion of the Court, is justly entitled to be heard. The second is that the Court may also order any other person so to be represented. The expression "any other person" is grammatically capable of referring equally to a person who has not applied for leave or, paradoxically, who has applied for leave but in the opinion of the Court is not justly entitled to be heard.

Having found that the applicants were justly entitled the Court granted leave to be heard, and the applicants consequently became parties.

The decisions cited do not provide directly applicable precedents. The facts somewhat differ. Still they give valuable assistance as to the interpretation of the relevant provisions of the Act which in future arguments may be quoted.

Three types of appeal

The judgments mentioned came to the Labour Court either by way of appeal or reference. In *New Zealand Baking Trades IUW v Findlay's Gold Crust Bakeries Limited*, WLC 47/89 (Chief Judge Horn, Judges Finnigan and Travis) the chairperson of the grievance committee held that the worker in question was justifiably dismissed. The union appealed, and sought to call witnesses who did not give evidence before the committee. The employer objected. As the issue raised a serious question about the nature of the appeal the full Court heard submissions. The issues for contention were:

1 The nature of such an appeal; and

2 The extent of the Court's powers and discretions relating to the conduct of an appeal.

After quoting ss 217, 279, 299 and 303 of the Labour Relations Act as well as cl 9, 11, 12, 15, 16, 17 and 18 of the Seventh Schedule to the Act the Court considered that in general there are three types of appeal:

1 On point of law only.

2 By way of rehearing based only on the evidence and submissions placed before the grievance committee.

3 By way of full rehearing de novo.

The now-repealed Industrial Relations Act did not provide for appeal from a grievance committee. The grievance could be referred to the Arbitration Court only if the Committee did not settle it. In such cases the Court always heard the matter de novo.

Findlay's submitted that under s 217 the Court has a discretion to hear further evidence. The decision stated:

> The Court should not exercise its discretion to allow additional evidence which the appellant had available but had elected not to call; that the onus is on the appellant to show that the decision was demonstrably wrong.

Reference was made to the Court of Appeal judgment in *Shotover Gorge Jetboats Limited v Jamieson* [1987] 1 NZLR 437, CA, in which Cooke P said:

> In some of the foregoing authorities it is put that in this type of appeal there is no presumption in favour of the decision under appeal. Clearly that is so in the sense that the appellate Court has to approach the case afresh. The proceeding is an appeal, however, and if in the end the appellate Court could not make up its mind as to what was the right decision, the decision under appeal would, I think, stand. But that equipoise is unlikely if the appellate Judge accepts his or her true responsibility. There is another type of appeal which, although open on fact as well as law and to be by way of rehearing, is by the terms of the relevant statute to be heard on the record of the oral evidence given below, subject to a discretionary power to rehear the whole or any part of the evidence or to receive further evidence. (at 440)

The learned President further stated:

> But it is trite to say that all appeals are creatures of statute, and their scope likewise. Apart from cases of agreement between the parties, hearings of appeals on the record of evidence taken below are usually so confined by the express terms of a statute. No doubt there could also be a case of necessary implication.

The Labour Court declared that it found nothing in the Act, including the Seventh Schedule which would even suggest that on appeal a personal grievance should not be a full hearing de novo. The matter was summarised as follows:

(a) A grievant is entitled to have his grievance fully and properly considered.

(b) He has a right by way of appeal to a full hearing.

(c) The right to tender evidence means, in our view, that all evidence which is relevant to the issue of the grievance must be admitted.

(d) The overall requirement in s 279(4) which we have quoted above requires that the Court's emphasis should be on ultimate fairness rather than more technical restriction unless it is clearly otherwise or by necessary intendment spelt out in the statute.

(e) That s 303(1) reinforces the above propositions.

(f) Section 217 does not distinguish between referrals to the Court by the committee and an appeal from the chairperson's decision.

Chief Judge Horn also quoted a decision of Judge Jamieson, *AHI (NZ) Glass Manufacturing Co Ltd v North Island Electrical etc Trades Union* [1978] ACJ 1 made by the Arbitration Court under the Industrial Relations Act. This judgment announced the principle that "the Arbitration Court will not lightly overturn a decision of a Disputes Committee . . . without very good and convincing reasons". Sections 190 and 191(b) of the Labour Relations Act support this approach, but s 217 contains no such provision in respect of grievance committees. Accordingly in the view of Chief Judge Horn this suggests that the legislature's intention was to place less weight:

> . . . on the decision of the grievance committee, a conclusion which favours an appeal being de novo in terms of the *Shotover Gorge* principles.

While the appeal, without doubt, should be de novo, meaning that the Court should treat the grievance appeal as if it were a tribunal of first instance, the real problem is: in case of finding the dismissals unjustified and ordering reinstatement, can the order be enforced? The simple answer is that the order binds, and is enforceable against, the employer. In practical terms, however, if the work which the dismissed workers performed will be made impossible to perform because of the secondary employer's refusal of entry, and the primary employer cannot provide other work, then the position disappears making the workers redundant. In such a case redundancy dismissal with adequate compensation may be justified.

Statutory provisions

As to the question whether or not the Labour Court has jurisdiction and power to order joining the secondary employer in the grievance proceedings appeal, the following sections of the Labour Relations Act are quoted.

Section 299(2) on the face of it merely may allow to appear or to be represented any person, if in the opinion of the Labour Court such person is justly entitled to be heard.

Such person, on looking at subs (2) alone, would not necessarily be a party. Nevertheless, reading subs (2) together with subs (3) "any person appearing or represented in the proceedings . . . shall be deemed to be a party to the proceedings". Therefore, though the word "joinder" is not used and the parties do not expressly apply for joinder, the result is making such person a party by joining.

Section 317(1)(a) gives express power to "direct parties to be joined" in order that the matter may be more effectively disposed of "according to the substantial merits and equities of the case". Such joinder may be made at any stage of the proceedings, and the Court can exercise this power of its own motion or on the application of any of the parties.

Section 279(4) grants full and exclusive jurisdiction to the Labour Court in all matters before it to determine them by admitting all evidence as in equity and good conscience it thinks fit. (s 303, Labour Relations Act) The equity and good conscience principle may not be used when it is inconsistent with the Labour Relations Act or any other Act, and particularly cannot be applied in connection with proceedings under ss 242, 243 and 280 of the Act. By expressly excluding these three proceedings it appears clear beyond doubt that in grievance applications the principle can or even must be applied: *expressio unius est exclusio alterius.*

Section 278 is significant as, in addition to the statutory jurisdiction, it mentions inherent jurisdiction, similar to that of the High Court. The inherent jurisdiction, nevertheless, is much narrower than that of the High Court. It must be confined to industrial matters connected with the Labour Court's exclusive statutory jurisdiction.

The power of joinder on the

combined effect of the sections quoted above, has a universal application. The phrase in s 299(1) is "any party to any proceedings" and the words in s 317(1) say "any matter before it". It seems a correct argument that there is nothing in these sections or in the Act generally which restricts the power of joinder, and excludes grievance proceedings from it.

At this juncture it should also be examined whether or not the Contracts (Privity) Act 1982 can be invoked. The essential purpose of this statute is to confer a benefit on third persons who are not parties to the contract. The secondary employer is certainly not a party to the employment contract. Any benefit from the employees' work on the secondary employment derives from its contract as an independent contractor with the primary employer. It may be argued that in an oblique way the work performed by the dismissed workers benefits the secondary employer. Notwithstanding the applicability or otherwise, of the Contracts (Privity) Act 1982, reliance should be placed on the quoted provisions of the Labour Relations Act which directly relate to the issue of joinder.

The problem of the borrowed servant

Would the fact that there was no employment contract, or any contract, between the secondary employer and the two workers dismissed mean in reality that it had nothing to do with the dismissal? While the actual employer, no doubt, remained the primary employer as the workers performed tasks on the site of the secondary employer directed by its management, the criterion of control must be closely looked at. The question can be asked:— were the servants transferred to the secondary employer thereby making it the actual master with control over them, notwithstanding the actual legal relationship between the primary employer and the workers? It is a well settled legal principle that although the employee remains in the general service of the actual employer, for the purposes of specific tasks the power of control passes, and to that extent the worker becomes the employee of the temporary, the secondary employer: *Donovan v Laing Wharton and Down Construction Syndicate* [1983] 1 QB 629; *Gibb v United Steel Company Limited* [1957] 2 All ER 110. In the latter case the Court emphasised that the mere fact of the general employer continuing to pay the servant's wages was not essential to disposing the question. In the classic case of *Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Limited*, [1947] AC1 the House of Lords held that despite passing the control to the temporary employer the general power of dismissal remained with the permanent employer. Similarly, Denning LJ (as he then was) indicated in *Denham v Midland Employers' Mutual Assurance* [1955] 2 All ER 561, CA that the general employer remains the employer with the power of dismissal.

While accepting the validity of the principles pronounced in all the above quoted judgments, it should be remembered that they and many others dealt with a situation of determining vicarious liability for accidents. There can be no argument on the power of formal, actual termination of employment by the primary employer — frequently on the pressure or demand of the secondary employer. It is beyond doubt that in the quoted Arbitration Court and Labour Court decisions the secondary employer decided on the dismissal, the primary employer merely agreed, or rather was compelled to agree, and formally "fired" the employees.

If the secondary employer assumes full control over the borrowed servant with the actual though not formal power of dismissal, then the secondary employer logically should also take responsibility when the Labour Court finds the dismissal unjustified. Consequently it must obey the orders of the Court. In justice, fairness and equity, assuming full control of a servant should also mean accepting the consequences and not pleading lack of privity of contract.

Special powers of the Labour Court

At this juncture it is necessary to look at important Court of Appeal pronouncements on the special character of the Arbitration Court, now the Labour Court. Section 314 emphasises this by providing that the Court of Appeal in determining appeals under ss 309, 311, 312 "shall have regard to the special jurisdiction and powers of the Labour Court". (Section 314 re-enacts s 62B(4) Industrial Relations Act 1973.)

The Court of Appeal decisions in *Auckland City Council v James Henessey*, [1982] ACJ 699, CA; *New Zealand Forest Products Limited v Northern etc Woodpulp etc IUW* [1981] ACJ 613, CA; and *Wellington Road Transport Union of Workers v Fletcher Construction Company Limited* [1982] ACJ 663, CA; pronounced the Arbitration Court as a specialist Court with unusual powers having a broad and equitable approach not fettered by legalistic rules, applying fairness, equity and good conscience. Woodhouse P and Holland J said in *Fletcher's* case, Somers J in *Henessey's* case that legal technicalities will not always be helpful in achieving the objectives of a just and equitable solution. It is submitted that these statements apply even more forcefully to the present Labour Court which has a wider jurisdiction than its predecessor had.

The significance of the Court of Appeal judgment in *Winstone Clay Products Ltd v Cartledge* [1984] 2 NZLR 209, CA, lies in the statement of McCarthy J who reiterated and reinforced previous Court of Appeal pronouncements on the nature of the Arbitration Court. His Honour said:

> [I]t would be most dangerous to overlook the special nature of the Arbitration Court, its purpose and its powers. It is not to be assumed that propositions of law, however prestigious and well established in the High Court or the Court of Appeal, will apply with the same clear force in the Arbitration Court. That is a specialist Court, designed for specific field. In the matters directed by statute . . . it has exclusive jurisdiction, and when exercising it, it must take into account other considerations besides legal issues. It is concerned primarily with fairness . . . legal technicalities or analogy of rules will not always be helpful in achieving the objects of a Court [with] "unusual powers".

The above pronouncements clearly

show that relying on technicalities and principles which may apply to a District Court or the High Court are not compatible with the special objects of the Labour Court to decide a matter before it in fairness and true justice. In the last few years the Court of Appeal several times stressed the importance of implications to be derived from the main contract either as an implied contract, as in this case, or as important implied terms. Cooke P pronounced in the case of *Auckland Shop Employees v Woolworths New Zealand Limited* [1985] 2 NZLR 372, CA as an implied duty of the employer "to be good and considerate" (quoting *Woods v WM Car Services (Peterborough) Ltd* [1982] ILR 693, Lord Denning MR). The State Sector Act 1988, s 88, enacted this requirement and defined the principle in more details.

It is not quite fanciful to argue that through the instrumentality of the primary employer enforced by the secondary employer's assuming control over the workers, an implied contract, establishing in fact a master-servant or what may be called a quasi-master-servant relationship was created. This argument may find support in the Court of Appeal judgment, *Northland Milk Vendors Association Inc v Northern Milk Limited* [1988] 1 NZLR 537, CA, 530 HC, though its applicability by reason of different facts may be doubtful.

As to the duty of fairness Somers J in *McMenamin v Attorney-General* [1985] 2 NZLR 274 in relation to a District Court said:

> An inferior court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction. Such court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of the process.

The Labour Court like the District Court is a creation of statute. The above statement applies even more to the Labour Court which is not an inferior but a specialist Court having beside its exclusive statutory jurisdiction in the industrial field also the inherent jurisdiction of a Court of record.

Two other decisions, *Cocker v Tempest* (1841) 7 M & W 502 and *Connelly v DPP* [1964] AC 1254, HL underline the principle that any Court with a particular jurisdiction has powers necessary to enable it to act effectively within its particular jurisdiction, and these powers are inherent in its jurisdiction.

One more point may be mentioned: the landowner's right to prohibit access to certain persons. Such prohibition would lead to the same result as relying on lack of privity of contract. The dismissed workers would be regarded as trespassers. This issue, however, is outside the problem of the power to order joinder, and it is not necessary to elaborate it further.

Compliance order

The next question: has the Labour Court jurisdiction to make a compliance order against the secondary employer? If the Court has power to order joinder, then the secondary employer will become a party, and no doubt an order may be made against it under s 207 of the Labour Relations Act. Subsection (1) provides that "where any person has not observed or not complied with" certain statutory provisions as set out, or any award, agreement, order, determination direction or requirement made, among others, by the Labour Court or a grievance committee, the Labour Court "in matters where [the Labour Relations Act] gives jurisdiction" may require any person who is a party to the proceedings to obey. Accordingly on reading only subs (1) the person ordered to comply must be a party.

Subsection (2), however, provides that where a union, or an employers' organisation, or an association or a worker or an employer alleges having been prejudicially affected by non-observance or non-compliance with any statutory provision or order as described in subs (1), such a person "may commence proceedings against any person in respect of non-observance or non-compliance" for an order.

Comparing subs (1) with subs (2) and the use of the phrase "any person" it should be noted that in subs (1) it is clearly linked to the words "to which this person is a party". In subs (2), contrarywise, the "any person" against whom proceedings may be commenced need not be a party. An allegation of being prejudicially affected gives a right to proceed, and jurisdiction to the Court to deal with the application. Logically an order made against such "any person" not being a party to the proceedings may be enforced. It may be stated that such "any person" whose conduct is detrimental to the party applying for compliance, whether or not such "any person" agrees, by the very fact of the order, so to say through the backdoor, will become a party to the proceedings.

Subsection (7) of s 207 again uses the words "any person". Although paras (a) and (b) refer to plaintiff and defendant respectively, it is a logical consequence that the "any person" brought in under subs (2) will be a defendant. The sanctions set out in this subsection may be imposed, and enforced by a District Court under s 208.

The reasoning by Chief Judge Goddard in *NZ Airline Pilots* case (supra) in respect of s 299 applies to s 207. It should be accepted that the difference in wordings "that person is a party" in s 207(1) and "any person" in subs (2) expresses legislative intention and is not an error; likewise in s 299 "any party" in subs (1) and "any person" in subs (2) are deliberate different expressions. It is considered that this argument applies more forcefully to s 207(2) than to s 299(2) as in this last mentioned provision the words "who applies to the Labour Court for leave" refer to a different situation where a person "applies", but as Chief Judge Goddard pointed out the last sentence "the Labour Court may order any other person . . ." gives power to the Court to act without application.

The Labour Court, sitting as a full Court consisting of Chief Judge Horn with Judges Williamson and Finnigan in *NZ Harbours IUW v R D Smith and Others* [1988] ILB 42, WLC 28/88; an application for rehearing, was asked to answer (among others) the following question:

> Does the Labour Court have jurisdiction or power to make an order for compliance under s 207 of the Labour Relations Act 1987 without giving notice to the party against whom the order is sought and/or proposed to be made?

Chief Judge Horn and Judge Finnigan answered the question

with a clear "No", but Judge Williamson in his separate decision declined to give an answer with the comment that he "cannot presently think of any circumstances in which a compliance order should be made ex parte".

Analysing s 207 Chief Judge Horn stated:

> Subsection (2) . . . provides for an *originating* application for a compliance order where a person (being a union or an employers organisation or an association or a worker or an employer) alleges that a person has been *prejudicially* affected by non-observance or non-compliance as above, that person may commence proceedings against any person in respect of the non-observance or non-compliance and seek an order of the kind described in subsection (1). This is the provision for an originating application for a compliance order. As I perceive the practicalities of the matter, it is in respect of applications for compliance orders under subsection (2) that the questions of interim or ex parte compliance orders can arise.

The term "ex parte" primarily means an application by one party in the absence of the other, but the term "originating application" clearly indicates that such application may be made against *any person* if the applicant is prejudicially affected. Contrary to this contention it may be argued that the secondary employer not being a party, it cannot be ordered to observe and comply with any decision of the Court. The counter-argument, as already elaborated, is reference to the Labour Court's special jurisdiction in equity and good conscience.

The learned Chief Judge held that in respect of compliance orders the High Court Rules are not incorporated into the procedure unlike injunction matters by reason of s 307(2), and the jurisdiction as to such orders is confined to s 207(2). He added obiter that both in applications for injunctions and compliance orders in essential industries the public interest should be considered. As to the inherent powers he referred to the decision in *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 and *Clifford v Commissioner of Inland Revenue* [1966] NZLR 201 and commented:

> Courts are considered as possessing an inherent power to regulate their own procedures save insofar as the enacting law has itself done so. The Labour Court may have an inherent power as well as a statutory power derived from s 307(1) and (2) to make rules which could deal with ex parte compliance orders. But the qualification on that power is whether such rules would be inconsistent with the Labour Relations Act or with any regulations made under that Act.

Judge Williamson considered that the general intent of the legislature was to change the forum but not the remedy. He said:

> Because the remedy included the jurisdiction to make interim injunctions and to make them ex parte, it follow from the general intent that the Labour Court has a similar jurisdiction within its statutory limits.

Summary and conclusions

In conclusion it is firmly considered:

1 It can be validly argued that despite there being no privity of contract, ie direct employer-employee relationship, the secondary employer in such cases has the right of supervision and control which places him, her or it in the position of the "master".

2 The fact that the dismissed workers are employed by a primary employer and the secondary employer has only a contract for services with the primary employer, in other words, lack of privity of contract with the dismissed worker, is not decisive.

3 In view of the special powers under its equity and good conscience jurisdiction according to the substantial merits and equities of such a case, with special reference to ss 278, 279(4), 299(2), 303 and especially s 317(1)(a) of the Labour Relations Act, the Labour Court can make an order joining the secondary employer as a party to the proceedings.

4 The Labour Court has jurisdiction to make a compliance order against the secondary employer: Labour Relations Act s 207(7).

5 The Labour Court has power to enforce such an order: Labour Relations Act s 208. □

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should notify the organisers when sending in their registration form and fee. No guarantees are given, but the local membership of the ILA will try to arrange for student delegates to sample Queensland's hospitality in a home environment for those interested. The registration fee for students (or articled clerks) is only $250.

One of the attractions of the Conference is that the registration fee is "value for money". For the registration fee of A$625 (for ILA members and A$700 for non-members), delegates are entitled to attend all special events, workshops and committee sessions, the welcoming reception (Sunday), the reception sponsored by Bond University and the University of Technology, Sydney (Monday), the Vice-Regal Reception (Thursday), the Banquet (Friday), and enjoy morning tea, luncheons and afternoon teas on all days during the Conference. These and other benefits (including a full report of proceedings), are available at no additional charge.

This is a useful opportunity for all delegates to meet in Australia delegates from countries throughout the world and especially the Asian Pacific region and an opportunity to become part of the export of legal and business services into the region. After Australia, the ILA Conference will convene in Cairo (1992), Buenos Aires (1994) and The Hague (1996). This is an excellent opportunity to meet now in Australia, and to renew, possibly in the years to come, those friendships and professional contacts made in Australia in a professionally stimulating atmosphere. □