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Law and war

In his book *Revolt In the Desert*, T E Lawrence (more commonly known by his romantic title as Lawrence of Arabia), has a short, dispassionate, chilling sentence that says much about the reality of battle. He has described for over two pages the horror of the Turkish (and German) destruction and slaughter in the village of Tafas in 1918. He quotes himself as saying pitilessly "The best of you brings me the most Turkish dead". And then after describing the Arab attack on the retreating Turkish column he writes the deadly conclusive sentence: "By my order we took no prisoners, for the only time in our war". This chivalrous hero of romantic campaigns, seems to be saying that war is the true illustration of Hobbes' judgment that human life is nasty, brutish and short.

What Lawrence did in the sands of Arabia, the battles he won and how he did so, seemed insignificant at the time compared to the slaughter of Verdun, the Somme and Passchendaele. Then there were the horrors of the period from 1939 to 1945. Subsequently for the past 45 years there have been wars and rumours of wars, skirmishes, uprisings, coups and revolts, year in and year out. But for us these have been largely insignificant and we have ignored them — if not the civil war in Vietnam then certainly the eight year conflict between Iraq and Iran and so many others, particularly and tragically in black Africa.

The present Gulf War however is different. We cannot ignore it, and this for four reasons. The first is the size of the conflict, and its inevitable dominance of the news media. The second is the involvement of New Zealand Army units, even if only transport and medical units, alongside the fighting forces of the United States, Britain and Australia. Radio New Zealand, apparently running its own Jane Fonda foreign policy, was reported to have prohibited the use of the word "allies" in news stories in the context of the Gulf War, as though to pretend the Kuwaitis and Saudis had no allies and Saddam Hussein had a multiplicity of them! Radio New Zealand might wish to deny that these are our allies, but in doing so it gives the appearance of siding, at least by implication, with Saddam Hussein. Not that Radio New Zealand is alone in its perhaps unintentional pretence. Others are more strident and specifically denounce the United States, or George Bush personally for warmongering. But in *The Guardian Weekly* for 13 January 1991 Hugo Young exposed this argument by writing:

> . . . the useful demon of Uncle Sam simply won't stand up. Surprisingly, most of the anti-war left go halfway to admitting this even now. Almost everyone has said that Saddam Hussein's iniquity must not stand. No Ho Chi Minh he. But between their resounding denunciations of him and their resounding refusal to countenance decisive measures against him, a well-meaning but obvious unreality echoes off the walls of silence.

The fact of the matter is that this is our war. One does not have to be pleased about this, but the fact is undeniable. We are involved. Thirdly this war concerns, among other things, the economic interest of oil. For those who see the war as only about oil, as some sort of capitalist plot against a poor third world country this issue has become a justification for indulging again in an anti-American campaign. But undeniably oil is an important issue. It was oil that started the conflict in that it was the reason for the Iraq invasion of Kuwait. Iraq wanted to increase its share of the world's oil, to increase this share substantially, and Iraq went to war to do so. It did so for the reason that it is on oil that all modern industrial economies are based. This is also true of our own economic and social organisation. Whatever slogans are used, protecting our way of life, or maintaining a viable global economy or whatever, the truth remains that we, and the United States and the other allies are dependent on oil, its availability and its price. Oil is important for us but it was Iraq that made it an issue and cause of war. Iraq went to war and annexed Kuwait for its oil. It is in that sense particularly that oil is the cause of the war.

The fourth reason why this is our war is that we are part of the community of nations. In signing the United Nations Charter, in joining and taking an active part in and generally supporting the world body, New Zealand has assumed certain obligations to its fellow members, such as Kuwait. It is an imperfect world, and the United Nations is an imperfect body; but the military occupation and annexation of a member state of the United Nations is as clear a legal violation of the international order as is likely to be found. In terms of the international order and a developing global economy of the community of nations, the war may be legally justifiable and a political necessity; but even if this is so it must nonetheless be recognised as a tragic necessity.

There are those of course who adopt a self-righteous attitude and argue that Kuwait is not a democracy and therefore nothing should be done about it. Alternatively it is suggested that Kuwait was an imperialist creation with no historical political validity, and for this reason too

nothing should be done about its forcible destruction as a political entity. The historical, moral and legal basis for answers to these arguments were put forward by Bernard Lewis, Professor of Near Eastern Studies Emeritus at Princeton University and author of the magisterial book *The Arabs in History*, in an excellent article in *The New York Review of Books* for 20 December 1990. Bernard Lewis dealt with the argument about independent sovereign states after emphasising the true significance of the oil issue for the whole world. The point he made is that while the developed nations are dependent on oil for their prosperity the developing nations are dependent on it for the very subsistence of their economies, and they are the ones most likely to be affected by an oil monopoly that could be used for political purposes. He then went on:

> The second danger, even greater than the monopolization of oil, is the legitimization of aggression. In our opposition to Saddam Hussein's invasion and annexation of Kuwait and threat to Saudi Arabia, our previous support for Saddam Hussein and our present acceptance of undemocratic allies are equally irrelevant. In a world of multiple sovereign states, governments have a free hand within their own frontiers and do not have to pass some test of virtue in order to retain their independence. This may be wrong, but it is so. Under present rules, we have no right to designate democracies a protected species, and declare open season on the rest.

Concerning the question of the alleged arbitrary creation by imperialists of Kuwait as a sovereign nation state, Bernard Lewis turned to history. He wrote:

> The Iraqi dictator has offered various justifications of his invasion of Kuwait, none of which bears close examination. His immediate claim that Kuwait is a part of Iraq, separated by an artificial boundary drawn by British officials, is a dangerous absurdity. The frontier was indeed drawn by British officials, but so were all the other frontiers of Iraq, except for the frontier with Iran, which was agreed upon by Turkish and Iranian officials, with some outside help. If Saddam's case against Kuwait is accepted, no frontier in the continent of Africa and few in Asia would be safe, since almost every state could have equally legitimate claims on its neighbors. As to Saddam's argument that not just the frontier but Kuwait itself is an imperial artifact, it might be noted that while Iraq was created and delimited by Britain after the First World War out of three Ottoman provinces, Kuwait, as an autonomous polity ruled by its present dynasty, dates back to the mid-eighteenth century, and is thus somewhat older than the United States.

The war having started it is important to recall the distinction in international law between *jus ad bellum* and *jus in bello*. The first, the right to make war, is concerned with the rights and wrongs of the causes of a conflict. The second, the rights of those involved, is concerned with how the fighting is conducted. Does the concept of "total war" mean that there are no limits, no restrictions, no codes, no legal requirements? The international community does not, and historically has not accepted this. The excellent book by Geoffrey Best *Humanity in Warfare*, is a detailed consideration of this issue in a legal and historical context. The author is concerned to show that historically, and also in practical terms there has been a consistent effort to preserve some essentials of humanity in an activity that paradoxically is devoted to killing human beings. From the point of view of a strategist however the purpose of war is not to kill every enemy soldier, but to defeat the enemy as an organised force. It is because of this distinction that the military mind readily accepts the principle of surrender and of conducting war in some ways but not in others.

Murder, the deliberate killing of another human being, is almost universally regarded as the worst of crimes. But the warrior, one who kills as his profession, has been historically and still is almost universally regarded as the bravest of men. The reasons for this apparent contradiction are many. First, and most basically, every soldier puts his own life at risk. He (or she now) is a fighter not just a killer. Secondly the killing is done for a limited political purpose, and not as an end in itself. This is the distinction between the death of millions of soldiers in the Second World War and the extermination of millions in the camps of Auschwitz, Belsen and so many others. Finally, at a more formal, abstract level, there is the fact that soldiers are necessarily a disciplined force, killing and being killed for something – patriotism, duty, an ideology, a religion, whatever – that is considered larger or higher or more valued than themselves. It is this disciplined aspect of military activity that is the basis of the idea that there is a place for law in war. Even when, after a siege or battle, the sacking and looting of a city used to be allowed, it was always put down after a short period, and order and discipline re-established. It is because armies are disciplined bodies exercising the use of lethal force for a limited purpose that war and law, on the face of things so antithetical, can be seen to have a formal relationship. In a sense the fact that soldiers are professionals gives them a vested interest in some limitation on the killing activity itself.

Geoffrey Best quotes Vattel, the Swiss jurist who was writing on this question in 1758. The passage reads:

> Let us never forget that our enemies are men. Although we may be under the unfortunate necessity of prosecuting our right by force of arms, let us never put aside the ties of charity which bind us to the whole human race. In this way we shall defend courageously the rights of our country, without violating those of humanity. Let us be brave without being cruel, and our victory will not be stained by inhuman and brutal acts.

Vattel, of course, was not the only one to write in this vein from the time of the Enlightenment on. It is however particularly appropriate to cite him because he was Swiss. That extraordinary organisation the International Committee of the Red Cross to give it its full title, has been since its inception a Swiss gift to mankind. It is known and respected throughout the world for its humanity, its integrity, its unfailing commitment to the needs of individual men and women, caught up in conflict situations of whatever sort. Its effectiveness stems in large part from its extraordinarily restricted membership, restricted both in number, in national origin and in means of selection. The ICRC is a neutral, non-political institution of only 25 members, who are all Swiss citizens and are recruited by co-option. It was founded by a Swiss

banker Henri Dunant, and for its first forty years was presided over by a wise Swiss lawyer, Gustave Moynier.

What has been called the hard legal centre of the humanitarian approach to war is the Geneva Convention of 1864 concerned with Bettering the Condition of Wounded Soldiers. There were other relevant Conferences more particularly those at the Hague and at Geneva in 1906-07, and these updated and extended a degree of protection most importantly to prisoners of war. Since the First World War meetings have continued to be held and other Conventions adopted, of which the Geneva Conventions of 1949 were the most significant including an extension to civilians.

Iraq is a party to the Geneva Conventions of 1949 relating to the treatment of wounded and sick combatants, to the treatment of prisoners of war, and the protection of civilians. It has not however signed either of the Protocols of 1977. Protocol I, among other things, extends the Conventions specifically to all forms of medical units and medical transportation; in practical terms this means extending the protective effect of the red cross symbol. The Protocol also discusses and defines the varying status of both combatants and prisoners of war. Protocol II relates to armed conflicts that are not of an international character. The question however remains whether Saddam Hussein and the other present political and military leaders of Iraq who came to power by revolution will consider themselves bound by any of these Conventions. It is known that they have been breached, at least to some degree, in these first two weeks of the conflict. It remains to be seen whether this is part of a deliberate policy of flouting the Conventions or merely a temporary breach.

Law in war situations is a very practical discipline. It cannot stop the bloodshed, any more than the existence of a criminal code and a police force can prevent crimes being committed. But the rule of law even in war can be a mitigating factor limiting and restraining the effects of an activity that is essentially destructive in itself. Geoffrey Best concludes his book referred to earlier by writing that:

> The will and desire to limit them [ie. wars] are no less important than the practical likelihood of being able to do so, for they testify to the survival, even through experiences as discouraging as some through which we have recently lived, of the ideas that, after all, internecine strife is not the highest ideal of humanity; that men and women are not citizens of their nations alone; and that although men still find it necessary sometimes to fight each other, they can still understand the importance of discriminating carefully between the different means and styles of doing it.

PJ Downey

"War" in the Gulf

. . .

At common law no state of war exists until there has been a formal declaration of war by the Crown or hostilities have been commenced by the authority of the Crown. The Prime Minister, John Major, certainly had discussions with the Queen before the present hostilities were initiated, so at common law we would seem to be in a state of war.

However, the position is almost certainly governed by the International Convention Relative to the Opening of Hostilities (Hague Convention III) (The Hague, October 18, 1907, Cd 5029). This Convention, along with others, was signed at the Hague Conference in 1907 and requires a formal declaration of war. The Lord Chancellor's Department has issued a statement that the country is not at war with Iraq, stating "we are participating in an enforcement action on behalf of the UN pursuant to a Security Council resolution."

No such formal declaration of war has been made, which avoids various legal consequences which flow from a state of "war", considered below.

. . .

The consequences of making a formal declaration of war would be that all Iraqi nationals in this country would be classed as "enemy aliens". In *Sylvester's case* (1703) an "alien enemy" was defined as one whose state is at war with the Sovereign of England.

The legislation concerned with trading with the "enemy" in the Trading with the Enemy Act 1939 would apply. Under this legislation "enemy" means any state or sovereign of a state at war with Her Majesty

. . .

A person is deemed to trade with the enemy under the 1939 Act if he has any commercial, financial or other dealings with or for the benefit of an enemy. It is an offence to trade with an enemy.

. . .

There is already a substantial body of regulations dealing with the assets of Iraqis and Kuwaitis and restricting payments, back transactions and other financial and trading matters, in connection with Iraq and Kuwait and their nationals.

. . .

It is understood that the Government believes these regulations and its powers under the Prevention of Terrorism Act are sufficient without the necessity for declaring war and using the powers under the Trading with the Enemy Act.

An interesting practical consideration is in connection with companies who have attempted to enter into contracts with the "protection" of clauses, for example, permitting them to terminate such contracts in the event of "war". The courts generally take a common-sense view of "war" and such clauses would offer the necessary protection. Contracts may be frustrated.

Whatever the legal niceties, for all practical purposes we are at war, but for those involved in giving advice in connection with contracts or in interpreting statutes where, in both cases, reference to "war" is made there will be no alternative to a close scrutiny of the relevant legislation, its statutory definitions and the position under common law.

Susan Singleton
in *New Law Journal*
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Case and Comment

Stock Securities: Onerous and Impracticable?

Elders Pastoral Ltd v The Bank of New Zealand, Privy Council, 22 October 1990 (No 61) of 1989) Lords Bridge, Templeman, Griffiths, Ackner and Goff. [1991] BCL 372

The Privy Council decision in this case has now been released, with the Court rejecting Elders' appeal and confirming judgment for BNZ, albeit on a different ground from that adopted by the New Zealand Court of Appeal. Furthermore, their Lordships have stated the law in a way which, according to Cooke P, obiter, in his Court of Appeal judgment, would cast "an onerous and impracticable duty . . . on those dealing with a farmer [selling mortgaged stock] in the ordinary course of business".

BNZ was grantee under an instrument by way of security which had been given by a farmer who was also a customer of Elders. By the security, the grantor assigned and transferred by way of mortgage to BNZ his flocks of sheep and cattle, and certain other stock. It was duly registered under the Chattels Transfer Act 1924. Clause 15 of the security provided that

> . . . (in the absence of any direction to the contrary by the Bank) all moneys payable in respect of the sale of any of the said stock . . . shall be paid to the Bank whose receipt therefor shall be a sufficient discharge for or on account of the Grantor/s and the Grantor/s shall direct every purchaser . . . accordingly.

Elders, as agents for the grantor, sold some of the stock and received the purchase price from the purchaser. They applied the net proceeds of sale in repayment of an outstanding debt which the grantor had with them. The bank claimed it was entitled to those proceeds.

In the Privy Council their Lordships began by considering whether clause 15 of the security created an equitable assignment to the bank by way of a charge on a future chose in action, namely the right of the farmer to receive from a purchaser the sale price of the mortgaged stock. In the Court of Appeal Cooke P and Somers J were of the view that the clause did not amount to a contract to assign a future chose in action. Somers J noted that the clause was "not sufficiently clear" to amount to such an assignment, it being merely a contractual obligation on the part of the farmer. His Honour was of the view that, if the grantor did not give the direction required of him by the clause, purchasers would be entitled to assume that they could pay either the grantor or as directed by the grantor and, having done so, would be discharged from any further liability to either the grantor or the bank. Their Lordships disagreed, holding that the stipulation that the purchase moneys be paid to the bank "sufficiently clearly assigned to the bank the right to receive the purchase money as mortgagee and in the place of the mortgaged stock sold to the purchaser." As such, by clause 15 of the security, the farmer had effected an equitable assignment of the proceeds of sale of the mortgaged stock.

Their Lordships then considered whether the purchaser and Elders had notice of the assignment. Section 4(1) of the Chattels Transfer Act provides that "all persons shall be deemed to have notice of an instrument and of the contents thereof when and so soon as such instrument has been registered as provided by this Act." As the bank's security was clearly an instrument in terms of the Act ("Any . . . mortgage or any other document that transfers . . . the property in . . . chattels"), their Lordships concluded that notice of the assignment had properly been given by the bank to both the purchaser and Elders: "In the present case the mode of disposal of the mortgaged stock permitted by the Act of 1924 and the stock security imposes on the purchaser an obligation to pay the proceeds of disposal to the bank. The purchaser has noticed that his right to acquire the mortgaged chattels involved him in an obligation to pay the purchase price to the bank."

In the Court of Appeal Cooke P, without expressing a concluded view, felt that, in the situation of a buyer at a sale or a recipient of proceeds having only statutory notice of a grantee's rights under a stock security, "[i]t may very well be that, if the sale is in the ordinary course of farming business, third parties . . . are entitled to assume a direction to the contrary or other authorisation by the grantee. Otherwise an onerous and impracticable duty to inquire would fall on those dealing with a farmer in the ordinary course of business." Their Lordships did not accept that view, saying that, in the present case, "the purchaser and Elders were not entitled to assume that the bank has issued a 'direction to the contrary'." Furthermore, they did not believe that their ruling would cause any great inconvenience, and set out what they saw to be the avenues open to purchasers and auctioneers:

> A purchaser of chattels may either trust his vendor or trust the auctioneer or carry out a search against the vendor. An auctioneer may either know or enquire from the vendor or search against the vendor to ascertain if there is any

> stock security which either forbids a sale without the prior consent of the mortgagee or requires the proceeds of sale to be paid to the mortgagee. It is likely that an auctioneer will be aware of the terms of the standard form of the stock security issued by the bank. It is likely that any prudent lender on the security of stock will also require the proceeds of sale of mortgaged stock to be paid to the lender. The purchaser need not pay and the auctioneer need not transmit the purchase moneys to the vendor until it is clear that no registered instrument requires payment to some other person.

They thought that, if this did cause any inconvenience, it was due to the very nature of the protection afforded to lenders by the Chattels Transfer Act which "would be much weakened if a mortgagee of mortgaged chattels was unable to secure the proceeds of sale of the mortgaged chattels."

The High Court had been told by counsel for the parties that the point in issue in this case was "of very great moment to the rural industry". Moreover, counsel for Elders had told the Court that clause 15 was standard in bank stock security documents and that, in the past, banks had not required compliance with that clause. Master Hansen had accepted that such conduct might give rise to an arguable case of estoppel, although, on the evidence, he held that there was no such conduct evident. He acknowledged that this point was also "of considerable moment to stock firms."

If, in fact, stock firms have been proceeding on the basis that banks either would not, or could not, enforce compliance with the likes of clause 15 in the BNZ stock security, then this decision of the Privy Council will surely cause them to re-think their position and the steps which they will need to take, when effecting a sale of mortgaged stock, so as to protect their interests and those of the purchasers with whom they deal.

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Domestic Protection: Recent decisions regarding non-molestation orders

Of possible interest to both practitioners and academics are three recent unreported decisions on the subject of non-molestation orders: *B v P* (FP 004/43/89, Auckland District Court, Judge M D Robinson, July 1990); *B v The Police* (AP 88/90, High Court, Auckland, Robertson J, July 1990); and *Bicknell v The Police* (AP 68/90, High Court, Rotorua, Doogue J, November 1990).

B v P

This was an unsuccessful application to have interim non-violence and non-molestation orders rescinded and declared void ab initio. The orders had been obtained by the respondent, the applicant's estranged wife, on an ex parte application in May 1989. It had been accepted that delay would entail risk to her personal safety (Domestic Protection Act 1982, ss 5(1)(a) and 14(1). The respondent's affidavit in support of her application contained a number of claims regarding her husband's behaviour and his psychiatric and criminal history. At the hearing in July 1990, some of those claims were found to be either (or both) untrue or to be in breach of the rule that affidavit hearsay evidence must supply details of its source (District Court Rules 1948, R 199(1)(c), applicable to Domestic Protection Act proceedings per the Domestic Protection Rules 1983, R 5(4).) One claim which breached that rule was held inadmissible:

> . . . the Court may choose to exclude such evidence where the source of such evidence is unreliable and the effect of placing the evidence before the Court can only aggravate the antagonism between the parties and prejudice the chances of conciliation which counsel is obliged to promote under section 8(b) of the Family Proceedings Act 1980. (Judge Robinson.)

However, a further claim which also breached that rule regarding hearsay was accepted, apparently on the grounds that, at the July hearing, the applicant acknowledged its truth (although his testimony also indicated that in some respects – ie the question of the time of the alleged incident – the respondent's claim remained false).

On the question of truth, the respondent admission at the hearing that another two of the claims in her affidavit were false did not provide grounds to declare the interim orders null and void. After referring to *Brinks-MAT Ltd v Elcombe & Ors* [1988] 3 All ER 188, 193 (". . . an ex parte injunction will be discharged if it was obtained without full disclosure . . . [but] this judge-made rule cannot be allowed itself to become an instrument of injustice." Balcombe LJ), his Honour held that the errors in the affidavit, "whilst serious in themselves", did not affect the evidence upon which the orders were justified. The errors were "in connection with evidence which was not strictly relevant or is of little importance so far as the making of the protection orders are (sic) concerned." (Judge Robinson.)

In this case, there was a preponderance of evidence on which to justify the orders. The presence of the "serious" errors and defects was not fatal to the orders. Sir John Davidson MR (*WEA Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721, 727, cited with approval by Judge Inglis QC in *Dawson v Dawson* (1985) 3 NZFLR 353, 354) noted that

> . . . ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. . . . the applicant is under a duty to make full disclosure of all relevant information . . . .

Despite that (and the *Brinks-MAT*) exhortation to openness and accuracy, the decision of Judge Robinson indicates that in respect of affidavits supporting these ex parte applications, in the interests of justice there is a line up to which errors and defects are acceptable and will not affect the application. Where that line is to be drawn depends heavily on the strength of the balance of the affidavit evidence, but it may prove extremely difficult to estimate in many cases.

B v The Police

B appealed against conviction for breach of an interim non-molestation order made against him on ex parte application. The appellant had two arguments, the first going to actus reus, the second to the question of intent: (i) there

must be service of the order before a breach of it can be committed; (ii) there must be knowledge of the order before a breach of it can be committed.

The first argument turned upon an interpretation of the opening words of the Domestic Protection Act 1982, s 16: "Where a non-molestation order is in force, the person against whom it was made". A list of prohibited activities followed. The appellant read those words to mean that there may be an order "made" but not "in force", and if so it would not be an offence to perform any of the activities listed. The argument went on to suggest that the distinction between orders "made" and orders "in force" could only be found in s 14 and its reference to ex parte orders: an ex parte order which is "made" is not "in force" until served. The learned Judge rejected both parts of that argument: ". . . an order once 'made' is an order 'in force'." (Robertson J.) The judgment does not, however, discuss in any detail the reasons for that finding, nor does it explain the wording of s 16. With respect, it is submitted that the appellant was absolutely correct in drawing the semantic distinction in the wording of s 16, but less so in linking it exclusively to s 14 for its explanation. As the appellant suggested, orders can be "made" but need not be "in force". Discharged interim orders fit squarely into that category; reference to the service of ex parte orders is unnecessary to give meaning to s 16. This interpretation of s 16 would remove any suggestion that the provision was poorly drafted ("It may be that Parliament could have expressed itself in another way." Robertson J). "In force" should, then, be read as "made and is in force", and as his Honour ruled, the force of the order does not depend upon its service.

Its force does, however, depend upon the respondent to the order having knowledge of its existence and of its provisions (the appellant's second argument). *Police v Lindsay* [1989] DCR 389 is authority for the proposition that knowledge of the order is a necessary ingredient of the offence of its breach, and although that case was not expressly referred to by Robertson J the proposition now has High Court approval. The evidence showed that B had knowledge of the existence of the order, although service had not been effected. The appeal against conviction was dismissed.

Bicknell v The Police

Bicknell appealed against conviction on one count of threatening to kill and one of breach of a non-molestation order. The focus here is on the second of those. (The first was dismissed.)

An occupation order and a non-molestation order had been granted in favour of the appellant's wife. While both were in force, the appellant entered on to the porch of the building in which his wife was living. He did this with his wife's implied consent. That consent was neither withdrawn nor revoked at any time. It must be inferred from the judgment (the facts are unclear on the point) that the appellant then entered the home itself. As to that entry, there was a dispute about whether the appellant had his wife's consent (express or implied). Counsel for the respondent submitted that there was no consent, and that therefore there was a technical breach of the non-molestation order. The relevant parts of s 16 read:

> 16. Where a non-molestation order is in force, the person against whom it was made –
> (a) Shall not enter or remain on any land or building which is in the occupation of the applicant . . .
> (i) Without the consent (express or implied) of the applicant . . .

Counsel's submission was rejected by Robertson J:

> The section of the Act is specific. It refers to "enter . . . on any . . . building". [Counsel for the respondent] had to accept that there was clear evidence that the appellant was entitled by virtue of implied, if not express, consent from previous conduct and conduct on the particular day that the appellant was entitled to enter on to the porch of the building. He submitted, however, that there was no right of entry into the building but he had to acknowledge that the statute does not refer to entry into the building but only entry onto the building and that such consent existed in the present case.

The appeal was successful on that count. With respect, however, the interpretation of s 16 indicated by its truncated reference in the above quotation is questionable. The assumption is that the preposition "on" refers to both "enter" and "remain". It is submitted that "on" refers only to "remain", which could not sensibly stand alone without it. "Enter", on the other hand, has no need of that word, and indeed makes more sense without it. Strictly speaking, that interpretation would require commas after "enter" and after "or remain on", but given the historical reluctance to use such punctuation, their absence is understandable.

By that interpretation, a respondent to a non-molestation order would not be in breach of it if, with consent, he or she entered on to a building occupied by the holder of the order, but did not enter the home itself. That is neither worrying (given the presence of consent) nor novel:

> [These orders] are of a kind designed to protect the [holder] against an unreasonable invasion by the defendant of her privacy; but they are not designed to provide her with a fortress within which she can isolate herself entirely from any communication with the defendant. The purpose of a non-molestation order is to prevent molestation; it is not a non-communication order. (*Police v N* (1984) 2 NZFLR 353, 355, Judge Inglis QC)

The interpretation suggested would also support counsel's argument for conviction in this case, and so provide a greater degree of security for those holders of non-molestation orders who agree to communicate with their ex-partners – in the garden, on the porch, on the doorstep; anywhere in the open – but who do not want to be with them away from the protective public eye. By recognising the right of a person, against whom a non-molestation order exists, to be on a building with the consent of the order's holder, but also recognising the right of the holder to deny them entry into it, the Courts could provide that security. Section 16 can, without strain, be interpreted to that end.

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New hope for debt subordination

By Ross Grantham, Department of Commercial Law, University of Auckland

This article considers a recent decision of the Court of Appeal in respect of the question of whether on the winding up of a company by the Court the statutory provisions providing for the order of distribution of the company's assets can or cannot be varied by the contractual arrangement in existence at the time of the making of the order. A short comment on the case Attorney-General v McMillan & Lockwood Ltd *was published in the Case and Comment section of the New Zealand Law Journal at [1991] NZLJ 2. The author of this article takes a more critical view of the decision of the Court of Appeal.*

Debt subordination it is said is a simple concept. It involves creditors agreeing that one or more of their number shall stand behind the general body, when the time for payment arrives. The efficaciousness of this arrangement depends upon the agreement surviving the onset of insolvency. It is here however that this simple concept becomes complicated, as in most Commonwealth jurisdictions there are statutory provisions providing for the order of distribution of the company's assets on winding-up. The issue which has thus come before the Courts has been whether the statutory order can be varied by contract. As the authorities have differed in their responses to this question, the decision of the New Zealand Court of Appeal in *Attorney-General v McMillan & Lockwood Ltd (In Rec, In Liq)* [1990] BLC 1508 (see generally Grantham [1989] NZLJ 224) is of considerable interest.

The case concerned two contracts entered into between McMillan & Lockwood Ltd and the Crown, in 1985 and 1987, for the construction of buildings in two New Zealand provincial towns. These contracts provided for payment by instalment, on the basis of an architect's certificate of the value of work completed to that date. By Clause 19.10 of the agreement the architect was entitled to refuse to issue a certificate until the company could demonstrate that all sums owing to subcontractors had been paid. In addition, Clause 19.11 granted the Minister of Works and Development the power to make payments directly to subcontractors, out of moneys owing to the company.

There also existed in New Zealand at that time the Wages Protection and Contractors' Liens Act 1939. This Act created a lien over land and chattels in favour of those who worked on the land and chattels, and in favour of those who supplied materials. However as this Act did not apply to the Crown the practice developed, as evidenced by some 750 Ministry of Works and Development contracts, to include clauses such as Clause 19. The purpose of which was to achieve an effect similar to that of the Act.

By mid 1989 most of the work had been completed and a total of $310,000 was owing to McMillan & Lockwood Ltd. However under neither contract had the company been able to satisfy the architect that all sums owing to subcontractors had been paid. The debenture holder of McMillan & Lockwood Ltd then intervened and placed the company in receivership. Finally in September 1989 an order was made to wind the company up. At this point the Minister indicated that he intended to exercise the powers in Clause 19 and make payments to the subcontractors.

The action commenced by the liquidator challenged the exercise of this power. It was argued that as the effect of Clause 19 was to prefer subcontractors over other unsecured creditors, the clause infringed the pari passu rule of insolvency law, and was therefore void.

At first instance ((1990) 3 BCR 654) Ellis J held that the agreement infringed the pari passu rule and that in accordance with the decision of the House of Lords in *British Eagle International Airlines Ltd v Compagnie Nationale Air France* ([1975] 2 All ER 390), such agreements were void as being contrary to public policy. It had been contended by the Crown that the Wages Protection and Contractors' Liens Act, although not binding on the Crown, nevertheless indicated an overriding policy concern in favour of the efficacy of such agreements. Ellis J accepted that while the Act was in force this was so, but that as the Act had been repealed prior to the making of the order for winding-up, the general rule established in *British Eagle* applied. This decision was appealed by the Crown. The Court of Appeal, by a majority (Richardson and Bisson JJ), dismissed the appeal and agreed that the contract infringed the pari passu rule. In dissent, Williamson J agreed with the trial Judge that the Wages Protection and Contractors' Liens Act established a competing policy concern, but unlike Ellis J, Williamson J held the rights acquired before the Act was repealed, should continue to be given effect to.

The decision of the majority rested upon two main conclusions. First, it had been contended by the Crown that under the terms of the New Zealand legislation, the pari passu rule did not apply to a winding-up administered by the Court. This contention was rejected on two grounds. First, that although the only specific reference to a pari passu distribution in the Companies Act 1955 was in s 293, and this was specified to apply only to voluntary windings-up, s 293 must apply to compulsory windings-up as,

> it is inconceivable that the legislature, in failing to provide in equally direct terms for the pari passu rule to apply to

> winding up by the Court, could have contemplated an uneven distribution of the property amongst different unsecured creditors . . . (p 7)

Secondly, the Court felt that in any event the pari passu principle did apply to compulsory windings-up because s 307 of the Companies Act 1955 incorporated into such windings-up the rules for the time being in force under the law of insolvency. Thus:

> When [the Companies Act] was passed in 1955, bankruptcy was governed by the Bankruptcy Act 1908, s 120(e) of which provided that the property of a bankrupt should be applied by the assignee "in payment pari passu, of all debts provable and proven in the bankruptcy" . . . . While s 104(f) of the Insolvency Act 1967, the counterpart of s 120(e) of the 1908 Act, does not refer expressly to pari passu, the same principle of ratable division . . . continues to apply. (p 8)

This conclusion, which the Court felt was supported by the comments of Lord Cairns in *Webb v Whiffin* ((1872) 5 LRHL 711), meant that the money payable under the contract, which although not actually due was nevertheless an asset of the company, was required to be distributed pari passu amongst all unsecured creditors.

This finding required the Court to then turn to the issue of whether the requirement of a pari passu distribution could be varied by contract. In the majority's opinion while

> it is arguable that the right to share equally can be waived by the creditor . . ., (p 16)

the principle to be applied in a situation where the agreement between the creditor and the company conferred priority on that creditor, was that established by the House of Lords in *British Eagle*. This principle was that

> a company cannot by contract and for whatever business reasons, leave some of its unsecured creditors at an advantage over others when it goes into liquidation. (p 16)

It followed, as the liquidator of McMillan & Lockwood Ltd had contended, that as this was the effect of Clause 19, the agreement was void and the pari passu rule prevailed. Williamson J who agreed with the first conclusion, and with the principle in *British Eagle*, felt the existence of the Wages Protection and Contractors' Liens Act indicated that public policy justified an exception to the rule in favour of subcontractors (p 15).

The two conclusions reached by the Court hold considerable significance for those wishing to enter into agreements to subordinate debt, or any other informal arrangement with creditors. The first conclusion merits some comment as it is a conclusion reached apparently in spite of the terms of the New Zealand legislation. The second conclusion, that statutory provisions providing for the order of distribution cannot be contracted out of, is potentially of even greater significance. The conclusion reached by the Court, although adopting the reasoning of the House of Lords in *British Eagle*, may contain within it the potential to limit the scope of that decision and to again open the door for effective subordination of debt in New Zealand and England.

I The pari passu rule and the Act

The Court's first conclusion, that the New Zealand statutory provision dealing with winding-up require a pari passu distribution is open to considerable doubt, as neither of the grounds relied upon by the Court would seem to support this conclusion. The first of these grounds, that s 293 applied to compulsory windings-up, overlooks a number of matters. Companies statutes in both England and New Zealand have historically provided separate provisions for voluntary and compulsory windings-up. The authorities which have considered these provisions have consistently maintained that the equivalent of s 293 applied only to voluntary windings-up. As F B Adams J put it in *Re Walker Construction Co Ltd (in liq)* ([1960] NZLR 523):

> So far as I can gather, s 293 has never been regarded as having any application except in a voluntary winding up, and one has to seek elsewhere for statutory authority for pari passu payment in a winding up by the Court. (p 531)

The same view has found favour in England. In a passage, quoted by the Court of Appeal, in *Webb v Whiffin*, Lord Cairns acknowledges that:

> It is quite true . . . that that [s 293] applies to the case of a voluntary winding-up only. (supra pp 734-735)

While it must be conceded the reasons for the legislatures of both England and New Zealand providing separate provisions for voluntary windings-up are less than apparent, it should be noted this has not tempted previous authorities to suggest s 293 applies to anything other than voluntary windings-up. The explanation given by Lord Cairns in *Webb v Whiffin* of this phenomenon has, it seems, satisfied the curiosity of most Courts.

In addition to their finding that s 293 applies to compulsory windings-up being inconsistent with prior authority, the Court's suggestion that this conclusion is a necessary one, as Parliament could not have intended differences between the modes of winding-up, is valid only with the benefit of hindsight. When the Companies Act was passed, as the Court acknowledged (pp 8-9), the bankruptcy legislation incorporated into the Act expressly provided for pari passu distribution. The possibility of differences between the types of winding-up arose only through changes to the bankruptcy legislation in 1967. Thus it is suggested, as when the Companies Act was passed in 1955 pari passu distribution was provided for, for both types of winding-up, it can not now be said simply because of changes to other legislation that Parliament in 1955 must have intended s 293 to apply to both types of winding-up.

The second ground, which is necessarily an alternative to the first, relied upon by the Court to justify its conclusion that a pari passu distribution is required by statute also warrants comment. As the Court acknowledges s 104(f) of the Insolvency Act 1967 has unlike its predecessors omitted any references to a "pari passu" or "ratable"

distribution. The Court by suggesting that the principle continues to apply notwithstanding the absence of express references to it is necessarily implying into the Act words which are not present. Traditionally the Court's power to read words into an Act was restricted to where the

> words of a statute are so obscure or doubtful in their meaning they are not capable of grammatical construction (*Halsbury's Laws of England* 4th ed, Vol 44, para 862),

Any additions to an Act beyond this, and the Court was held to have committed the gravest of sins, usurping the legislative function.

More recently however, the Courts have begun to view their function as being one of making the Act work as it was intended. To the extent that the Act does not do this, the Courts now feel entitled to add words to the Act. While there have been calls for English Courts to embrace this approach, its most enthusiastic reception has been in Australasia. The New Zealand Court of Appeal recently approved such an approach when it said

> the Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightfully belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended. (*Northland Milk Vendors Assoc. Inc v Northern Milk Ltd* [1988] 1 NZLR 530, 538)

What we have seen in *McMillan & Lockwood Ltd* is an example of this. The omission of references to the pari passu principle is assumed to be accidental and the Court has divined in the scheme of the Insolvency Act an indication that Parliament nevertheless intended pari passu distribution. This intention is then used to justify the insertion of words in, or as it is sometimes put the rectification of, the Act. While in New Zealand such action is fast ceasing to be novel, it must not be lost sight of that "there is a line, which must continue to be drawn, between what the legislature wanted, and what the Court itself wants." (Burrows, *Interpretation of Legislation: A New Zealand Perspective* 9th Commonwealth Law Conference, 1990, 285, 286) The question that the judgment of the Court in *McMillan & Lockwood* does not satisfactorily answer is, why is it a necessary inference that the omission was a mistake, and not deliberate. The inclusion of the word "ratable" in three of the ten paragraphs of s 104 must surely suggest that the word has been used in a discriminating fashion. Indeed the authors of *Morrison's Company Law* (14 ed, para 40.24) go so far as to suggest that by this omission "the Legislature has endorsed the decision in *Walker*".

II Private right or public policy

The other significant conclusion reached by the Court of Appeal was that the statutory provisions for pari passu distribution could not be contracted out of by the company. Prior to this decision it was possible to discern two lines of authority on this issue. One line, which began with *Re Walker*, held that

> the statutory requirement of pari passu does not rest on considerations of public policy, but is a matter of private right (supra p 536),

which a creditor may contract away. While doubt was cast on the authority of this decision by *Re Orion Sound Ltd* ([1979] 2 NZLR 574), later Australian authorities have consistently preferred the *Walker* approach. The other line of authority, which held contracting out to be contrary to public policy, is represented by *British Eagle*. The comments in that case of Lord Cross, together with the decision in *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* ([1972] AC 785 (the reasoning of this decision is however flawed: Grantham [1989] NZLJ 224)), are generally taken to deny efficacy to any agreement which purports to alter the statutory order of distribution. The extensive references to Lord Cross' judgment and the adoption of the principle his Lordship enunciated, would at first glance appear to place *McMillan & Lockwood Ltd* firmly within the *British Eagle* line. A closer examination however reveals that the Court of Appeal acknowledges the possibility of certain kinds of contracting out, and in the process adopts a distinction which if generally followed would limit the scope of the *British Eagle* principle, in England as well as New Zealand. The majority, it will be recalled, prefaced their approval of the *British Eagle* principle with the comment that it is arguable that the right to share equally in a distribution might be waived. In this there is an indication that the public policy concerns referred to by Lord Cross only deny to the company the ability to contract with creditors to alter the mode of distribution. It therefore remains possible, as the authors of both texts cited by the Court suggest (*Morrison's Company Law*, 14 ed, and *Palmer's Company Law*, 24 ed), that an agreement made between creditors providing for the deferral of some claims would not frustrate the policy behind the pari passu rule, even where the Act, as the Court insists, provides for the order of distribution. Therefore, while agreements like those in *McMillan & Lockwood Ltd* in which the company prefers one creditor over another, will continue to be avoided, the typical subordination agreement where "an unsecured creditor agrees not to be repaid until another unsecured creditor is repaid in full" (Johnston (1987) 15 ABLR 80), will not fall within the ambit of the principle.

If this is indeed what the Court had in mind, their views would echo those expressed in *Horne v Chester & Fein Property Developments Pty Ltd*. Southwell J, in that case, took the view that the principle of public policy referred to in *British Eagle* was only that a creditor's right to share equally could not be taken away by the company. Thus as the agreement in *British Eagle* had the effect of claiming for some creditors, including Air France, "a position analogous to that of secured creditors" (*British Eagle*, supra p 410), a position which even Air France conceded was "anomalous and unfair to the general body of unsecured creditors" (*British Eagle*, supra p 410), the agreement was contrary to public policy. However it followed in Southwell J's view that where the effect of the

> agreement of the parties is in no way to cause detriment to a

> creditor not a party to that agreement (supra p 252),

it would not be contrary to public policy to give effect to it.

The distinction adopted by the Court of Appeal, if followed generally, would have the effect of reconciling the lines of authority by suggesting they each deal with a different situation. In *Re Walker* the agreement was of the true subordination type, made between creditors, providing for the deferral of their claims to other creditors. The type of agreement which will be contrary to public policy on the other hand, is the type, seen in *British Eagle* and *McMillan*, that prefers one creditor over the rest. To the extent therefore that *Re Walker* and *British Eagle* deal with different situations they are not inconsistent. There must however be some doubt whether such a distinction will gain general approval. While it is true that if viewed with the distinction in mind the decision in *Ex Parte MacKay* (1873) 8 Ch App 643, the primary authority relied upon in *British Eagle*, may also be seen as dealing only with the preference type agreement, it must be acknowledged that more recent authorities have viewed the principle in *British Eagle* as applying equally to preference and subordination agreements. In *Re Orion Sound* Mahon J considered that *British Eagle* overruled *Re Walker*, while in *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] 1 All ER 155 Peter Gibson J saw the principle established by Lord Cross to be that

> where the effect of a contract is that an asset . . . would be dealt with in a way other than in accordance with s 302 [of the Companies Act 1948,] then to that extent the contract as a matter of public policy is avoided . . . (p 168)

Despite these doubts this distinction may yet prove an attractive one to future Courts. The prohibition, which the *British Eagle* principle is usually thought to impose on subordination, has been the subject of the persistent criticism that

> it is hard to see what consideration of public policy is relevant to post-liquidation subordination, which merely affects priorities between the two creditors concerned and makes not one jot of difference to the rights of other creditors. (Goode, *Principles of Corporate Insolvency*, 1990, p 65)

The distinction adopted by the Court of Appeal would seem to answer this criticism by accepting that there are indeed no such policy considerations, and therefore no need to invalidate such agreements.

Conclusion

While the agreement in question in *McMillan & Lockwood Ltd* was not the typical subordination agreement, the conclusions reached by the Court are directly relevant to such agreements. So far as New Zealand is concerned, the Court's conclusion that the pari passu is enshrined in the Act must be considered doubtful. While under a purposive mode of interpretation the Courts have some authority to read words into the Act, it is by no means clear that to do so would have furthered the legislative purpose. In the event of the Court's second conclusion however, the doubts surrounding the first may not prove to be crucial. The Court, by accepting that there is a distinction between agreements made with the company to prefer creditors, and agreements made between creditors, have revived hopes that subordination agreements and informal compositions with creditors will be effective in insolvency. □

Appointment of Mr Justice Penlington

Just before Christmas the Attorney-General announced that Mr Peter Penlington QC of Christchurch was to be appointed as a High Court Judge.

The new Judge was educated at Canterbury University College from which he graduated in 1956. From 1959 to 1977 he was a partner in the Christchurch law firm of R A Young Hunter and Co. In 1977 he commenced sole practice as a Barrister. The following year he took Silk. He has been a Judge of the Court Martials Appeal Court of New Zealand since 1983.

He was formerly Chairman of the Criminal Law Reform Committee and a member of the New Zealand Law Reform Council. He has been a member of the panel of counsel who conduct prosecutions in Christchurch, and has also been a member of the national panel of those who conduct prosecutions under the Serious Fraud Office Act.

His Honour was a former President of the Canterbury District Law Society and at the time of his appointment was Chairman of the New Zealand Law Society's Ethics Committee. His involvement in community affairs includes his current membership of the Board of Governors of Christ's College and he was at one time President of the Christ's College Old Boys Association.

The new Judge is 58 years of age. He is married and has three children. His Honour will sit in Hamilton. □

Guilt by inference

By Don Mathias, a Barrister of Auckland

Sometimes, the mythical reasonable man otherwise known as a juror has to use his or her judgment in drawing — or refusing to draw — an inference from a factual situation. Don Mathias in this article makes the point however that some inferences cannot be drawn as a matter of law. He points out that the cases clearly show that the inference drawn must itself indicate guilt beyond reasonable doubt. The rejection of defence evidence still leaves the question to be determined whether the evidence that is accepted will support the inference of guilt, again, beyond a reasonable doubt.

When can the prosecution correctly submit that the question of guilt is a matter for the tribunal of fact to decide as a matter of inference? Such a submission is frequently made in answer to an application by the defence for a discharge on the grounds that there is no case to answer, or on the grounds that a properly directed jury could not conclude that the offence had been proved to the required standard. There is a danger that the issue will be decided without a rigorous application of legal principles to the evidence adduced in the case, the Judge instead yielding to the temptation to simply leave it to the jury to determine as a matter of common sense. Yet even where the accused has given evidence and has been disbelieved an appeal against conviction may succeed if the issue of guilt should not have been left to the jury because such inferences as obviously were made should not in law have been made. An understanding of this potential is clearly a powerful resource for the defence. The first step towards an explication of inference is consistent use of appropriate terminology.

Terminology

In discussing inferences it is useful to employ an extended version of the analysis of facts used by Fisher J in *Auckland City Council v Wotherspoon* (1989) 5 CRNZ 110, 116-117. In endeavouring to establish the case against D the prosecution will lead evidence of various facts; some of these facts will be essential for the prosecution case in that they allege the various ingredients of the offence which it is sought to prove. These are termed *facts in issue.* In a particular case there may be no dispute from the defence as to some facts, so these could not properly be said to be in issue, but for the purposes of analysis it is sufficient to say that facts in issue are those which must be established by the prosecution to prove its case. Distinct from facts in issue are *subordinate facts*, that is, facts which go to the admissibility of evidence, or to the competency or credibility of witnesses, or to other collateral matters, Subordinate facts do not constitute ingredients of the offence. If a particular fact is not a fact in issue it will be a subordinate fact.

Each of these two kinds of facts may itself be of one of three kinds. A *primary fact* is a fact proved by a witness who saw it or did it, or a fact proved by production of an exhibit, or by direct observation by the tribunal of fact as where a view is taken. A primary fact may be variously called factum probans, evidentiary fact, fact established by direct evidence, or circumstantial fact. A primary fact may be either a fact in issue or a subordinate fact. In considering inferences it is convenient to extend the categories recognised by Fisher J (who was not concerned with this point in *Wotherspoon*) to two: a *primary inference* is a conclusion drawn from primary facts by a process of reasoning; a *secondary inference* is an inference drawn from a combination of either inferred facts or inferred facts and primary facts. Again, secondary inferences may be either of facts in issue or of subordinate facts. Fortunately the only significance of the difference between primary and secondary inferences for present purposes is in drawing attention to the need to avoid considering facts in isolation — a practice rejected in *Thomas v R* [1972] NZLR 34.

The method of inference

It is fundamental that before an inference of a fact in issue can be made the primary facts or primary inferences upon which it is based must be proved beyond reasonable doubt. This is a consequence of the standard of proof and the logic of inferences. In *Chamberlain v R (No 2)* (1984) 153 CLR 521 Gibbs CJ and Mason J said (p 536)

> . . . the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt.

Murphy and Brennan JJ agreed. See also *Chow* (1987) 30 A Crim R 103, *Melrose* (1987) 30 A Crim R 332. This is not to say that the primary facts themselves must establish guilt beyond reasonable doubt, for what would be the need for inference if they did? On the other hand, inferences of subordinate facts (for example the fact that a given witness is wrong on a particular point) do not have to be based on facts proved beyond reasonable doubt unless the subordinate fact is to be used as the basis for an inference of a fact in issue.

While the members of a jury

must agreed on their verdict, they need not agree on how that verdict is reached. Different jurors may accept different evidence and some may draw inferences from some facts while others draw inferences from other facts: *Thomas*, supra. On the individual level, a juror cannot draw an inference to the standard of beyond reasonable doubt if he or she is not satisfied to the same standard of the primary facts upon which that inference is based: *R v Van Beelen* (1973) 4 SASR 353, 379: it is an

> obvious proposition of logic, that you cannot be satisfied beyond reasonable doubt of the truth of an inference drawn from facts about the existence of which you are in doubt.

On its own a fact proved beyond reasonable doubt may have little probative value in relation to a fact in issue, but in combination with other facts similarly proved (each on their own having small probative value) the inference of the fact in issue may be made beyond reasonable doubt. An illustration is *Makin* [1894] AC 57, discussed on this point by T C Brennan KC in (1930) ALJ 106, 109. Ds were charged with the murder of an infant which was found buried in their backyard. On its own, the fact that the body was in their backyard was of little probative value to the fact in issue which was again identity. But other facts (proved beyond reasonable doubt) were that four other infants' bodies were found buried in the same yard (again not particularly probative), and six were found buried in a yard where Ds had previously lived, and two others in another place where they had lived and one in yet another. (Your cue, Lady Bracknell.) From this sort of situation arises the old cords-of-a-rope metaphor, used by Pollock CB in *R v Exall* (1886) 4 F and F 922, 928; 176 ER 850, 853 and approved by the Court of Appeal in *Thomas* supra. Here inferred facts may be regarded as the cords of a rope; one cord may be insufficient to sustain the weight but three stranded together may be enough. Different jurors may rely on different cords.

Aspects of this metaphor make two points: firstly, the jurors need not agree on the evidence they accept (the different cords aspect), and secondly, inferences can be strengthened by their context (the addition of cords aspect). For example, the fact in issue in *Thomas* was the identity of the murderer and the primary facts included the following: (1) the victims died of gunshot wounds, (2) the bullets apparently came from a gun owned by D at the time (taken together these facts, if accepted beyond reasonable doubt, could hardly prove the fact in issue to that standard), (3) the bodies had been bound to an axle, (4) the axle came from D's farm (again, taken by themselves facts (3) and (4) would not prove identity beyond reasonable doubt, but considered with facts (1) and (2) they go further towards that standard; of course a stranger could still have taken D's gun and ammunition and axle and committed the crimes), (5) the wire which had bound the bodies to the axle was of a type found on D's farm but on no other farm in the area searched by the police (again, more probative in combination with the other facts, but still short of proof beyond reasonable doubt), (6) D had had an association with the female victim before she was married to the male victim, (7) D had been inactive when the police sought the assistance of those residing in the neighbourhood.

Not all jurors had to accept that all these facts were proved before the jury as a whole could reach the conclusion that the fact in issue was proved; some might have reasoned that proof of facts (1), (2), (6) and (7) allowed the primary inference of identity, while others might have relied on facts (3), (4), (5) and (7) to reach the same conclusion.

Findings of primary facts

Simpler facts in *R v Puttick* (1985) 1 CRNZ 644 give rise to an illustration of the need for the members of the jury to make findings of primary facts before the process of making inferences of facts in issue can begin. The fact in issue was whether D knew when he received it that certain meat was stolen. The primary facts were contested. Police officers claimed that when they arrived at D's house D told his father to say nothing and he'd take the rap, and further that D had said that the meat had arrived in a carton which he had destroyed (the label would have indicated that the meat must have been stolen before D obtained possession of it). At trial D denied those claims. Clearly any juror who rejected D's denials and who accepted beyond reasonable doubt the police officers' evidence on these points would be able to draw an inference of the fact in issue from these primary facts.

Puttick tends to be regarded as a leading case on inferences, and for that reason it is necessary to ascertain exactly what it has to say on the subject. In doing this one must make allowances for differences in terminology. The following dicta are accompanied by suggested interpretations:

> Where the charge has several essential elements, proof of guilt necessarily involves proof of each of those elements to the same standard. It does not, however, require proof beyond reasonable doubt of every fact which may be relevant to proof of each essential element (p 647).

On its face this appears to contradict the basic laws of logic relied on in the Australian cases cited supra. But that would be a misinterpretation. Read in context this extract is apparently a reference to the different cords aspect of the rope metaphor. Even so, on the evidence in *Puttick* it is difficult to see how the jury could infer knowledge beyond reasonable doubt unless the police version was accepted beyond reasonable doubt. Perhaps the Court was implying that the jury may have had doubts about the police allegations concerning D's comments to this father while accepting those concerning D's admissions about the carton and that those alone would have been sufficient to found the inference of the fact in issue.

> Since there is no distinction either in law or logic between facts established by direct evidence and those established by inference, so long as collateral or evidentiary facts need not be proved beyond reasonable doubt a direction that only "irresistible" inferences are permissible must constitute an unjustifiable restriction of the normal and proper use of inference. It must also tend to restrict the use by the jury of the

> combined knowledge and experience of its members, which is its greatest contribution to the trial process (ibid).

The reference to facts established by direct evidence translates to primary facts, the reference to facts established by inference translates to primary and secondary inferences, and the reference to collateral or evidentiary facts translates to subordinate facts. The extract recognises the lesser standard of proof required in respect of subordinate facts. It does not mean that an inference of a fact in issue may be made from facts not established beyond reasonable doubt. To interpret this extract as applying to facts in issue would be to confuse the inference of a possibility (which is permissible) with the possibility of an inference (which is not permissible).

The reason an inference need not be proved beyond reasonable doubt on its own has nothing to do with there being no requirement that subordinate facts be proved beyond reasonable doubt. The reason an inference need not be proved beyond reasonable doubt on its own is that it may gain strength from its combination with other inferences or with primary facts, as was the case with the finding of buried babies in *Makin*. In relation to facts in issue the extract can only mean that the members of the jury may pool their abundance of common sense in evaluating the true strength of an inference in the overall context of the evidence in the case. (See further the discussion under the heading **Competing inferences**, infra.)

> It must be equally unhelpful to tell jurors that, if proven facts support two inferences of equal weight, they should accept one and reject the other. To draw an inference either way from such facts would be pure speculation. Jurors should not be directed to accept or reject inferences when they have no logical basis for either step (ibid).

This is a useful illustration of speculation. It may be too restrictive to suggest that the only occasions on which speculation occurs are where there are two inferences of equal weight. In the context of the burden of proof and the rope metaphor, it might be said that it would be speculation for the jury to supplement the existing cords with imaginary cords not based on primary facts. Of course this extract is concerned merely to correct the tendency of trial Judges to obscure the burden of proof by suggesting that an inference of innocence must somehow equal the strength of an inference of guilt before it can be preferred.

The essential point is that inferences must be based on proven facts. If the inference is of a subordinate fact, the facts (whether primary or inferred) on which it is based need not be proved to the standard of beyond reasonable doubt, but they must still be "proved". If the inference is of a fact in issue, the facts on which it is based (again whether primary or inferred) must be proved beyond reasonable doubt. Aspects of these principles are illustrated in the following cases.

The need for primary facts

In *R v Congdon* CA 255/90, 22 November 1990 the fact in issue was whether D had had possession of sufficient cannabis at a given time to raise the inference that he had it for sale. The primary facts were that traces of cannabis were found in Kleensaks and on lines of twine strung up in a shed on his property, D admitted possession of the items found, and D had been on the property for about six months. He gave evidence at trial but this was rejected by the jury and he was convicted.

The Court of Appeal observed that "Once his innocent explanation was rejected the jury should have been directed to look at the Crown case alone for proof beyond reasonable doubt of possession for sale." Here there was an *absence of evidence* pointing to sale such as "deal bags, scales, entries in notebooks of sales, presence of money, affluent circumstances and the like," and the primary facts were consistent with the inference that smaller quantities than would be sold, although adding up to a significant amount, had been dried in the shed from time to time and that such cannabis could have been for D's own use. D's conviction was accordingly quashed.

In *R v Flavell* (High Court, Auckland, T 212/89, 13 November 1989, oral ruling of Wylie J on s 347 application) the fact in issue was whether D was the importer of cannabis preparation which had been posted to her in a parcel. The primary facts relied on by the Crown were: D had come to New Zealand directly from Holland where she lived and the parcel was posted to her from Holland, only a few people in Holland knew her New Zealand address, D had shown concern when she had been told that a parcel had been delivered to the letterbox but had gone missing during the day. Wylie J held that the latter two facts were equivocal as the sending of the parcel could have been a gratuitous act and it would be natural for anyone to express concern at mail going astray. There was no evidence that D was actively involved in the sending of the parcel from Holland. It was therefore ordered that no indictment be presented.

In *R v Bennet* (High Court Timaru, T 12/90, 11 October 1990, ruling of Tipping J on an application under s 347) the fact in issue was whether D had intended to hit V when he fired a gun at V's car. The primary facts were that D fired two salt rounds and then a real round, the car's windscreen was broken and there were some marks on the bonnet as a result of the shooting, D said in his statement to the police that he fired at the centre of the windscreen at around the roofline and not at V but intending to scare V (adding: "There was no way in hell I was going to jail for murdering the slime ball"), and D expressed relief at not hitting V. These facts supported the inference that D knew V may have been behind the windscreen when he fired the gun, but on the offence charged (Crimes Act 1961, s 198(2)) recklessness was insufficient (following Hillyer J in *R v Pekepo* [1989] 2 NZLR 229, (1989) 4 CRNZ 204 and perhaps misinterpreting Chilwell J's oral ruling in *R v Stephens*, High Court, Auckland, T 91/83, 8 December 1983).

Tipping J expressed the question as whether a properly directed jury could decide beyond reasonable doubt that D intended to hit V. The damage to the car was ruled to be equivocal, and D's statements pointed towards innocence. Therefore there was insufficient

evidence upon which to base an inference of intent and D was discharged on that count in the indictment. It is noteworthy here that evidence of recklessness was not sued to infer intent: those being distinct states of mind.

Avoiding speculation

In *R v Paul and Nepia* (Court of Appeal, 139 and 142/86, 5 November 1986) the Court observed in an oral judgment delivered by Casey J that in recent times Judges have thought it proper to explain the meaning of the term inferences and to warn the jury against having resort to speculation. Those obiter remarks echo what was said in *Puttick*, supra, where on the evidence in that case it would have been sufficient that

> any general direction as to the use of inference in this case, as in most cases, did not require special elaboration, and could have been in the simplest terms. It would have sufficed had the jurors been advised that in assessing the meaning of the evidence they were entitled to draw inferences, but that such inferences should be logical inferences from proven facts, not mere speculation or guesswork. (p 647)

Competing inferences

A similarly simple direction would have been sufficient in *R v L* (Court of Appeal, 128/85, 9 October 1985) where in commenting on the direction which had been given in the Court below, the Court of Appeal in an oral judgment delivered by Tompkins J said.

> We do not consider this direction to be correct in stating that a jury can act on an inference only if satisfied that it totally overwhelms all the others. This Court considered the appropriate direction relating to inferences in *R v Puttick* . . . . It was there concerned with a direction that an inference must be "irresistible". The Court held that that requirement constituted an unjustifiable restriction of the normal and proper use of inferences. So too would a requirement that an inference should totally overwhelm all others.

The basic approach when there are competing inferences, some pointing towards guilt and others towards something other than guilt, is the same as always: the relevant fact in issue can only be established by inference if, considering all the circumstances, that fact can be inferred beyond reasonable doubt from primary facts or inferences themselves proved to the same standard. Obviously there will be many occasions when competing inferences prevent an inference of guilt, and the "equal strengths" case is but one example.

In *Pairama v Police* (High Court, Hamilton, 25 June 1990, judgment of Doogue J) on a charge of cultivation of cannabis the fact in issue was whether D was the cultivator and the decisive pointwas how long D had lived at the relevant premises. The primary facts were that there were four small, well cared for plants, D was the occupier of the premises, D told the police he'd only just moved there, D also told the police that "some people stay here. No-one is permanent though." On appeal against conviction it was held that there were equal inferences available on the fact in issue and that in the absence of other evidence the District Court Judge should have been left in a state of reasonable doubt about whether D could have been responsible for the cultivation; the conviction was quashed.

Where the circumstances are suspicious they may nevertheless fall short of sufficient strength to require explanatory evidence from the defence, and inferences consistent with something other than guilt may prevail. This occured in *Bonica v Police* (High Court, Gisborne, 14 November 1984, oral judgment of Thorp J). On a charge of burglary the fact in issue was whether D was a party and that turned on whether he had been in a vehicle at the time when the burglary had taken place. The primary facts were that the burglary occurred at about 11.00 pm and the vehicle had been used to carry property away, about an hour later the vehicle was about five kilometers from the premises and was travelling *towards* them, it was crossing a bridge and two of the occupants in the rear of the vehicle were trying to throw stolen property into the river, D was the front-seat passenger.

On appeal against conviction Thorp J held that in view of

> the fact that the vehicle was apprehended not proceeding away from the scene of the burglary but towards it and a significant time after the burglary, the inference that the passenger must have been one of the occupants of the vehicle at the time the burglary took place, is not one which seems to me so inevitable that it is a safe inference on a matter of such importance.

The suspicions did not reach "the necessary standard of cogency" to permit the conviction to stand. It was also noted that *R v Coombs* [1983] NZLR 748 made it clear that failure to respond to police questioning is not a matter which can provide the basis for an inference of guilt, and that failure to give evidence is only a relevant consideration when the evidence of D's involvement is "such as logically to require a response" which was not the situation on the present facts. (See further the discussion of *McBurney* under the heading **When inferences of innocence are weak**, infra.)

Failure to exclude inferences consistent with D's innocence was the reason for a successful appeal against convictions for possession of cannabis for supply and cultivation of cannabis in *R v Ford* (Court of Appeal, 219/83, 1 November 1983). The fact in issue on each charge was possession and that turned on possession by D of plastic bags which the police had found concealed with the cannabis. The primary facts were that the cannabis was in a bivouac in dense bush some distance from a track which D used to gain access to a block of land on which he held a licence to kill opossums; he did not have exclusive use of the track; he was seen leaving the area but was not carrying anything that could have been cannabis; before he reached home the police searched his house and found the plastic bags which they had marked but no cannabis was found there. Evidence was given for the defence by D, his wife, and a third person who had seen D emerge from the block of land carrying nothing suspicious.

The jury must have rejected D's evidence since he was convicted.

Nevertheless that did not affect the issue of whether there was sufficient evidence to support the inference of the fact in issue to the requisite standard (cf *Congdon*, supra). The Court, in an oral judgment delivered by McMullin J, held that the evidence of D's use of the track and the knowledge which he might have had of the general area,

> while highly relevant to the question of whether he had the opportunity to commit the offence, is entirely equivocal so far as the proof of his guilt is concerned.

The evidence at the trial certainly pointed, on one view, to D's involvement

> but when all the facts established in the Crown evidence are taken together . . . they were insufficient to exclude other inferences open to be drawn and consistent with the applicant's innocence. While one inference open to the jury was an inference consistent with guilt that inference was not so compelling as to point in that direction only. The evidence may be regarded as establishing suspicion, perhaps grave suspicion, but it is not inconsistent with the applicant's possible innocence.

This approach reflects the requirement that for an inference of guilt to reach the necessary standard of proof it must, in all the circumstances, be the only rational inference; the circumstances must be such as to be inconsistent with any reasonable hypothesis other than D's guilt.

Unchallenged prima facie inferences

A prima facie inference may be strengthened by absence of competing inferences where the defence has had the opportunity to challenge the prosecution case. In *Smales v Auckland City Council* (1989) 4 CRNZ 434 the fact in issue was whether the blood specimen analysed by the DSIR was the specimen taken from D on the occasion in question. The primary facts were established by what the enforcement officer said in evidence, namely (p 437)

> I obtained the keys of the locked refrigerator, and put the blood specimen in the refrigerator. I then advised the defendant that I was causing it to be sent to the DSIR in Petone for analysis. From that I would like to submit the analysis report from the DSIR in Petone.

Wylie J held that the fair prima facie inference was tht the fact in issue was established by the last sentence of the officer's evidence which provided the necessary link.

Obiter remarks were made (p 436) on another issue, namely when the inference that blood taken was venous blood as required by the definition of blood sample in s 57A of the Transport Act 1962 could be drawn. The inference was viable where the officer gave evidence that a sample of venous blood was taken by a registered medical practitioner and the subsequent actions of the medical practitioner as described by the officer suggested a knowledge by the doctor of the statutory procedures and the officer said the practitioner completed the medical certificate. The inference is all the more strong when no criticism is made by the defence either in cross-examination or by the giving of evidence, and it can satisfy the criminal standard of proof, as was necessary here to establish the chain of proof.

A refusal to permit the taking of a blood sample can be inferred. In *Hailes v Ministry of Transport* (High Court, Auckland, AP 11/90, 9 March 1990, oral judgment of Hillyer J) these comments were made:

> It would, of course, be wrong for a traffic officer having asked a driver whether he was prepared to give blood to assume that he was refusing simply because he did not say immediately that he was going to. It is the case, of course, that a refusal can be inferred from a course of conduct. The driver does not have to say "No I will not give a specimen of blood" and if he fails to do so that is an offence, but it cannot be assumed that he has failed to do so or refused simply because he is asking questions as to what his rights are and what will happen if he had for example some disease.

Absence of any evidence suggesting that D had been granted bail would have enabled a properly instructed jury to find that D had escaped from lawful custody in *R v Maxwell* (1988) 3 CRNZ 644. The fact in issue was whether D had been in lawful custody in a courthouse cell. The primary facts were that D had been arrested and taken to Court in police custody, he had appeared before the Judge, he had returned to the holding cell without protest, he had taken the opportunity to escape when others made their bid for freedom, and when eventually arrested for escaping he said that he had run because the others had run. The inference that he had been in lawful custody could be drawn in the absence of evidence that D had protested about being returned to the holding cell.

The Court of Appeal, in a judgment delivered by Barker J, held that the trial Judge should have told the jury that it was not sufficient for them to think that the evidence merely showed a strong probability of guilt (*R v Horry* [1952] NZLR 111) since to convict they would have to be sure that the only inference open left no reasonable doubt, and that other inferences as raised in cross-examination (the possibility of D having been granted bail) were possible, and that they might have drawn some inference from the failure of the Crown to produce evidence of what happened in the courtroom. These matters should have been covered in the direction even though the jury could easily have dismissed them as bare possibilities and still have found that the only reasonable inference was that the fact in issue had been proved. The appeal against conviction was allowed because of the shortcomings in the summing-up.

Inference of intent

Where the only evidence of intent is reliant upon inferences to be drawn from the nature of D's conduct, that conduct would have to be unequivocal in order to support the inferred intent to the necessary standard. This could lead to confusion in the context of attempts.

In *Drewery v Police* (1988) 3 CRNZ 499, Williamson J in dealing with the actus reus, said (p 503)

> It would seem to be a matter of

degree so that if the evidence of intent is strong and clear the proximity or immediacy may not have to be as great as in cases where evidence of intent is reliant upon inferences to be drawn from the nature of the act itself.

With respect, this would be a novel concept: the offence with the variable actus reus, changing according to the evidence of mens rea. Either there is an actus reus or there is not; if proof of mens rea requires further conduct beyond the actus reus then that is purely on the issue of mens rea. In attempts, the requirement of proximate acts is not dispensed with simply because D has confessed his intent.

As was noted in connection with *Bennet*, supra, an inference of recklessness is insufficient to establish intent.

Secondary inference of actus reus

In *Auckland City Council v Brailey* (1987) 2 CRNZ 397 the fact in issue was whether D had been the driver of a car at the time of an accident. The primary facts were (1) D got out of the driver's door a few seconds after the car struck a parked vehicle; (2) three other people were in the car; (3) the car was small. The primary inference was that it would have been difficult for the occupants to change seats in the time available. The secondary inference, drawn from primary fact (1) and the primary inference, was that D was the driver at the time of the accident.

Where inferences of innocence are weak

Sometimes an explanation consistent with innocence will be too weak, as against the other primary facts, to diminish the strength of the inference of guilt. This occurred in *McBurney v Ministry of Transport* (1989) 5 CRNZ 384 where D was charged with failing to stop and failing to ascertain whether any person had been injured after an accident in which he was the driver of a car which was in collision with an object (a person) on the road.

There were two facts in issue on each charge. Firstly, did D's car hit the person? On this issue the primary facts were that the collision occurred in the same place as the body was found, and that the body was found immediately after the collision. These facts gave rise to the inference that it was the person and not some other object which was hit. The innocent inference would require "too great a coincidence" (p 386). Secondly, did D know there had been an accident which might possibly have caused bodily injury? The primary facts were that D said he thought he had hit an animal and after arriving home he returned immediately with others to investigate, that another person drove him back to the scene, that of two drivers who were following D's car before the collision only one realised that a person had been hit.

This last fact was regarded as equivocal, and the other two facts supported an inference of the fact in issue because if D had thought it was an animal at the time of the collision and if he had been as concerned as he claimed he was, he would have stopped immediately to investigate. Returning later with another driver suggested that he wanted to avoid prosecution for an alcohol-related driving offence. By contrast with *Bonica*, supra, the inference of guilt here was sufficiently strong to allow the Court to take into account D's failure to give evidence which would then have been subject to cross-examination.

It is suggested that it is wrong to regard a failure by D to give evidence as if that failure were itself evidence and so capable of being the basis for an inference against D. Rather the true relevance of D's failure to give evidence is that, as a matter of common sense, it diminishes the strength of such inferences in D's favour as there might be, so that the weight which may attach to adverse inferences is relatively greater. Even so it should be remembered that this effect only comes into play where the inferences of guilt are already strong enough to call for an answer. This analysis is consistent with what was said in *Trompert v Police* (1984) 1 CRNZ 324, citing Lord Diplock in *Haw Tua Tau v Public Prosecutor* [1982] AC 136, 152-153 where it is specified that the inference of guilt must be such as to be properly drawn in the absence of an explanation. The reasoning of Fisher J in *McBurney* is consistent with this view.

Analogous to an inference of innocence is an inference that an essential procedural step has not been complied with. Again, there may be no room for such an inference, as was the case in *Love v Police* (High Court, Whangarei, AP 38/87, 15 October 1987, oral judgment of Tompkins J). The fact in issue was whether D had requested a blood test within the 10 minute period provided for in s 58(4)(A) of the Transport Act 1962.

The primary facts were that the form advising D of his rights was read to D, that D then read the form and signed it, and that within the 10 minute period D said he would accept the result of the evidential breath test. In the absence of any evidence or challenge by way of cross-examination, to suggest that D had no opportunity to change his mind within the 10 minute period, it was reasonable to infer that D did not say within the period that he wanted a blood test.

A similar situation occurred in *Auckland City Council v Scale* (Court of Appeal, 16/85, 10 July 1985, judgment of the Court delivered by Richardson J).

The fact in issue was whether the correct standard alcohol vapour container had been used in the preparation of an evidential breath testing device. The primary facts (not challenged by cross-examination) were the enforcement officer's evidence that he carried out the test in accordance with the Breath Test Notice, that he used standard alcohol vapour supplied by the DSIR, that he used a cylinder numbered 22 and the level of alcohol indicated on it was 400 micrograms of alcohol.

It was held that on these facts the Judge could have inferred that the correct cylinder had been used. The officer's failure to say that the vapour came from a container marked with the words "breath test standard alcohol vapour supplied by the DSIR" could, in the absence of challenge directed at this point, be inferred by the Court to be an inadvertent slip not seen as important by the defence. The Court emphasised that the totality of the evidence had to be considered.

Conclusion

When a tribunal of fact is faced with an invitation to draw an inference of guilt certain points

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Debenture holders 1 — landlords 0

By Steven Dukeson, an Auckland practitioner

This article is a note on the Essere Print Ltd *case, and considers the question of the conflicting rights of landlords and of debenture holders regarding chattels of a debtor who is also a tenant. A third party's equitable interest was held in the* Essere Print Ltd *case to prevail over a landlord's right to distrain over chattels in terms of s 3 of the Distress and Replevin Act 1908.*

At [1990] NZLJ 180, I adverted to the fact that it had not been resolved in New Zealand whether a landlord could distrain over chattels which were charged by a debenture. (The point had earlier been raised by Connard, "The Landlord's Right to Distrain" at p 242 of Hinde's *Studies in the Law of Landlord and Tenant*.)

Some receivers and lawyers have taken it for granted that a landlord's rights prevail over debenture holders. On the other hand, some lawyers have recognised that the position is not straightforward, particularly because of the exclusion of debentures from the definition of the term "instrument" under the Chattels Transfer Act 1924 and thus from the operation of s 4 of the Distress & Replevin Act 1908. In *Metropolitan Life Assurance Company of New Zealand Limited v Essere Print Limited (In Receivership)* [1990] BCL 1574, Jeffries J has come down in favour of debenture holders but it remains to be seen whether this is a half-time or full-time result.

The plaintiff leased premises to the defendant. Subsequently, the defendant granted a debenture in favour of the Bank of New Zealand. The defendant defaulted under the debenture and the Bank appointed receivers and managers of the defendant. The defendant was also in arrears of rent and the plaintiff subsequently issued a Warrant to Distrain against the chattels of the defendant on the premises. The receivers contested the plaintiff's right to distrain against the chattels because the chattels were charged by the debenture. By agreement, the chattels were sold and the proceeds placed in trust pending the outcome of the case.

At the heart of the issue was s 3(1) of the Distress and Replevin Act. That section enables a landlord to distrain on chattels "of" the tenant or the person in possession. The question was, for the purposes of s 3(1), whether a tenant has to have both legal and equitable title for the chattels to be said to belong to the tenant. On the basis of some previous authority and as a matter of interpretation, Jeffries J concluded that chattels could only be said to belong to the tenant if the tenant has both legal and equitable title.

Jeffries J first referred to *Public Trustee v Garrett* (1888) 6 NZLR 696. In that case, the Public Trustee, acting under a will, advanced funds for the benefit of an infant beneficiary. The funds were to be spent on the purchase of stock for a farm which was tenanted by the infant's mother. The mother executed a Declaration of Trust in favour of the Public Trustee which declaration was filed under the Chattels Transfer Act. The landlord, knowing of the existence of the declaration nevertheless distrained on the stock for arrears of rent. The Public Trustee obtained an injunction against the landlord on the basis that though the tenant as trustee had legal title to the chattels, the chattels belonged in equity to the Public Trustee. Though the judgment of Gillies J was short, Jeffries J was not persuaded that the case was wrongly decided.

Jeffries J then referred to *In re New Vogue Limited (In Liquidation); Hope Gibbons Limited v Collins* [1932] NZLR 1633 where, at 1645, Myers CJ expressly left open the point as to whether a tenant must have both legal and equitable title for the purposes of s 3(1) of the Distress and Replevin Act.

Next on the list was *In re Heiford Bros (In Liquidation)* [1933] NZLR 1503. In that case, Ostler J upheld the landlord's right to distrain on assets which had been charged by the tenant in favour of a debenture holder. Ostler J did not refer to s 3 but instead concentrated on the then equivalent of s 273 of the Companies Act 1955. (Section 273 provides for proceedings to be stayed on the commencement of voluntary winding up.) In this case, the tenant company, being in arrears of rent, and having executed a debenture over chattels, went into receivership and then, more

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should be borne in mind. Without attempting an exhaustive list of those considered in this article, it can be said that the main ones are that an inference of guilt must be based on facts or inferences which when considered in the context of the evidence in the case are proved beyond reasonable doubt, that the inference of guilt must itself indicate guilt beyond reasonable doubt, that rejection of defence evidence does not alter the issue which is whether the inference of guilt is properly founded in the evidence which is accepted, and that where there are competing inferences the question is still whether the inference of guilt is properly proved. □

or less immediately, passed a resolution for voluntary liquidation. Ostler J considered that where the value of the charged chattels was less than the amount secured by the debenture, there was no bar on the landlord distraining on the chattel because they would not be available for the general benefit of creditors under s 273.

The difficulties that Jeffries J saw with this decision were that Ostler J relied on two English authorities which were not affected by any equivalent of s 3 of the Distress and Replevin Act and that, though Ostler J referred to *In re New Vogue* (supra), the Judge ignored the passage from the judgment of Myers CJ referred to earlier in this note. Ostler J did not consider the effect of s 3(1) of the Distress and Replevin Act. Jeffries J then referred to *In re Roundwood Colliery Company, Lee v Roundwood Colliery Company* [1897] 1 Ch 373. Though that case concerned a contractual power of distraint off premises, Lindley LJ in the Court of Appeal seemed to accept that where a landlord's right was limited to chattels belonging to the tenant, the landlord could not distrain on goods which were not the goods of a company both at law and in equity. Lindley LJ considered that the goods were still the property of the tenant because the goods were subject to a floating charge which had not yet crystallised. Accordingly, the landlord could distrain.

In *Essere Print*, counsel for the plaintiff sought to explain *Roundwood Colliery* on the basis that while the charge was a floating charge, the debenture holder had authorised the tenant to carry on business in the normal way and accordingly, took the risk that the landlord might exercise the contractual right of distraint off premises on the goods subject to the floating charge. Once the charge crystallised, the goods would then in equity be vested in the debenture holder whose rights would prevail over the contractual rights of the landlord to distrain. It was argued that this is why it was important to determine whether, in the equitable sense, the goods had become the property of the debenture holder.

With respect, it cannot be said with any degree of certainty that Lindley LJ would have approached the matter any differently had the case concerned "on premises" distraint and had there been a statutory provision like s 3(1) of the Distress and Replevin Act. However, because there was no equivalent to s 3(1) of the Distress and Replevin Act, the case may be of little persuasive authority in the New Zealand context.

Having referred to most of the cases cited by counsel, Jeffries J decided that for goods to be distrainable under s 3(1) of the Distress and Replevin Act, they must belong to the tenant both at law and in equity.

Jeffries J felt that this interpretation was consistent with the "obvious" purpose of s 3. At common law, all chattels found on the premises could be distrained, no matter to whom they belonged. Because s 3(1) restricts distraint to chattels which belong to the tenant, Jeffries J concluded that the purpose of s 3(1) was to prevent a landlord from interfering with the interest of third parties. It was considered that this conclusion supports the relative priorities of creditors contained in the Companies Act, the fair or equitable principle of notice, and that (unspecified) matters of policy generally favour this view. (In relation to equitable principles of notice, it would appear that Jeffries J accepted submissions by counsel for the defendant that a landlord should not prevail in circumstances where a debenture was executed by a soon-to-be tenant prior to the execution of a lease because registration of a debenture under the Companies Act 1955 is notice not only of its existence but also of the contents of the charge created by it in so far as the charge relates to chattels: s 4 Chattels Transfer Act. It would also seem that Jeffries J accepted counsel for the defendant's submissions that to give a landlord priority over a debenture holder would be to override the scheme of priorities set out in ss 101 and 308 of the Companies Act 1955.)

Jeffries J felt that this interpretation was also supported by s 4 of the Distress and Replevin Act. Section 4 provides that where the tenant has given "an instrument" as defined in s 2 of the Chattels Transfer Act over chattels, those chattels should be deemed to be the property of the tenant for the purposes of distress for rent. The definition of "instrument" in s 2 of the Chattels Transfer Act excludes debentures. Thus, in the view of Jeffries J, it was clear that the legislature must have intended that chattels the subject of debentures should not be able to be distrained upon. (This would not apply to chattels subject to a floating charge which has not crystallised because until crystallisation, the tenant would be both the legal and equitable owner of the chattels.)

Moreover, in s 2(f) of the Chattels Transfer Act, "instrument" is defined to include any agreement by which a right in equity to any chattels is conferred. Thus, chattels over which an instrument conferring a right in equity to another has been given (but excluding company debentures) are none the less deemed to be chattels of the tenant if they are found on the demised premises. In the view of Jeffries J, if all goods were available for distraint under s 3(1) of the Distress and Replevin Act so long as the tenant had bare legal title, it would not be necessary to deem that goods subject to an agreement conferring equitable title to another are available for distraint by virtue of s 4.

There are some unsettling aspects of the decision. Not the least is that there appears to be no logic in affording a landlord a right to distrain on chattels the subject of an instrument granted by an individual (under which the grantee may have legal title) but not on chattels the subject of a company debenture (in respect of which the debenture holder will only have equitable title) or for that matter, an instrument by way of security granted by a company. This in itself might suggest that, at the time s 4 was enacted, it was thought that a landlord would have priority over a debenture holder and that s 4 of the Distress and Replevin Act was intended merely to bring instruments under the Chattels Transfer Act into line with debentures. However, I doubt this. Cain, [1959] NZLJ 167 at 168 suggests that the sole reason for the existence of s 4 may have been an intention to prevent a landlord from being deprived of his rights by a fictitious arrangement between the tenant and a third party.

Accordingly, it seems to me that one has to be extremely careful when trying to interpret these relatively old and difficult pieces of legislation. Further, later in this note, I will suggest that s 4 may have no bearing on the interpretation of s 3(1) at all.

It seems to me that there are a number of difficulties in interpreting the legislation. The first is in relation to the purpose behind s 3(1) of the Distress and Replevin Act. As Jeffries J remarked, the position at common law was that a landlord could distrain on all chattels found on the premises no matter to whom they belonged. Section 3(1) of the Act limits this right of distraint. However, whether it limits this right so as not to interfere with *any* interests of third parties or whether it merely precludes a landlord from distraining on chattels which legally belong to third parties is an issue. (Counsel for the plaintiff valiantly tried to persuade Jeffries J that Parliament could not have been intended to completely overturn the common law position and that, just as was the case prior to the enactment of s 3(1) and its predecessors, it was still the case that a landlord could distrain on chattels to which the tenant had legal title. However, with respect, this submission begged the question and the difficulty for Jeffries J and both counsel was that there seems to be no real indication of the precise mischief which s 3(1) of the Distress and Replevin Act was intended to overcome.)

As has been adverted to, Jeffries J considered that the existence of s 4 of the Distress and Replevin Act supported his interpretation of s 3. However, I doubt that s 4 has any bearing on this question.

One can see that the purpose behind s 4 of the Distress and Replevin Act is to make it clear that a landlord can distrain on chattels the subject of an instrument granted by an individual where legal title may have passed from the tenant to the grantee of the instrument. But does the existence of s 4 point to an intention that there should be no right of distraint on chattels the subject of a debenture? If the legislators considered that distraint was possible only if the tenant had legal title to chattels, and that for some reason it was thought that a landlord should be able to distrain on chattels the subject of an instrument under which a tenant might not have legal title, the fact that the term "instrument" as defined in the Chattels Transfer Act as excluding company debentures would be merely incidental in this regard. Indeed, I believe this to be the case. The exclusion is surely just a recognition of the existence of a separate register for company charges.

Further, I am not sure that s 2(f) of the Chattels Transfer Act is relevant. One of the consequences of s 4 of the Distress and Replevin Act having regard to s 2(f) of the Chattels Transfer Act, is that a landlord would have the right to distrain on chattels over which an instrument conferring a right in equity to another has been given if the chattels are found on the demised premises. Jeffries J considered that such a provision would have been largely unnecessary if all goods were available for distraint under s 3(1) so long as the tenant had bare legal title ie it would not be necessary to "deem" that goods subject to an agreement conferring equitable title to another are available for distraint by virtue of s 4.

However, a number of questions arise here. For one thing, what do the words "a right in equity to any chattels" mean? If they mean equitable title, then s 2(f) does not help at all because under an instrument by way of security (for example), the grantor merely has an equity of redemption.

Further, as has already been adverted to, the purpose behind s 4 of the Distress and Replevin Act may have been no more than to prevent tenants entering into fictitious arrangements with third parties to deprive a landlord of his right of distraint. In such circumstances, the fact that s 2(f) of the Chattels Transfer Act includes instruments which confer a right in equity to another over any chattels within the definition of an instrument is irrelevant.

It should be remembered that the Distress and Replevin Act is of ancient origins and that the Chattels Transfer Act is hardly a model piece of legislation. When the two are combined, it should not be surprising that difficulties arise. Bear in mind also that there are inherent difficulties in the Distress and Replevin Act itself. For example, at first sight, ss 3 and 4 of the Distress and Replevin Act are irreconcilable. Not surprisingly, case law dictates that goods the subject of a bailment (even with an option to purchase) do not belong to the tenant for the purposes of s 3 of the Distress and Replevin Act. (See, for example, *Wertheim v Samson* (1886) NZLR 5 SC 208, *Smart v Russell* (1892) 11 NZLR 796.) However, s 4 of the Distress and Replevin Act deems chattels the subject of an instrument as defined in the Chattels Transfer Act to be the property of the tenant. A bailment is one type of instrument under the Chattels Transfer Act. While there is no doubt that a Court would not allow a landlord to distrain on chattels bailed to the tenant, the example makes it clear that the legislation is not easy to interpret.

Purely and simply, the question is when chattels can be said to be "of" the tenant for the purposes of s 3(1) of the Distress and Replevin Act. In the present context, the question becomes whether chattels in respect of which a third party has an equitable interest can be said to belong to the tenant.

If the matter has to be determined on the basis of general principle alone, the answer must surely be no. There is no reason why a landlord, without even an equity, should prevail over a third party's equitable interest. (I would argue that this position would be irrespective of whether the debenture was executed before or after the lease). In the absence of clear evidence as to the precise mischief which s 3(1) of the Distress and Replevin Act was intended to remedy, I feel that there can be no objection to the section being interpreted in a manner consistent with this conclusion.

Essere Print is an important case. I believe that the Court has arrived at the right conclusions though not necessarily by the right reasoning. It remains to be seen whether the case will be appealed.

As a final point of interest, I note that there have been rumours for some time that the landlord's right of distraint will be abolished in New Zealand. The latest rumour is that the matter is being considered by the Law Commission.

□

Proposals under Part XV Insolvency Act:

Is the public interest relevant?

By Paul Heath, practitioner of Hamilton

The Insolvency Act 1967 enables an insolvent debtor to make an arrangement with creditors. This can be of benefit both to the debtor and also to the creditors. There are however, certain restrictions on this. In particular, the proposal must be filed in Court and have the approval of the Court. In this article the author considers the circumstances in which the Court may refuse to approve a proposal even if it is acceptable to the majority of the creditors in number and 75 per cent in value of the debts. The author discusses particularly, the question as to whether the Court can take into account matters of public interest and suggests that there should not be an overriding public interest element taken into account although the weight of judicial authority at the moment appears to be the other way.

Since the 1987 share market crash an increased use is being made by debtors of the provisions of Part XV of the Insolvency Act 1967. The Part XV proposal enables an insolvent debtor to reach an arrangement with his or her creditors for the satisfaction of his or her debts without the need for an adjudication in bankruptcy. Clearly, from a debtor's perspective, this is desirable as it can avoid the restraints placed upon the debtor by bankruptcy. From the point of view of a creditor the provisions are also desirable because, in appropriate cases, they provide a mechanism for the creditors to realise upon the property of a debtor with the co-operation of the debtor and thereby maximise any return to the creditor.

Part XV of the Insolvency Act requires an insolvent person to make a proposal to his creditors and to file the proposal in the appropriate High Court Registry. The proposal must be signed by the insolvent and have endorsed upon it the name of a person who is willing to act as Trustee for creditors. The proposed Trustee must sign a statement indicating that he or she is willing to act. Once filed, the proposal cannot be withdrawn without leave of the Court pending the decision of the creditors and the Court thereon. All of this is clear from a reading of s 140 of the Insolvency Act 1967.

Upon the filing of the proposal the Trustee who is named in the proposal becomes the Provisional Trustee. It is the duty of the Provisional Trustee to call forthwith a meeting of creditors in the manner stipulated by s 141 of the Insolvency Act. Creditors may vote on the proposal as made or as altered or modified by resolution. They may confirm the Trustee nominated by the insolvent debtor or appoint some other person who is willing to act as Trustee: see ss 141 and 142 of the Act.

In order for a proposal to be accepted by creditors a resolution must be passed pursuant to s 142(2) of the Act by a majority in number and 75% in value of those creditors who vote.

If the required majorities of creditors accept the proposal the Trustee must make application to the High Court for approval of the proposal. Notices of the hearing of the application for approval must be sent by the Trustee to the insolvent and to every known creditor not less than 10 days before the date of the hearing. The Court must, before approving a proposal, hear any objection which may be made by or on behalf of any creditors: see ss 143(1) and (2) of the Act.

Section 143(3) of the Insolvency Act 1967 provides:

> "The Court may refuse to approve the proposal if it is of the opinion –
> (a) That the provisions of [Part XV] of [the] Act have not been complied with; or
> (b) That the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors; or
> (c) That for any reason it is not expedient that the proposal should be approved."

Further, the Court is not permitted to approve a proposal if the proposal does not provide for the payments in priority to the claims of all claims directed to be so paid in the distribution of the property of a bankrupt and for the payment of all proper fees and expenses of the Trustee of and incidental to the proceedings arising out of the

proposal: s 143(4) of the Act. By way of example, it has recently been held that GST is a debt for which priority must be given in the proposal: see *District Commissioner of Inland Revenue v Bain* (High Court, Christchurch, 21 February 1990, M 474/89, Williamson J) referring to s 42 of the Goods and Services Tax Act 1985 and s 104 of the Insolvency Act 1967.

The purpose of this article is to consider the circumstances in which the Court may refuse to approve a proposal once the creditors have, by the requisite majorities, voted to accept it. More particularly, I aim to discuss the question as to whether (and if so, to what extent) the Court can take into account matters of "public interest" in determining whether to approve or reject a proposal.

There is a growing weight of judicial authority which espouses the view that matters of public interest can be taken into account in determining whether to approve or reject a proposal. In *Duncan Holdings* (High Court, Christchurch, M 306/81, 1 February 1982) Hardie Boys J observed that the Court must exercise an independent judgment and that considerations of wider public interest are relevant. Further, Tompkins J in *Trott and Joy* (High Court, Auckland, B 1471/88, 14 April 1989) said:

> An insolvent's misconduct may be so irresponsible and its effects on creditors or others so devastating that a Court may conclude that it is in the public interest that the person responsible should not escape the stigma of bankruptcy. Rather, it may be in the public interest that such a person should be marked as a bankrupt and further, that he should suffer the various disqualifications that go with bankruptcy. Those disqualifications are, after all, designed to protect the unsuspecting community from the ravages of irresponsible financial conduct. And the stigma of bankruptcy is itself a deterrent to others from behaving in a like manner.

Similar comments have been made by Fisher J in *Re Fidow* [1989] 2 NZLR 431 (albeit in the different context of a judgment considering whether to adjudge a person bankrupt), by Robertson J in *Re Nathan* (High Court, Whangarei, B 53/89, 29 August 1989) and by Holland J in *Re Guest* (High Court, Auckland, B 2239/89, 9 May 1990).

With some trepidation, in view of the weight of authority to the contrary, I express the view that there is no basis in law for the Court to take into account wider questions of public interest on an application to approve a proposal under Part XV of the Insolvency Act 1967. My reasons for that conclusion are set out below:

1 It is undoubtedly true that the Court must reach an independent judgment as to whether the proposal should be approved. To argue to the contrary would, in effect, ignore the rationale behind s 143 of the Insolvency Act 1967. Clearly Parliament intended that an independent judgment should be exercised by the Court. If Parliament had not so intended then the proposal should have been made binding upon creditors once proved by the requisite majorities; rather than, as at present, being binding upon the creditors whose debts are provable under the proposal and are affected by the terms of the proposal on approval by the Court: s 143(5) of the Act. However, the fact that the Court must exercise an independent judgment in determining whether to refuse to approve a proposal does not entitle the Court to stray from the criteria upon which it must base its judgment. Section 143(3) of the Act refers to three criteria only. The Court can only refuse to approve a proposal if it is of opinion that:

(a) The provisions of Part XV of the Act have not been complied with; or

(b) The terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors; or

(c) For any other reason it is not expedient that the proposal should be approved.

2 The grounds upon which the Court can refuse to approve a proposal are to be contrasted with the grounds upon which it can refuse to approve a composition under Part XII of the Insolvency Act. A composition is an arrangement made between debtor and creditors *after* the debtor has been adjudged bankrupt. Thus, a composition comes into existence at a time when the bankruptcy provisions have already been brought into play; and, for that reason, s 121(3) of the Insolvency Act 1967 requires the Notice of Meeting of Creditors to be accompanied by a report from the Official Assignee on the proposed composition. By virtue of s 122(3) of the Insolvency Act the Court may refuse to approve a composition if it is of opinion that:

(a) The provisions of Section 121 of the Act [which deal with the formalities of the meeting of creditors] have not been complied with; or

(b) The terms of the composition are not reasonable or not calculated to benefit the general body of creditors; or

(c) The bankrupt has committed any such misconduct as would justify the Court in refusing, qualifying or suspending his discharge; or

(d) For any reason it is not expedient that the composition should be approved.

A comparison of the grounds upon which the Court may refuse to approve a composition and a proposal respectively reveals that the Court is empowered to refuse to approve a composition if it is of opinion that the bankrupt has committed any such misconduct as would justify the Court in refusing, qualifying or suspending his discharge. Apart from that addition, the grounds upon which the Court may refuse to approve a proposal or compromise are essentially the same.

In *Trott and Joy* a submission was made to Tompkins J that misconduct by the insolvent could not be taken into account because the omission of any equivalent provision in s 143 to that contained in s 122 of the Act should indicate a contrary intention on the part of

the legislature – ie that misconduct by the insolvent was not a factor to be taken into account. Tompkins J answered that submission at pp 27-28 of the unreported judgment. His Honour held that the wider public interest was a factor which the Court could take into account in determining whether, for any reason, it was not expedient that the proposal be approved. With respect to Tompkins J I suggest that that reasoning is not completely sound. The term "expedient" is defined in the Oxford Dictionary as: "Suitable, advisable; . . . more politic than just." What may be expedient or politic is not necessarily just or right. It is not the overall justice of the case which needs to be considered. It is the suitability, advisability or advantage to be gained by what is being done. In order for the Court to refuse to approve a proposal under s 143(1)(c) of the Act it must form a positive judgment that it is not expedient that the proposal be approved. I respectfully suggest that the comments of Tompkins J in *Trott and Joy* and comments to similar effect by Hardie Boys J (in *Duncan Holdings*), Fisher J (in *Fidow) and Robertson J* (in *Nathan*) respectively overlook the fact that expediency is different, conceptually, from what may be appropriate or just. It may be expedient for creditors to receive a dividend quickly through a proposal; but, it may be more just or appropriate for matters to be investigated through a bankruptcy.

3 Although one may quibble with the way in which the principle has been stated, one cannot quibble with the way in which the cases have been decided. All cases in which a proposal has not been approved are ones where there have been dissentient creditors. In such cases the creditors can put before the Court evidence as to the reason for their stance and the Court can then judge whether the terms of the proposal are reasonable or are calculated to benefit the general body of creditors. That is a particular factor which the Court must consider under s 143. Usually, the fact that appropriate majorities have accepted a proposal will necessarily mean that the creditors have reached a commercial judgment that the terms of the proposal are reasonable or are calculated to benefit the general body of creditors. However, there may be cases where because of the limited number of creditors and the large amount of debt owing to one particular creditor that the Court should exercise an independent judgment on that issue. Where the creditors have accepted a proposal unanimously (or nearly unanimously) it is difficult to see why the Court should interfere with the decision of the creditors and require evidence on wider issues of commercial morality – irrespective of the quantum of indebtedness of the insolvent or of his or her conduct. The purpose of a proposal is obviously to protect the debtor from the social stigma and restrictions of bankruptcy while at the same time assuring creditors that they must all be consulted before any arrangement is entered into: *Re Falconer* [1981] 1 NZLR 266 (Barker J). In my view there are two principal reasons why Part XV was enacted: *first* to encourage debtors and their creditors to settle differences expeditiously without recourse to expensive litigation; and *second*, to encourage the utilisation of a system for the distribution of a debtor's assets among his creditors which would not impose upon the state the burden of administering the insolvent estate which would otherwise end up as bankruptcy to be administered by the Official Assignee. One must assume that Parliament, by restricting the factors to be taken into account by the Court in determining whether to approve a proposal, (and expressly excluding misconduct of a debtor) understood that the best people to make commercial judgments about the way in which debts are to be repaid are, in fact, the creditors. There appears to be no rational reason to import into s 143 the need for the Court to act in a paternalistic way to ensure that creditors know what they are doing. If the creditors are prepared to allow the matter to proceed in terms of the proposal without an investigation by the Official Assignee then their wishes should be appreciated. it cannot be said with any cogency that it is not expedient to approve a proposal because the Court itself believes that the insolvent estate should be administered in a manner different to that contemplated by the creditors.

4 In cases where there is unanimity among creditors there is a limited amount of information which will be made available to the Court by the Trustee. The Trustee is bound to give a report to the Court. The duty of the Trustee is to provide a report in Form 35 in the First Schedule to the Insolvency Rules 1971. The information to be contained in such a report is limited. Unless evidence was filed from creditors who objected to the proposal the Court would have no information before it on wider public interest issues: cf the fact that on an application to approve a composition the Court has before it a report from the Official Assignee which will deal with issues of misconduct or public interest. This is yet another reason why the Court should not consider, in the exercise of its discretion under s 143 of the Act wider public interest issues. The point is further strengthened by a reading of s 143(3) of the Act. The Court has a discretion to refuse to approve the proposal if it is of the opinion that any of the three matters stated in s 143(3) has been proved. However, it is not *bound* to refuse the proposal if those grounds are made out. The only basis upon which the Court is bound to refuse to approve a proposal is if the priorities of claims are not dealt with in accordance with bankruptcy law: s 143(4).

In my view, it is contrary to the clear words of s 143(3) and to the spirit of Part XV to import an overriding public interest element as a factor to consider on an application to approve a proposal.

At present my views are clearly contrary to the weight of judicial authority. It remains to be seen whether, in a case in which the issue is critical, the Court will adopt the approach discussed in the cases I have mentioned. □

Maori Language:

Some observations upon its use in criminal proceedings

By D L Bates, Barrister of Hamilton

The broad object of this paper is to increase awareness of criminal advocates (and others interested) of the reality that use of Maori language in criminal proceedings has arrived, is doubtless here to stay, and can and must properly be accommodated in our judicial process. The paper briefly traverses some historical aspects of the use of both English and Maori language in official proceedings in New Zealand; the recognition of Maori as an official language of New Zealand; a more recent acceptance of equality of Maori and English as official languages in New Zealand; consideration of some provision of the Maori Language Act 1987 in the context of criminal proceedings, and reference to a few decided cases. The author has acknowledged that he claims no ability to speak, interpret or translate the Maori language. He writes from a non-Maori New Zealander's perspective and bases his observations upon his own experiences, opinions and readings.

Historical aspects

On 6 February 1840, William Hobson presented a brief but hugely important document to an assemblage of Maori Chiefs for their signature. This happened at Waitangi.

It will be no surprise to you, of course, to learn that this document was the unexecuted Treaty of Waitangi.

Just one week before, on 30 January 1840, the same William Hobson, then holding the not unimportant rank of Captain in Her Majesty's Navy, had managed rapidly to elevate his status in this new land. He did so by reading to a different body of people assembled at Kororareka a Proclamation.

That document (more or less the same length as the Treaty of Waitangi) was, in simple terms, advice to the expatriates that Her Majesty wanted Hobson to be "Lieutenant-Governor of the British Settlements in Progress In New Zealand" and that he had accepted the job.

(In the absence of details about his motives and what he stood to gain personally, it is not possible confidently to state whether Hobson had used the document fraudulently to obtain some pecuniary benefit or other advantage. For the purposes of this paper we will assume good and honest intent.)

Regardless of the fact that when he made the Proclamation, Lieutenant-Governor Hobson was standing on a piece of real-estate in a country where "he did not control an inch of the territory", he pressed on with the business of presenting the Treaty.

His mission (and he had decided to accept it) was to obtain sovereignty over New Zealand for and on behalf of Her Majesty. It was to be done peaceably. By written treaty.

Clearly he was equal to the task, keen to the great need to ensure that what Her Majesty was proposing was comprehensible to the Maori Chiefs he would be inviting into the partnership. With the assistance of some learned local fellows named Williams and Busby, the English draft Treaty was *translated* into the Maori language.

Thus, in due course, Hobson delivered a little speech to the Chiefs and other dignitaries assembled, extolling the virtues of British intervention in the affairs of the colony, and exhorting the Chiefs to sign.

He was very fair and proper in the way he went about the matter according to what recorded history tells us.

It seems not one Chief was allowed to sign until the Maori version had been read to them, deliberately, carefully, by Mr Henry Williams.

Even then, there was no rush.

The matter was open for discussion by those assembled. Some were for – some against. There was talk of uncertainty among some of the Chiefs as to what they were *really* being invited to sign (a problem not unfamiliar to criminal lawyers relating to notes of Police interviews and signatures of clients), but eventually, the deed was done.

Most of the Chiefs signed up.

Now I am not suggesting that this tortuous path is the one criminal proceedings should take when one is faced with a request to speak Maori in Court. But, the lesson is there with the Treaty. If we would have fair hearings, if we would do justice, we must be sure there is deliberation, understanding, and comprehension by all concerned. That much was recognised even in 1840.

After the Treaty — What language for the Courts?

Transportation had wider application than removal of miscreants from Her Majesty's United Kingdom. Also transported

to this colony by way of the English Laws Act 1858 were:

> . . . the laws of England as they existed on 14 January 1840 so far as applicable to the circumstances of the colony of New Zealand . . . These laws were taken to have been in force in New Zealand and after that day would continue to be applied in New Zealand in the administration of justice *Mihaka v Police* [1980] 1 NZLR 453, 459 (per Bisson J); (462 per Richardson J) (CA).

Effectively, the English Laws Act 1858 (which subsequently became part of the Consolidation Act 1908 displaced Maori language, at least for the purpose of administration of justice in New Zealand.

Somewhat strange, you might think, that even though Maori taonga were recognised specifically in the Treaty in 1840, and that Maori seemingly was the *original* language here, it was not only displaced in the administration of justice, *but* it was to be 113 years before it was accorded *official* recognition by Act of Parliament.

Section 77A of the Maori Affairs Act 1953 provided that recognition. It states:

> The recognition and encouragement of Maori language –
>
> (1) Official recognition is hereby given to the Maori language of New Zealand in its various dialects and idioms as the ancestral tongue of that portion of the population of New Zealand of Maori descent.
>
> (2) The Minister may from time to time take such steps as he deems appropriate for the encouragement of the learning and use of the Maori language (in its recognised dialects and variants), both within and without the Department and in particular for the extension to Government Departments and other institutions of information concerning and (sic) translations from or into the Maori language.

However, did s 77A restore the Maori language to anything like its original place in the juridical affairs of New Zealand? Regrettably, the answer has to be "no". It was an "encouraging" provision, "recognising" the desirability of use, teaching and preservation of the language. But, it did not enable its use in the justice system.

One might be excused for thinking that the 1953 statute would have taken a hint from Rule 346 of the District Courts Rules 1948 which is concerned with translation of documents from English into the Maori language. The rule states:

> 346. Translations –
>
> (1) Where in any proceedings a document is served on a Maori he shall be entitled on making a request to the Registrar at any time within three days after the date of the service on him of the document, or, where service is effected by registered letter, within ten days after the posting of the letter, exclusive of the day of posting, to a translation of the document into Maori language.
>
> (2) Where a translation is requested under sub-clause (1) of this rule the following provisions shall apply:
>
> (a) The translation shall be supplied by and at the expense of the person on whose behalf the document is issued, and shall be served on the Maori.
>
> (b) The proceedings in respect of which the document is issued shall be stayed until the translation is so served.
>
> (c) The document shall be deemed not to have been served until the translation is so served, unless the Court otherwise orders.
>
> (d) Every subsequent document served on the Maori in the proceedings and every warrant issued against him in the proceedings, shall be accompanied by a translation into the Maori language, unless the Court otherwise orders or unless the Maori is at the time represented by a solicitor.
>
> (3) If the Maori does not apply for a translation, the Court may at any time direct that a translation be served, and may grant any adjournment or rehearing that may be necessary in the interest of justice.
>
> (4) The execution of any warrant against a Maori shall not be invalid by reason only of its not being accompanied by a translation into the Maori language.
>
> (5) Every translation served under this rule shall be certified as correct by an authorised interpreter.
>
> (6) For translating any document under this rule the interpreter may be allowed fees in accordance with the Witnesses and Interpreters Fees Regulations 1969. Such fees, and any additional costs of service, shall be costs in the cause.
>
> (7) For the purposes of this rule the term "Maori" has the same meaning as in the Maori Affairs Act 1953.

Clearly, the Legislature had at some stage turned its mind to *some* use of the Maori language in judicial proceedings, albeit a very limited use. It would have been a very simple and sensible matter in the 1953 statute to not only officially recognise the language but to have extended the breadth of statutory authority for a more general use of the language in judicial proceedings.

Rule 346 is a clear attempt to ensure fairness in civil proceedings in the interests of Maori persons involved in such proceedings. But, it allows only translations of documents and no more.

When s 30 of the Summary Proceedings Act 1957 came into force to facilitate translation of documents into the Maori language for the purposes of criminal proceedings, that section simply adopted the utility of Rule 346. Again, the matter of more general use of Maori language in judicial proceedings remained limited. Section 30 states:

> S 30 Translation of documents into Maori language –
>
> Where a document is served on any person who is a Maori within the meaning of the Maori Affairs Act 1953, the provisions of the Rules for the time being in force under the District Courts Act 1947 relating to translations of documents served on Maoris in civil proceedings shall apply.

The limited nature of both Rule 346 and s 30 is recognised and confirmed in *Mihaka*, supra, at p 454 (per Chilwell J), pp 458-9 (per Bisson J). The Court of Appeal (ibid, pp 460-3) recognised this also by refusing leave to appeal in both cases. Specifically as to s 77A the

Court of Appeal stated at pp 462-3, lines 50-05:

> But s 77A is quite limited in its terms. There is no provision to that effect in the section or elsewhere in our laws and any extension of the official use of the Maori language is a matter for the legislature, not for the Courts. English has been the customary language of the Courts in New Zealand from the earliest colonial days. It is the only language of most of our people. The provision for translation of documents into Maori is some recognition of the practice of the Courts. In its inherent jurisdiction any Court will, of course, satisfy itself, that where a party or witness does not appear to be proficient in the English language, appropriate steps are taken by the use of interpreters or otherwise to ensure that he is not disadvantaged.

Of course, in 1980 when this case was reported English was and remains no doubt "the only language of most of our people". But, reflect on the position in February 1840. *Then* Maori, no doubt, was the language of most of our people and probably remained so until numbers of non-Maori substantially exceeded those of Maori in New Zealand.

One might well ask why the seemingly *original* language, Maori, was not then accorded (ie in 1840) official and equal recognition for use in at least the administration of justice. After all, a central theme of the Treaty of Waitangi was the dispensing by Her Majesty of justice for all New Zealanders.

Never mind. All was not lost. It seems that the words of the Court of Appeal in 1980 did not fall on entirely deaf legislative ears. The "extension of the use of the Maori language" being "a matter for the Legislature, not for the Courts", Parliament apparently took the matter to heart. The result? The Maori Language Act 1987 came into force on 1 August 1987. Great, you might say, real progress! But wait — the very issue we are concerned with (use of Maori language in criminal proceedings) was not yet quite fait accompli. *That* was not to happen until s 4 of the Act came into force on 1 February 1988. Happily, that date too has now passed — a mere 148 years after the signing of Tiriti O Waitangi.

The Maori Language Act 1987

The Long Title tells us that it is:

> An Act to declare the Maori language to be an official language of New Zealand, to confer the right to speak Maori in certain legal proceedings, and to establish Te Komihana Mo Te Reo Maori and define its functions and powers.

The content of the Long Title contains matters of significance.

1 *Maori is declared to be an official language of New Zealand*

This is consistent with the purpose of the former s 77A of the Maori Affairs Act 1953. But, given that the Maori Language Act 1987 is also an Act:

2 *"to confer the right to speak Maori in certain legal proceedings"*

Should the Long Title have been drafted more widely to statutorily recognise Maori as not only an *official* language, but one of *equal status* with English in New Zealand?

The Long Title refers to creation of statutory *right*, but is full recognition given that right in the absence of an unqualified statutory statement as to equality of the two languages? The point seems moot.

The stated intentions in the Long Title are given substance in several sections in particular.

Section 3 states:

> *Maori Language to be an Official Language of New Zealand* — The Maori language is hereby declared to be an official language of New Zealand.

Section 4 states:

> *Right to speak Maori in legal proceedings* —
>
> (1) In any legal proceedings, the following persons may speak Maori, whether or not they are able to understand or communicate in English or any other language:
> (a) Any member of the court, tribunal, or other body before which the proceedings are being conducted:
> (b) Any party or witness:
> (c) Any counsel:
> (d) Any other person with leave of the presiding officer.
>
> (2) The right conferred to sub-section (1) of this section to speak Maori does not:
> (a) Entitle any person referred to in that sub-section to insist on being addressed or answered in Maori; or
> (b) Entitle any such person other than the presiding officer to require that the proceedings or any part of them be recorded in Maori.
>
> (3) Where any person intends to speak Maori in any legal proceedings, the presiding officer shall ensure that a competent interpreter is available.
>
> (4) Where, in any proceedings, any question arises as to the accuracy of any interpretation from Maori into English or from English into Maori, the question shall be determined by the presiding officer in such manner as the presiding officer thinks fit.
>
> (5) Rules of the Court or other appropriate rules of procedure may be made requiring any person intending to speak Maori in any legal proceedings to give reasonable notice of that intention, and generally regulating the procedure to be followed when Maori is, or is to be, spoken in such proceedings.
>
> (6) Any such Rules of Court or other appropriate rules of procedure may make failure to give the required notice a relevant consideration in relation to an award of costs, but no person shall be denied the right to speak Maori in any legal proceedings because of any such failure.

There is obviously an element of flexibility and discretion built into this section which will enable a presiding officer to determine various matters in the course of the proceedings as to the use of the Maori language. But, the flexibility

and discretions do not seem wide enough to cater for situations where a person wishing to communicate by use of Maori language might need to do so by means other than oral communication. What of a deaf mute? Does the section allow communication by signing? Does the section allow communication in writing?

Neither does the section make it clear whether a person authorised to *speak* Maori may be asked questions in the Maori language. A matter of common sense, you might say! But is it? The language of the section is specific and the flexibility and discretions it contains do not seem, on a reasonable construction, to extend to a right to have questions asked in the Maori language. If Parliament intended it, it should have said so.

This very issue arose in the course of a recent trial, *R v Hillman & Others (Ruling on application under Maori Language Act 1987)* (unreported, Tauranga District Court, 12 March 1989, T 2/89, Richardson, DCJ).

Briefly, this was a trial of five Maori men arising out of their occupation of the new Civic Centre building erected on the old Town Hall site in Tauranga City. The men had occupied the building to protest their continued concerns about Maori land claims affecting the Ngai Tamarawaho sub-tribe.

Certain damage occurred to the building and the five men were jointly indicted on counts including breaking and entering the building, wilfully setting fire to property in the building, wilful damage, assault with intent to injure, and common assault.

The accused Hillman of Tuhoe was raised in Tuhoe traditional ways and his first language was Maori until his early teen years. English is his second and acquired language. He exercised his right under s 4 of the Act to speak Maori in the proceedings. His Honour the Judge determined the matter thus:

> Counsel for the accused sought directions from the Court as to the manner in which cross-examination should proceed. It was submitted on behalf of the accused that he had the right under the Act to have all questions put to him in cross-examination translated into Maori. He then wished to reply in Maori, which would be translated into English.
>
> Counsel for the Crown opposed this suggestion and relied on the provisions of s 4(2). He submitted that the right to speak Maori did not extend to having questions put translated into Maori during cross-examination.
>
> The right created by the Act to use the Maori language for speaking was broad in its application, extending to all persons regardless of their linguistic ability in English, hence the restrictions imposed by s 4(2).
>
> I ruled that the request of the accused be granted. That all questions in cross-examination should be put first in English, then translated to the accused in Maori. His reply in Maori should then be translated back into English. I indicated I would make my reasons available at the conclusion of the trial.

His Honour gave the reasons in some detail. I do not outline them in full here. Suffice to say for the present purposes that he traversed the matters referred to in *Mihaka*, supra, relating to the effect of the English Laws Act 1958 and the Consolidation Act 1908, and the comments of the various Judges involved in one way or another in the *Mihaka* proceedings. His Honour traversed also the preamble to the Maori Language Act 1987, referred to s 3 and s 4, contrasted some of the wording used in s 4 and considered the functions of various words and their dictionary meanings in the context of that section. At pp 6-8 of the ruling, His Honour stated inter alia:

> I do not interpret section 4(2)(a) in the rather restrictive manner contended by the Crown. I do not consider it as such as to deprive a person electing to speak Maori of his right to request a direction from the Presiding Judge as to the manner in which the trial, or cross-examination, should be conducted. Nor does it inhibit the Trial Judge in exercising his inherent jurisdiction in giving such directions as to the mode of procedure or conduct of the trial, including cross-examination in cases not otherwise provided for. I consider the section has been carefully framed to ensure that this very question of the right to have questions and cross-examination translated into Maori, be left to the discretion of the Trial Judge in the exercising of his inherent jurisdiction in matters where there are no other rules or provisions providing for such procedure and conduct of the trial.
>
> In exercising my discretion I have taken into account the obvious objections that the Crown advances in respect of translation –
>
> (i) that where an accused is conversant with the English language, or has some reasonable comprehension thereof, additional time is gained by translation to enable an appropriate answer to be framed.
> (ii) the inevitable delays implicit in proceeding with translations at trials.

Any such objections are clearly outweighed in the interests of justice to this accused:

(a) I consider it is in keeping with the spirit and intent of the Act, that where a person desires (to) use Maori for expressing himself he should also have a choice of electing to have questions put to him translated into the same language.

The Preamble to the Act guarantees to the Maori people their taonga – the Maori language is declared to be one of such taonga. The Act establishes the Te Komihana Mo Te Reo Maori. See s 6, *Maori Commission.*

The functions of that Commission under s 7(b) include inter alia –

> To promote the Maori language, and, in particular, its use as a living language and as an ordinary means of communication.

In my opinion the Act as a whole intended to foster the use of Maori in legal proceedings as a step towards the preservation of the taonga. Whilst its use in such legal proceedings must of necessity be tempered at present by the knowledge that few of the inhabitants of New Zealand can

speak the language, the use of Maori can be further advanced where requested by permitting questions put to an accused and cross-examination to be translated into Maori and to which the accused can reply in the same language.

It may well be that not every person electing his right under s 4 will request cross-examination to be translated into Maori, but I consider where such request is made it should be readily assented to – it seems to me inconsistent with the grant of the right to speak Maori that a translation from English into that same language should not be made for the purposes of questioning the person electing to speak Maori.

(b) Though the accused is bilingual, Maori is his first and chosen language. English is a secondary and acquired language. The accused is more relaxed and comfortable with his first language and the ends of justice require that to avoid any possible misunderstanding, to ensure the accused is not and does not appear disadvantaged in any respect, questions as put in English in cross-examination should be translated into Maori. In this manner not only will justice be done but will clearly be seen to be done to the accused.

With respect to His Honour, I believe he got it right but wouldn't it have been so much nicer if the section had made it clear in the first place?

Section 6, relating to the third main statement of intention in the preamble, establishes the Commission Te Komihana Mo Te Reo Maori, s 7 sets out the functions of that Commission, and s 8 states the Commission's powers.

Sections 3 to 8 indicate, it is submitted, a desire by Parliament to revive the Maori language and raise it to a level of importance and prominence in New Zealand – a level it no doubt enjoyed in 1840 and before. If that *was* the intention of the statute, it seems to me a shame that what looks suspiciously like and attempt legally to equalize the languages was not specifically stated to be the case. Perhaps at the end of the day it is just that expedience demands that one language be more equal than the other?

As to whether the two languages might now be considered equal, at least for the purposes of use of both in criminal proceedings, Richardson DCJ touched on this matter in *R v Hillman & Others*, supra, at p 4 where he said:

> The fact that Maori is now *an* official language in New Zealand does not, of course, mean that it is *the* official language for use in the Courts.
>
> As I see the position, since the passing of the Maori Language Act in 1987 *here in New Zealand we have two languages of equal standing*, both official languages (English and Maori) but the English language remains *the* official language for use in our Courts. (Emphasis added.)

Again, with respect, I believe His Honour got it right. But, doesn't this reality simply point out the fact that one language *is* being treated as more equal than the other?

"Maori language" is not defined in the interpretation provisions, or elsewhere, in the *Maori Language Act 1987*. Curiously, the Act does not adopt the references in the Maori Affairs Act 1953 in s 77(a) to:

> (1) . . . the Maori language of New Zealand in its various dialects and idioms . . . and
> (2) . . . the Maori language in its recognised dialects and variants.

To some people, especially those Maori who from time to time find their liberty and related interests bathed in the refulgent glare of judicial wisdom, idiom and dialect (and variants) are likely to be significant.

Maybe it is trite to say here that idiom and dialect are likely to vary among the tribes and sub-tribes, *but* it *has* to be said. After all, when a Maori defendant or accused exercises his or her right under the Act to speak Maori, a person certified as "competent in the Maori language" (ss 15-21 incl refer) will become involved in the proceedings.

In reality, that person's function will be to act as interpreter and translator in the proceedings; ie to interpret questions put or comments made in one language, and translate that into the other language, and vice versa. If, unknown to the various persons involved in the proceedings, differences in idiom and dialect exist in the understanding and useage of the Maori language as between a person or persons referred to in s 4 of the Act and the interpreter/translator, how can the presiding officer be sure a truly *fair* hearing is being conducted?

For example, in *R v Hillman & Others*, supra, whilst the accused Hillman was giving his evidence and Maori was being spoken as between him and the Court, the problem of accurate interpretation and translation became obvious.

Two certified interpreters/translators were available to the Court for most of the two and a half week trial. One of the graffiti phrases written on an interior wall by the accused Hillman read:

> "Kai To Hamuti Pakeha"

When, in giving his evidence, he spoke that phrase in *his* way, with *his* style of pronunciation, one interpreter/translator told the Court:

> "Eat your or drink your tea" (I recall the same interpreter advising the Court that he had said "Drink your nice cup of tea, Pakeha").

The other interpreter/translator pricked up her ears, looked somewhat stunned and disagreed with the interpretation.

His Honour queried the translation and was then told the phrase "could mean several things". Some discussion followed between Bench, translators and witness, and the Court was then told by the translator again "it means several things" but that the meaning the witness wanted to convey by the phrase was:

> "Good job, not eat anything".

There was some further to-ing and fro-ing between both translators, Bench and witness, and the end result to be gleaned from the transcript was that it meant different things to each translator.

Sitting and listening to these exchanges naturally aroused my curiosity. I happened to have with me in Court a handy little book – E Tregear, *The Maori-Polynesian Dictionary* (1891) Whitcombe and Tombs Limited, Wellington. So, I had a quick look at a few of the words in the phrase in issue. This is

what I discovered.

pp 115-6 – *Kai* – five separate entries; and variants.
1 food.
2 a prefix to words used as transitive verbs, to denote the agent: *hoe*, to paddle; *kai-hoe*, one who paddles, etc.
3 (South Island dialect for *Ngai*), menace. 2. The heel.
4 for *Kei*), lest: *Hei koko i te hani kai tahuri papa nui* – MSS.
5 (*kai*), the name of a tree: *Kei te rakau maenene te rau he kai tene rakau* – A.H.M., ii 153.

pp 520-21 – *To* – Nine separate entries; and variants. Without listing them in detail they referred to staight plant stems, small poles, pregnancy, to set (as the sun) thy, to drag/haul (as a canoe), to perform a ceremony over a child, a probably compound of *te* and *o*, up to/as high as, entirely, and (in Moriori) the finger or toe.

To say the least, those discoveries were interesting. Well, it did not get easier or less confusing as I looked at the next word "*Hamuti*" (I skipped "Pakeha" as it sounded fairly familiar).

p 44 – Hamuti – Human excrement : *Ma wai e kai tena kiore kai hamuti* – G.P., 170. Also *Hamiti*. 2. A heap of dung: *he poporo tu ki te hamuti*. – Prov.

Do you see the scope for confusion? With a Maori accused whose first language is Maori, represented by a non-Maori lawyer who does not speak Maori, trying to give accurate evidence on his own behalf, assisted by two interpreters/translators who are unable to agree with each other as to the correct interpretation, and a Judge who simply wanted to hear honest accurate evidence?

Perhaps you would agree with me that idiom and dialect are matters of moment. Perhaps the 1987 Act should specifically have recognised that, not only in a definition of Maori language for the purposes of that Act, but also in setting more careful guidelines for certification of persons competent to act as interpreters or translators or both.

Coincidentally, it is interesting to note that s 15(2) differentiates between:

(a) A certificate of competency in the *interpretation* of the Maori language:
(b) A certificate of competency in the *translation* of the Maori language:
(c) A certificate of competency in the *interpretation* and *translation* of the Maori language. (emphasis added).

Quaere: If a person is certified as a competent interpreter will they necessarily be a competent translator or vice versa? If not, should they be allowed to appear in criminal (or other) proceedings contemplated by the Act? The act of translation seems to me to inevitably involve interpretation as a prerequisite. Should only persons competent in both categories be certified in terms of the Act?

The record of proceedings

Section 4(2)(b) seems to imply that the presiding officer may determine how the proceedings are to be recorded.

If one accepts for the moment that where interpretations and translations of languages occur in the course of criminal proceedings there is room for significant variation in correct meanings of words and phrases, it follows I suggest there is considerable latitude for mistakes to be made.

If mistakes of interpretation and translation are made, will the attention of the presiding officer be focused away from the principal issues? Will the Judge be able to bring correct and complete evidence to bear on the crucial issues? Will the Judge have the *correct* story? If not, how can justice truly be done? How could an Appellate Court *properly* review the proceedings to determine whether there had been injustice?

To answer the last first, let me suggest that a *complete* record of the proceedings at first instance should be kept. A *complete* record.

Audio recording of all oral exchanges throughout the trial, together with the usual transcript of evidence would probably suffice (except of course the opening and closing addresses of counsel or unrepresented parties, unless the Judge required those too to be recorded).

All oral exchanges between translators, presiding officer and others should be included in the audio and written records.

Then, should Appellate Courts become involved, a full translation of the audio-tape could be provided, the inter-lingual material being interpreted and translated at that stage by "certified experts" familiar with and proficient in not just Maori language generally, but also any particular dialect or variant being used.

Some legislative changes would probably be necessary to provide for this procedure. That should be no great obstacle. Some extra money might be involved. *Always* a problem. And, so might some extra time. Something no criminal advocate ever has.

But then, in criminal trials, are we not engaged in the pursuit of truth, and fairness, possibly even something closely resembling justice?

If so, we should be very careful not to arrive at a wrong destination quickly and cheaply, only to find when we get there that no one including ourselves really understood how we managed to arrive!

Conclusion

By way of closing, I want simply to repeat briefly one comment I made at the outset. The use of Maori language in criminal proceedings has arrived, is doubtless here to stay, and can and must properly be accommodated.

If you have not done so already, as a criminal advocate you will almost certainly encounter the experience. You must be prepared to meet it and cope with it.

That responsibility rests with each of us. □

References

R A Caldwell, *Garrow & Caldwell's Criminal Law in New Zealand*, (1981) 6th ed, Butterworths of New Zealand Limited, Wellington, p 317 – Translation of Proceedings, referring to:
Lee Kun [1916] 1 KB 337; *Fong Chong* (1888) 6 NZLR 374; *Attard* (1958) 43 Cr App R 90.

D L Mathieson, *Cross on Evidence* (1989) 4th NZ ed, Butterworths of New Zealand Limited, Wellington, para 16.22, pp 465-6, referring to:
Lee Kun, supra; *Attard*, supra; *R v Maqsud Ali* [1966] 1 QB 688 (as to use of sound recordings).

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Advocacy in environmental cases

By N R Watson, Solicitor, Waikato Conservancy, Department of Conservation

This article is intended as some notes for the guidance of practitioners with little, if any, experience of appearing before the Planning Tribunal. The article is not an essay in the art of advocacy, but is intended to be of practical use. The jurisdiction of the Planning Tribunal is steadily increasing and it is commonly considered that planning cases will proliferate rather than diminish, especially as a consequence of the Resource Management Bill if it is enacted in its present form. The comment has been made that the Bill as drafted enjoys a generosity of language, at times to the point of total imprecision, and that when it becomes law it will require the development of a whole new body of case law.

Introduction

Advocacy in environmental law is a specialised art. It can only be learned by practical, and sometimes bitter, experience. Certain doctrines, such as that of precedent, play little part and, as with ingrained notions such as who gets to say what, and in what order, may have to be consciously discarded.

Environmental cases have their own relatively unique rules of procedure.

There are two distinct phases – pre-hearing and hearing. Often, as will become apparent, the pre-hearing phase can be the more important of the two.

Prehearing

This has three basic components.

Procedural
Negotiations and pre-hearing conferences
Submission and witness preparation

Procedural

This is elementary. It involves such matters as whether for example the objection or appeal has been lodged in time with all necessary documents, whether the grounds advanced are relevant, and whether the relief sought is capable of being granted.

Read carefully the Town and Country Planning Regulations 1978 and the Schedule to those Regulations.

Read also Part VIII of the Town and Country Planning Act 1977 relating to the powers and procedures of the Planning Tribunal.

As one feature of the Resource Management Bill, introduced in December last year, is to increase the decision making role of the Tribunal, its procedures and practices will in all probability remain largely unchanged.

The Tribunal issues Practice Notes under the authority of the 1977 Act. These apply equally to appeals arising under the Water and Soil Conservation Act 1967. (See Vol 10 NZTPA p 467 for the current notes). Commit these to memory. The most important one in the prehearing phase is the "7 day rule". (Rule No 11).

It is instructive to trace the history of this rule.

By the early 1970s the then Town and Country Planning Appeal Boards had become exasperated with the tendency to treat hearings at the first instance as a "dry run" for appeals to the Board. A particularly annoying practice so far as the Boards were concerned was that of tendering only enough evidence to draw the opposition's fire at the local authority level, with critical evidence being held in reserve for a counter attack at the appeal stage.

The Boards were also concerned that some local authorities appeared to be ducking the hard decisions, when caught between an arguably meritorious planning proposal and

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S Mitchell and P J Richardson, eds, *Archbold — Pleading, Evidence and Practice in Criminal Cases* (1988) 43rd ed, Sweet & Maxwell, London, Ch 4, paras 4-12, 4-16: referring to:

Lee Kun, supra; *Attard*, supra; *R v Mitchell* [1970] Crim LR 153 (CA) (as to impartiality of interpreter).

Bartholomew v George (cited in *Best on Evidence*, 12th ed, para 148, as to interpretation of evidence of deaf mutes – signs or writing)

R v Imrie (1917) 12 CR App R 282 (CCA) (Conviction quashed where difficulty in interpretation made it impossible for testimony to be tested by cross-examination)

H C Black, *Black's Law Dictionary* (1979) 5th ed West Publishing Company, St. Paul, Minn, USA, pp 734; 1343:

> *Interpreter* – a person sworn at a trial to interpret the evidence of a foreigner or a deaf and dumb person to the Court.
> *Translation* – the reproduction in one language of a book, document or speech in another language.

T Lindsay Buick, *The Treaty of Waitangi, (How New Zealand Became a British Colony)* (1936) 3rd ed Thomas Avery & Sons Limited, New Plymouth, New Zealand, Ch 4, etc.

J M Hawkins ed, *The Oxford Reference Dictionary* (1987) University Printing House, Oxford, England, pp 429; 873:

> *Interpreter* – n. one who interprets, especially one who orally translates the words of persons speaking different languages.
> *Translator* – n. ref. "*translate*" v.t. 1. to express the sense of (a word or text etc.) in another language, in plainer words, or in another form of representation.

Russell and Somers (Wellington) Ltd v Wellington Harbour Board [1977] 2 NZLR 158, per Beattie J. (As to taking of statements in foreign language.)

vociferous opposition from local ratepayers. Foremost amongst these were, and still are, such issues as the location of rubbish tips, and neighbourhood taverns.

This led to the requirement that not less than 7 days prior to the appeal hearing all parties were to exchange briefs of evidence of all witnesses intended to be called.

Failure to do so without good cause might well result in the party in default being ordered to pay costs, especially where other parties could properly claim to be caught by surprise and, in consequence, obtain an adjournment.

By this means, coupled with the sanction of costs, both Crown and party to party, the Boards sought to ensure that all cards were on the table at the objection hearing stage, and that those hearings were not only seen to be done but were in fact a full examination of all relevant matters with a consequently informed decision on the merits.

Woe betide counsel who, without demonstrably good cause, produced materially new evidence only at the late stage of the appeal hearing.

The immediate and usually acerbic response, not the least from the Chairman of the No 1 Board, A R Turner SM, as he then was, became a more compelling sanction than any subsequent award of costs.

The 7 day rule had a number of consequences, the most significant of which was to encourage pre-hearing discussions.

In environmental cases, matters of fact are rarely in dispute. Evidence is largely that of experts in a wide variety of disciplines, and often of a highly specialised and complex nature. The 7 day rule forced the expert witnesses from all parties to come together to isolate those issues on which real differences of opinion existed.

A strong rebuke from the bench could be expected if it became obvious during the course of the hearing that there were wide areas of agreement between expert witnesses, thus obviating the need for lengthy and repetitious technical evidence, but there had been no pre-consultation. (See Vol 8 NZTPA p 319).

Today it is common practice for briefs of technical evidence to be exchanged not just days but usually weeks in advance. The time and costs of hearings are consequently reduced.

The 7 day rule had another unintended but entirely welcome consequence for those for whom cross-examination is a trying experience.

Instead of being faced for the first time on the day with highly specialised technical evidence accompanied by the usual and incomprehensible mass of graphs and diagrams, immediately on the conclusion of which evidence counsel were expected to put reasoned and pertinent questions, the 7 day rule meant that you had at least some prior knowledge of what it was all about, and even the possibility of understanding the answers to your questions.

Negotiations and pre-hearing conferences

There are those who would rather not face the opposition except from behind the familiar structures and regulated territory of a formal hearing. This is non-productive, and at times plainly stupid.

Pre-hearing negotiations can be crucial. The Planning Tribunal encourages this wherever possible.

In respect of mining privilege objection hearings, and major planning matters, the Tribunal has itself now developed a sophisticated pre-hearing conference process, which will be described in detail later.

The prime aim of pre-hearing negotiations and conferences is to reduce the time and cost of hearings, should in fact they ultimately prove necessary.

As already mentioned, the Planning Tribunal does not take kindly to parties who do not reach prior agreement on matters of fact or opinion evidence where this plainly could have been done, especially where that becomes apparent during the course of the hearing. Neither does the Tribunal take kindly to parties who force a hearing over issues the subject of obvious and reasonable compromise. The Tribunal's attitude reflects a wish to avoid waste of time and money at the public cost.

For that reason, it is the unstated practice of the Tribunal to schedule an impossibly lengthy list of cases within the prescribed sitting time. The imminence of a hearing can result in a sudden rush of reality, with a consequent deluge of consent order proposals and withdrawals.

There are a few basics concerning pre-hearing negotiations.

Counsel is responsible for the case from inception to final decision. Always either conduct such negotiations yourself, or at least be fully familiar with and endorse the outcome. Do not be caught in the middle of the case by some prior arrangement you know nothing about.

Conducted on a without prejudice basis, such negotiations do not compromise your client's position. But if firm agreements or undertakings are entered into, never resile from them, however much, on hindsight, you may wish to. If you do, word will soon get around in the small circle of those regularly practising before the planning bar.

Mining applications: Pre-inquiry hearing conference

It is now the practice of the Planning Tribunal, where a significant mining proposal has attracted a number of objections, to hold a semi-formal conference under the chairmanship of the Planning Judge. (A similar practice is followed in other major cases and may be requested by any party to a case who considers that practice may be helpful to the Tribunal).

This involves the applicant, the Minister of Commerce, and all objectors specifying the issues still remaining to be pursued and an assessment of the time required to hear those issues.

The Planning Judge then sets a timetable which has three basic stages.

1 The applicant is required to circulate all evidence in chief.

2 Objectors are then given an opportunity to examine that evidence before preparing their own.

3 Following this the applicant has the further opportunity to produce supplementary evidence in rebuttal.

Only then does the formal hearing proceed, the actual date of the hearing being dictated by the

process, rather than the reverse.

This has advantages over the 7 day rule. Many local authorities, have adopted that rule. Unfortunately, in some instances the objectives of the rule have become lost sight of – namely to identify precisely the issues between the parties, to encourage resolution wherever possible, and to arrive at a hearing only with those matters truly still in dispute.

The prior exchange of evidence can become merely an irksome matter of procedural compliance at the 11th hour, with so called "supplementary evidence" being called at the hearing, which evidence is, in reality, evidence in chief.

The Planning Tribunal's practice in relation to mining licence applications and other major cases has much to commend it, and the desirability of pre-hearing consultation has now been recognised in specific clauses in the Resource Management Bill.

Perhaps with the restructuring of regional and local government roles, encompassing in particular the present functions of catchment boards, a degree of universality towards such a procedure might be achieved at the local authority level. Similarly there is merit in adopting more widely the process contained in Regulation 69(2) of the present Town and Country Planning Regulations 1978 as to the admitted findings of technical report in appeals under the Water and Soil Conservation Act 1967.

Submissions and witness preparation

Submissions:
Leaving aside any preliminary matters such as to jurisdiction or status, submissions should:

outline the circumstances of the case, identifying the issues and in particular the stance and interest of the client.

summarise the nature of the evidence to be called

state the relevant factors and matters of law

bring all together in conclusion in justification of the relief sought.

The exact sequence is a matter of personal preference and judgment.

In some cases it may be appropriate to open directly with a summary of the evidence to be called to set the scene. In others, a point of law may be critical and any evidence called largely by way of background only.

Remember that unless you are appearing for the party called on first you have only one opportunity of address. Even the party called on first will only have another opportunity to address in reply to the cases presented later, not to address matters which could, and therefore should, have been dealt with in opening.

A common technique is to try and write the decision itself.

Typed and distributed submissions are not required but are customary, although you may have to substantially modify your written submissions as the hearing proceeds, if you are well down the batting order of appearances.

Submissions and evidence should compose a mutually supportive package.

Witness preparation:
This is obviously the most important element of pre-hearing preparation.

There is no such thing as too much time spent on this.

Virtually all evidence in chief will be by way of prepared statements. Evidence adduced viva voce only occurs in planning hearings in unusual circumstances, eg when matters of primary fact are in issue requiring direct question and answer.

Prepared statements of evidence should always begin with a clear statement identifying the witness and relevant qualifications.

This should, where appropriate, be followed by reference to the witness having inspected the subject site, or tested samples, or other matters qualifying the witness to give evidence on the particular case.

Most evidence will be that as to expert opinion, a subject which is covered in more detail later.

Counsel cannot of course be themselves the witness, but must become familiar enough with the basics of the evidence, however complex, to ensure its relevance. Counsel should also see the site, preferably with the witnesses, or view the samples, etc.

Do not pretend to know what you do not understand. Better to appear ignorant in the privacy of pre-hearing discussions with your witness, than in public.

One technique is to get the witness to translate as much as possible into layman's terms. For example, the phrase "perturbations of the temperature gradient of the sub surface thermally heated liquious layer" may be simply translated as "changes in the temperature of underground water which is geothermally heated".

Always examine your witnesses' conclusion against the data and research leading to that conclusion. Opposing counsel of any competence will certainly do so in cross-examination.

A carefully prepared brief of relevant evidence is only half the story. The other is in preparation of your witness for cross-examination.

The most common method is a meeting or "mock hearing", with your witnesses examining each other's statements, bringing to bear differing perspectives and values. Your role is to play opposing counsel, anticipating cross-examination.

Each witness should present his or her full brief of evidence as though at the actual hearing, including any visual displays, etc. As well as providing a practice run for those not naturally graced with the art of public speaking, this helps avoid those little mishaps that so often occur, such as the pinned up diagram which persistently interrupts the practised delivery of evidence, by falling to the floor.

Ensure that written evidence is in fact readable. Remember that when written evidence is being presented verbally, the listener is not so much listening as reading the printed copy before him. On the same subject, avoid masses of graphs and diagrams etc in the main body of evidence, unless they are truly illustrative of the surrounding text, and readily intelligible. Otherwise, attach them as appendices. Do not of course forget to remind your witness to identify and table these in evidence.

If graphs, diagrams, tables or maps need to be included in the main text of evidence make sure that your witness is aware that he or she

may not have to go through these in every detail. The witness should be taught to pause in the narrative, giving the Tribunal the opportunity to take such "as read", if it so wishes, although the witness may be asked, either by yourself or the Tribunal, to identify points of particular significance.

Nothing so detracts from the presentation of a well written narrative as a ponderous recital of every minutia of a page-long table.

The witness is your responsibility throughout. This is not only as to the content of evidence, but also in demeanour. All witnesses, however expert in their particular field, usually find daunting the prospect of giving evidence for the first time in an adversarial setting. Counsel's function is to make sure that first time witnesses are as prepared as possible as to the nature of the hearing and the procedures involved. Take any opportunity to get any such witnesses to sit in on a planning hearing.

It is trite, but make sure your witness is appropriately attired. The focus of attention should be on what they say – not what they look like. Sartorial eccentricity may have its place – but not here.

Guard against the potentially aggressive or dogmatic witness. For example, a witness who, in the hearing, insists on a conclusion despite cross-examination plainly demonstrating otherwise can do more damage than if they had never been called in the first place. That is not say your witness should not be encouraged to be firm and forthright in stating conclusions which *are* supportable – just remember that there can be a thin line between being assertive and asininely dogmatic.

Watch for the "professional witness". There are those who have given evidence so many times that they tend to become blase. Remind them to prepare for each hearing with all the sincerity and trepidation with which they approached their first. Otherwise, opposing counsel may have them tripping over their own familiarity.

This type of witness also tends to breed the jokester. Discourage this. As ever, the bench virtually never recognises other than its own humour. That most rare of moments when a witness, by word or action, evokes appreciative laughter, is nearly always spontaneous, never planned.

Last but not least, extend the courtesy of always checking before the hearing whether your witness wishes to give evidence on oath or by affirmation, and, where appropriate, make this known to the Registrar before the witness is called.

Some special points

The expert witness

Disputes as to matters of fact are rare in planning hearings. What is most usually at issue is which of two conflicting expert opinions should prevail. For example, there may be common agreement on the surface temperature parameters of a geothermal field. However there may be no agreement between experts as to the effect of further draw-off of geothermally heated water from that field, a matter vital to resolving the question of how much draw-off the system can sustain without failure of the surface geothermal features. (See *NZ Maori Arts and Crafts v NWSCA* Vol 7 NZTPA 365 p 370.)

Expert witnesses come in all variety of disciplines, from the exotic to the commonplace, with some disciplines so specialised as to be known only in the most select of scientific circles. Nevertheless, the functions of all expert witnesses are clear:

First, to provide a sufficient understanding of the subject matter and the scientific or technical issues involved to enable the Tribunal to best evaluate the importance of those issues;
Second, to describe the scientific or technical data the witness has used and the methodology employed to evaluate that data; and
Third, to state the witnesses' own conclusions from this and the reasons for forming those conclusions.

This can be as straightforward as identifying the use of a reliable traffic counter, or as complex as predicting the leachate rate of potentially toxic materials from a waste rock stack over a 20-year period.

The expert witness should not however assume a lack of knowledge of the Tribunal on abstract scientific matters. The Tribunal has appointed to it members with specialist knowledge in various fields, and deals with complex expert evidence on an everyday basis. It is counsel's job to be aware of this and to ensure that the evidence of his or her expert witness is formulated with that factor in mind.

The now commonplace prior exchange of briefs of evidence-in-chief has made life easier for counsel in overseeing the preparation of expert evidence, but not easy. Oversight of the preparation of such evidence remains vital.

There are certain fundamentals.

First, expertise cannot be assumed. It must be established, and at the outset. Neither is it merely a case of trotting out a long list of academic qualifications. On the ground examination of the particular circumstances is essential.

There is the longstanding, and probably apocryphal, story of the city planner who, after a desk-top analysis, recommended against council granting approval to a light industrial use adjoining residential properties, without appreciating that an intervening bank of some 15 metres made noise levels and visual impact acceptably minimal.

Likewise, the ecotoxicologist who on a previous analysis of water bodies of supposedly similar characteristics reached certain conclusions, only to find, as a consequence of other expert testimony, that the actual river in respect of which the discharge rights were sought had unusually different characteristics, rendering his conclusions irrelevant.

Secondly, an expert witness is a witness to his or her opinion, and to that opinion alone. It is quite remarkable how expert witnesses, despite the strongest cautions by counsel prior to the hearing, will, unexpectedly and without invitation, give voice to opinions quite outside their own area of expertise. Not the least of these transgressors are to be found amongst the engineering profession, who, despite a basically empirical training, seem to take an eclectical joy in holding forth on all manner of unrelated subjects.

Thirdly, the expert witness is to be discouraged at all times from indulging in what might be described as the Solomonic tendency.

Never, *never*, let your expert witness conclude, either in writing or verbally, with the statement. "Therefore the decision should be . . . ." Should you do so, and since you are always responsible for your own witness the judicial roof will fall on *your* head.

The purist's criticism of expert testimony is that the weight accorded to it may be such as to reverse, in effect, the decision-making roles but however much the expert witnesses are of the view that their expertise is such that they have the final answer, it is not theirs to pronounce. Besides, it is hardly tactful to intimate in any way however indirectly, that the Tribunal does not have the final say.

Fourthly, and obviously most importantly, make sure the expertise is directed to matters of relevance.

Environmental law exists, for better or worse, within a statutory framework. Whatever the final outcome of the Government's current review of decision making processes and bodies, that framework will undoubtedly remain, whether it be through the medium of the proposed Resource Management Act, or through the provisions of regional and district plans. Matters of relevance in a hearing, whether in relation to an overall scheme review or a simple prospecting licence application, are usually statutorily defined, occasionally with some particularity.

Counsel's initial function is to select expert testimony bearing directly on those matters. There is little point, for example in the overall process of evaluating and balancing competing interests in water usage, in producing a learned and lengthy discourse on the merits of improving potability in a water body in respect of which a farm discharge right is sought, if that water body will in all probability, at least for the forseeable planning future, never be required for community water supply.

Neither does counsel's job stop at selecting relevant expertise.

With the current practice of prior consultation between expert witnesses of all parties, there is an increasing potential for control to slip almost imperceptibly out of counsel's hands into those of the expert witnesses, who begin to decide for themselves what is relevant. Counsel's function is constantly to keep expert witnesses on the statutory strait and narrow of relevance.

The planning witness

The planner as an expert witness deserves special treatment because of a unique ability. Unlike other expert witnesses, the planning witness is entitled, and indeed expected, to wear a many-coloured cloak of multi-disciplinary views.

The planner's function is to assimilate all the various expert evidence brought to bear on a particular matter and to produce, as a whole greater than the individual components of expertise, the overall "planning assessment". But this assimilative evidentiary role must also be carefully monitored for its Solomonic potential.

In the environmental forum, matters of law and matters of evidence can become so entwined as to be symbiotic, if not at times downright incestuous.

The planner, having concluded that in his or her expert opinion the effect of the specified departure will not be contrary to the public interest, will have little planning significance beyond the immediate vicinity, and that granting the departure will not call into question the integrity of the provisions of the district scheme, finds almost irresistible the next step of stating his or her opinion that in law the departure should be granted. This can become habit-forming – a habit which must be quickly broken, preferably in private, rather than by the public rebuke of a Judge. (See *Toy Warehouse Ltd v Hamilton City* (1986) 11 NZTPA 465. This was a decision of Barker J.)

Winners or losers

While usually conducted within an adversarial arena, the desired outcome of a planning hearing, at least so far as the Tribunal is concerned, is not to establish who wins or loses despite what the protagonists themselves may think, but to arrive at the "best planning result".

The Tribunal, as a Court of Record with all attendant powers, conducts formal hearings in which parties with recognised status seek to establish the grounds for the relief they seek.

That is about the extent of any similarity with judicial proceedings in their traditional form – of identifying rights to litigate, determining matters of fact and arguing issues of law thereon, with a final determination resulting in clear winners and losers.

Not so in planning hearings. Whether appellate or inquisitorial in jurisdiction, or determinative or recommendatory in effect, planning hearings are essentially a process of assessing a variety of value judgments, involving a multiplicity of parties, whose interests are not always clearly defined, usually competing but often intertwined, and in which drawing discernible lines between issues of fact, merit, and law, is usually the exception.

It can be like having four or five teams on the field at the same time all playing slightly different games, and where the next round is played by different teams on a different field.

Planning and precedent

Accordingly, notions of precedent should be left in the law library. See *NZ Forest Owners Assoc v Opotiki District Council* – 13 NZTPA 325, 332.

Given the myriad of variables that can occur in planning hearings between planning schemes, parties, and proposals, it is indeed rare that the circumstances of one case are so similar to another that determination of one dictates the outcome of the other.

Normally, the recital of previous cases is only really useful where a discernible trend is developing which astute counsel can crystallise in the collective mind of the Tribunal, for example the recognition of non-physical Maori values.

A practical guide in reciting previous decisions is in the reaction of the Tribunal. If notes are not being taken or no questions being asked, it is either boredom, extreme politeness, or the right moment is being awaited when you are sufficiently committed to the path of your carefully constructed

argument to have it most effectively demolished.

If reference to a previous line of decisions is thought necessary, if only to reaffirm a point, a leading reference is enough.

Planning Tribunals do not appreciate a lengthy recital of previous decisions, particularly their own with which they can be expected to be reasonably familiar, especially if you are really only trying to demonstrate your learned expertise to your client.

Calling the list

It is the practice of the Tribunal to call through all cases scheduled for hearing before proceeding on each.

This is the time for counsel to identify themselves, to give notice of preliminary matters that will be raised, such as procedural compliance, jurisdiction, or status, to propose consent orders, and the last opportunity for withdrawals.

A comment on consent orders:

> Remember that consent orders are not merely a matter of form simply because the parties have agreed on the contents of a draft memorandum of consent. It is the Tribunal which makes the order and therefore must be convinced that it should do so. (See *Minister of Transport v Marlborough County* (1989) 14 NZTPA 13.)
>
> A resolution of the particular issues between the parties may affect others whose interests have to be taken into account.
>
> Also, consent orders cannot confer jurisdiction. For example a planning authority may have proposed scheme provisions which are ultra vires. Everybody may agree that these provisions have planning merit. Nevertheless the Tribunal cannot confer jurisdiction where the planning authority had none simply by the mechanism of a consent order.

Counsel must at the call-up stage give their assessment of the length of the hearing, including such matters as possible site inspections by the Tribunal. The Tribunal then sets specific times for the hearing of each case.

A word of caution on withdrawals at this late stage. Unless there is good reason for not withdrawing earlier, or withdrawal is a matter of agreement between the parties, an application for costs from the other side is almost inevitable.

This is also the last time to seek adjournments. Again a word of caution. Without *very* good reason the Tribunal itself may well impose costs. If an adjournment is sought this should have already been advised to the Registrar, with reasons, as soon as it became apparent that an adjournment may be required.

It should be noted that inconvenience to, or unavailability of, your witnesses will *not* be a good reason, if you are in a position to instruct another witness of comparable expertise.

The hearing

The first day:

Avoid arriving at the last minute, and *never* late.

Arrive in time to familiarise both yourself and your witnesses with the layout.

Make time for acquainting, or reacquainting, yourself with other counsel. Vital matters have a habit of cropping up at the eleventh hour.

Introduce yourself to Court staff. This is not just simple politeness, but may smooth the way, for example, with your witnesses setting up visual displays.

If preliminary matters have not been dealt with at the call-up stage, they should be dealt with at the outset. Don't leave a challenge to status until presenting your own submissions, unless of course you are proceeding first.

The normal order of appearances before the Planning Tribunal, depending on the nature of the case, is set out in the Practice Note — paras 15-17.

If some other order of appearance is desired because of unusual aspects of the case, this should have been agreed to between counsel prior to the hearing commencing, and preferably suggested to the Tribunal through the Registrar well in advance.

Submissions

The content of submissions has already been largely covered. Remember Wittgenstein, — saying a word is like striking a note on the keyboard of the imagination. Go for the phrase or statement which neatly encapsulates your case and may be reflected in the decision.

However, a word on presentation. Leave flamboyance to television and humour to the bench.

Witnesses

Your witnesses are your responsibility in all things. Introduce them. Don't leave them floundering around up there all alone. Make sure they are able to be seated in giving their evidence if illness or age so requires, and that a glass of water is on hand to ease either the vocal cords or the nerves.

Make sure they address the bench not you. If the bench is taking notes make sure the witness speaks slowly. If they depart from the written text of their evidence, make sure the bench is immediately aware of this, rather than being left looking for words that aren't there.

Help them if they become lost in their own written statement by bringing them back to the right page or paragraph reference. Protect them, by interjection, from unfair or improper cross-examination, in the unlikely event that the bench does not.

Prevent them from making injudicious statements. Thank them on the conclusion of their evidence. Ensure that they can be released from further attendance, if no longer required.

In short, look after them. They are more important than you.

Cross-examination

The most difficult phase of all, especially when it comes to the expert witness. Few are naturals.

As to content, cross-examination should primarily relate to points of clarification, and to testing the conclusions a witness reaches against their data and research.

As well as all the literature, and admonitions on do's and don'ts, here are a few pointers learnt from experience.

Keep the question simple. A succinct question which the witness immediately understands is infinitely preferable to having the witness ask you to put it again, or, worse, having the Tribunal rephrase it for you.

Keep the question short. You are likely to lose yourself, as well as everybody else, with a long preamble.

Keep to one subject at a time. The purpose of cross-examination is not to enable the witness to restate his or her whole evidence. In a similar vein, don't ask multiple questions. You are liable to strike the clever witness who restates all of the questions for you, and in a manner most embarrassing. For example: "I will answer your last question first, and what you're really trying to get at is this . . ."

Take your time. Even if you have to resort to the time honoured ploy of shuffling papers, think the question through before you put it.

Listen to the answer. It is remarkable how often even experienced counsel are into the next question before the answer to the preceding one is fully out. Assuming an answer can be fatal.

This is often caused through having written questions prepared. The better approach is simply to have a list of headings of the issues you wish to examine on. If you have made yourself reasonably conversant with the subject matter of the evidence, you should be able to examine both with confidence and with flexibility depending on the responses you get. Often your own witnesses will pass you questions on scraps of paper. Don't just read them out — make sure you know their significance. The Tribunal would rather grant you time to confer than have you cause confusion.

Don't bluster. This simply swings sympathy to the witness. It may well earn a rebuke from the Tribunal, and almost certainly an interjection from opposing counsel, both of which will ruin the line of your examination.

The courteous and conversational style has had more witnesses saying what they didn't intend, than any other.

Know when not to ask questions. This is just as important as knowing the right question to put. Don't ask questions simply for the sake of doing so. If a witness has given a clear and confident statement of evidence which looks unassailable, and you do not have contrary evidence, leave it alone.

Don't question to the point of making the witness even more emphatic in his or her conclusion.

Don't waste your client's time, or that of everybody else, by examining points of evidence irrelevant to your client's case, unless calling into question the integrity of the witnesses' evidence on such points reflects on the integrity of the whole.

Don't ramble on forever. You may have a fee to earn, but you've also got a case to win. Only ask the questions which you are obliged to (to put differences with evidence of your corresponding witness) and those which may really influence the case in your client's favour. Cross-examination which extends beyond 20 minutes is seldom effective. By that stage if you haven't made your main points, you probably never will.

There are said to be two distinct schools of cross-examination — that which takes the roundabout way of preparing a painstakingly thorough background, through the witness, of the subject matter of the examination, and the more jugular approach of going directly at the issue in question. It is entirely a matter of personal style, largely dependent on the nature of the evidence and the demeanour of the witness.

Remember the other shoe. If you have made your point, don't hammer it to death. It often makes more impression to deliberately leave unasked the obvious last question.

As a final pointer, it can be useful to leave something for the Tribunal by deliberately opening a line of questioning that the Tribunal may wish to develop further. The answers to its questions may weigh more with it than those asked by counsel.

Remember to put to the witness conflicting evidence you are subsequently calling. That gives the witness under examination the fair opportunity to comment on that subsequent conflicting evidence, an opportunity which may not otherwise be available.

If you do not, you might find your evidence being given reduced weight, or time wasted in having the previous witness recalled. Your client will also have to pay any costs involved in recalling that witness. These can be substantial if the previous witness has already been excused. Recall is at the discretion of the Tribunal.

Re-examination

Re-examination is essentially a rescue operation and is confined to matters raised in cross-examination only.

The initial confidence of your witness may have evaporated under rigorous cross-examination and the sotto voce mutterings of his or her peers from the rear of the Court.

Your job is one of restoration eg "In response to Mr X's question that . . ., did you take into account . . .?", or "If Miss Y had carried her line of questioning further and asked you . . . what would have been your response?" Watch however that you keep to matters actually canvassed in cross-examination.

But, if the painting is irreparable don't try a patch-up job. When your witness has properly conceded a vital point, don't re-examine. You only serve to highlight the concession.

Don't forget that you may also re-examine, at the Tribunal's indulgence, after any questions put to your witness by the Tribunal itself.

Costs

Refer paragraphs 22-26 of the Practice Notes. If you are seeking costs, don't forget to apply well before the Tribunal is functus officio. If costs haven't been quantified by the time the hearing ends, have costs reserved.

See also the power of regional and local planning authorities to award costs eg Regulation 38(5) Town and Country Planning Regulations 1978 — Section 24(2) Water and Soil Conservation Act 1967.

A few final points

A conflict of duty:

The issue of calling contrary evidence is a frequent source of potential conflict between the duty to the client and to the Court.

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Recent Admissions

Barristers and Solicitors

Abbott R K	Auckland	27 July 1990
Aiken R D	Auckland	27 July 1990
Aitken J C	Auckland	27 July 1990
Anderson S R A	Auckland	27 July 1990
Baker C	Auckland	27 July 1990
Bambury S A	Auckland	19 October 1990
Bendall S C	Auckland	27 July 1990
Benvie M H	Auckland	27 July 1990
Berry S H	Auckland	27 July 1990
Bevin B A P	Auckland	27 July 1990
Bigio D R	Auckland	14 September 1990
Brant G H J	Auckland	27 July 1990
Burt G M	Auckland	27 July 1990
Christmas S J	Auckland	27 July 1990
Crossland K J	Auckland	27 July 1990
David P W	Auckland	19 October 1990
Dolbel D J J	Auckland	27 July 1990
Donegan S P	Auckland	27 July 1990
Eccles S A	Auckland	27 July 1990
Ekambi C J	Auckland	27 July 1990
Ferguson G M	Auckland	27 July 1990
Foliaki S	Auckland	27 July 1990
Fordyce D G	Auckland	27 July 1990
Galbraith R J	Auckland	27 July 1990
Getley T A	Auckland	27 July 1990
Gibson J M	Auckland	24 August 1990
Gillespie A M	Auckland	27 July 1990
Gray M C	Auckland	27 July 1990
Green M C	Auckland	27 July 1990
Hannah-Jones P R	Auckland	27 July 1990
Harris K J	Auckland	27 July 1990
Harris S G	Auckland	27 July 1990
Hobbs R J	Auckland	27 July 1990
Hong B G	Auckland	27 July 1990
Hooker A C C	Auckland	27 July 1990
Hoskin D P	Auckland	27 July 1990
Hucker R B	Auckland	27 July 1990
Hunt A T	Auckland	27 July 1990
Jamieson M R	Auckland	27 July 1990
Jeffs E C	Auckland	27 July 1990
Jelas J M	Auckland	27 July 1990
Jones G D	Auckland	27 July 1990
Keil C J	Auckland	27 July 1990
Kuluz S	Auckland	27 July 1990
Lawrence R J	Auckland	27 July 1990
Lewis V R D	Auckland	27 July 1990
Lindberg K A	Auckland	27 July 1990
Lyons J F	Auckland	1 October 1990
McAra J A	Wellington	2 November 1990
McCarron K M	Wellington	2 November 1990
McPadden P A	Wellington	2 November 1990
Matthews A J	Wellington	2 November 1990
Mehrtens S L G	Wellington	2 November 1990
Miller A L	Wellington	2 November 1990
Olson C D	Wellington	2 November 1990
Pigou P M	Wellington	2 November 1990
Pok Y C	Wellington	2 November 1990
Pyke W C	Wellington	2 November 1990
Quigley J M	Wellington	2 November 1990
Shires R S	Wellington	2 November 1990
Stewart C W	Wellington	2 November 1990
Treadwell M S J	Wellington	2 November 1990
Weston P S	Wellington	2 November 1990
Yee ASGJ-M	Wellington	2 November 1990

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It sometimes happens that your client has relevant evidence, not available to another party, which does not support the case your client wishes to make. For example your client may have commissioned an environmental impact assessment of certain aspects of a development proposal, the results of which do not please him. It is incomprehensible to your client that you should make such evidence available and you may be instructed not to do so. Unfortunately you must.

You may of course argue your case despite such contrary evidence, but you must not withhold it. It is for the Tribunal, not you, to determine which evidence is to prevail.

Such evidence has a habit of coming to light anyway, and it is preferable to have it produced up front rather than under subpoena by another party.

Don't fight the bench:
Never get into arguments with the bench. You may be right but you can't win the fight. At most you are only entitled to "respectfully disagree" – you cannot take it further than that.

Only brickbats:
When you win you are expected to, but when you lose expect the brickbats. Human nature being what it is, it doesn't matter how poor the evidentiary material you have had to work with, how hopelessly optimistic the client's case was, and however much you did your best, if you lose it is always *your* fault.

This is a simple fact of counsel's life that you have to grin and bear.

A matter of confidence:
Finally, rare, if any, is the counsel who has not at some point had stage fright. The confidence of careful preparation is the best cure. □