THE NEW ZEALAND
LAW JOURNAL
21 SEPTEMBER 1991

Prisoners and civil rights

Certainly since the decision of the New Zealand Court of Appeal in *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961 there has been no doubt about the right of a prisoner to sue at common law. In that particular case the point in issue was an evidentiary one, but it was simply accepted that Jorgensen, although in prison, had a right to sue a newspaper for defamation in respect of a statement that Jorgensen and Gillies had machine-gunned Kevin Speight in 1963. The statement did not say they had been convicted of doing so, but merely that they had done it.

The question of the civil rights of prisoners came up in a different context when a change of the law in the 1970s allowed prisoners to vote. Section 18 of the Electoral Amendment Act 1975 repealed the provision disqualifying for registration as an elector anyone who was detained in a penal institution. But the matter did not rest there. Section 13(1) of the Electoral Act 1980 reimposed the earlier disqualification in respect of those detained in any penal institution pursuant to a conviction. That is where the matter currently remains.

Disturbances in prison have not been unknown in New Zealand (to put the matter mildly), any more than they have been in the United Kingdom. The tensions arising from imprisonment reflected in riots and breakouts merely highlight the problems of control in such institutions. The question of prison discipline must always be a difficult one in practice and one having certain legal implications. A recent decision of the House of Lords delivered on the 24th July 1991 indicates a further development of the jurisprudence in this area.

The two principal judgments were those of Lord Bridge and of Lord Jauncey. Lord Bridge began by referring to the decision of the House of Lords in *Leech v Deputy-Governor of Parkhurst Prison* [1988] AC 533 which established that Courts had jurisdiction on applications for judicial review of disciplinary awards under the Prison Rules 1964. This issue was not raised again. Lord Bridge noted this and indicated that he took it as acceptance that judicial review of prison discipline was beneficial, and should not be circumscribed by considerations of policy or expediency in relation to prison administration.

As an aside it is interesting to note the attitudes taken by the Supreme Court of India some 10 years earlier than *Leech* in the case of *Charles Sobraj v Superintendent of Central Jail* [sic] AIR 1978, Supreme Court, 1514. The Supreme Court held that imprisonment did not mean that a detainee had no fundamental rights, although adopting a realistic approach, the Court refused to recognise the full enjoyment of rights that belong to a free citizen. The reason given in India for the right of the Court to intervene was that every prison sentence amounted to a conditioned deprivation of liberty, with civilised norms built in. In this sense juridical policing of prison discipline and practices was taken as being implied in the sentencing power itself.

The case that came before Their Lordships this year related to two conjoined appeals, one by a prisoner appellant, Hague, and the other by a prisoner respondent, Weldon. The case can be most commonly called *R v Deputy-Governor of Parkhurst Prison*. In the case of Hague the Deputy-Governor of Parkhurst Prison decided to transfer him to Wormwood Scrubs and for Hague then to be held there for 28 days in segregation from other prisoners. The Court of Appeal held that the Governor of one prison had no power, under the relevant Prison Rules, to order the segregation of a prisoner after his transfer to another prison. That power could only be exercised by the Governor of the receiving prison. But it declined to allow Hague to sue for breach of statutory duty. Hague appealed.

In the case of Weldon the prisoner alleged that, without justification, he was dragged down the stairs and placed in a cell in a punishment block, and then subsequently taken to a strip cell where his clothes were taken from him and he remained there until the following morning. He alleged that during that time he was further assaulted by prison officers. Possibly this related to his resisting having his clothes taken off him. Arising out of this, it was alleged that the unlawful treatment converted what had been a lawful detention into a false imprisonment. The Home Office applied to strike out so much of the pleadings as alleged false imprisonment but this was declined by an assistant recorder and by the Court of Appeal. The Home Office appealed.

That then was the background to these two appeals. Both of them in effect claimed damages for false imprisonment, although one was technically for breach of statutory duty and the other specifically for false imprisonment.

On the question of breach of statutory duty as alleged in the Hague appeal, Lord Bridge, referring to authorities that had been cited, set out his view on the matter in the following way:

> . . . the role of the common law is simply to make effective the benefit which the legislature intends to confer on the particular plaintiff of protection from danger of a particular kind, in each of the cases cited, the danger of personal injury. I do not think one escapes by this route from the fundamental question: "Did the legislature intend to confer on the plaintiff a cause of action for breach of statutory duty?" by transposing it into the question: "Did the legislature intend to confer on the plaintiff protection from damage of a kind for which, if the protection is not effectively provided, the common law will afford a monetary remedy?" When asked in relation to enactments of the kind to which the authorities relied upon refer the two questions are really one and the same. When asked in relation to enactments of such a very different kind as the prison rules, the second form of the question neither avoids nor illuminates the problem of answering the first.

After considering some other submissions made and authorities cited Lord Bridge came to the view that the Rule in question could not support the conclusion that it was intended to confer a right of action on an individual prisoner. This Rule related to segregating prisoners from others. Lord Bridge concluded his comments on the Rule as follows:

> The purpose of the rule, apart from the case of prisoners who need to be segregated in their own interests, is to give an obviously necessary power to segregate prisoners who are liable for any reason to disturb the orderly conduct of the prison generally. The rule is a purely preventive measure. The power is to be exercised only in accordance with the procedure prescribed by sub-rule (2). But where the power has been exercised in good faith, albeit that the procedure followed in authorising its exercise was not in conformity with rule 43(2), it is inconceivable that the legislature intended to confer a cause of action on the segregated prisoner.

Lord Bridge then went on to consider the appeal in respect of Weldon and the allegation of false imprisonment. At p 10 of the typescript he described as quite illusory an argument that a prisoner had what was called a "residual liberty" being a species of freedom of movement within the prison and thus enjoyed a legal right which the prison authorities could not lawfully restrain.

Lord Bridge went on to say:

> The prisoner is at all times lawfully restrained within closely defined bounds and if he is kept in a segregated cell, at a time when, if the rules had not been misapplied, he would be in the company of other prisoners in the workshop, at the dinner table or elsewhere, this is not the deprivation of his liberty of movement, which is the essence of the tort of false imprisonment, it is the substitution of one form of restraint for another.

The other major judgment was that of Lord Jauncey of Tullichettle. His Lordship analysed the various authorities that had been put before Their Lordships at considerable length. On the question of false imprisonment he expressed the view in short terms, at p 25, that an alteration of conditions of imprisonment deprived a prisoner of no liberty because he had none already. Lord Jauncey summarised his conclusion on the two appeals at p 26 as follows:

> 1 No action of damages lies in respect of a breach of the Prison Rules 1964.
>
> 2 No action of damages for false imprisonment lies against the Secretary of State or the Governor of a prison either on the ground of unlawful deprivation of residual liberty, or on the ground of subjection to intolerable conditions.

The only other comment that these decisions called for was the fact that Lord Ackner expressly retracted certain comments that he had made when sitting in the Court of Appeal in the case of *Middleweek v The Chief Constable of Merseyside* [1983] WLR 481. Lord Ackner was careful however to insist that a prisoner might have a remedy against a fellow prisoner who locked him in some confined space within the prison.

P J Downey

Court restructuring

The following letter has been received from His Honour the Chief Justice concerning the editorial published at [1991] NZLJ 257.

Dear Sir,

I write with reference to your editorial on Court restructuring in the August issue. In it you refer to the transfer of "Middle Band" cases to the District Court under s 168AA of the Summary Proceedings Act, and describe the provision that the High Court Judge determines the issue on the papers, without the Crown or the accused being entitled to be heard, as a "somewhat arbitrary" one. May I draw attention to the following matters, not all of which may have been noticed:

1 Under the previous law all the Middle Band offences were committed to the High Court. In future, all such cases will be committed to the High Court in the first instance.

2 A High Court Judge is authorised to transfer such a case to the District Court, according to the criteria contained in s 168AA.

3 If dissatisfied with the transfer, under s 28J of the District Courts Act either the prosecutor or the accused may apply to the Court to have the case returned to the High Court for trial. Section 28J has been amended specifically so as to be available after a s 168AA transfer.

4 An application under s 28J is an inter-partes application, on which in the normal way both sides would be entitled to be heard. It seemed to me, at any rate, that it was unnecessary for the parties to be entitled to be heard twice on the same matter.

5 You say the Law Society was opposed to the particular provision. My understanding was that the Law Society wished the parties to have the right to submit a memorandum on the question of transfer, for submission to the High Court Judge with the committal papers. With the assistance of the Chairman of the Society's Courts and Tribunals Committee, I have prepared a standard form for this situation.

I hope this will clarify any misconceptions.

Thomas Eichelbaum
Chief Justice

Case and Comment

Matrimonial Property Act 1976, ss 2(2) and 13 — Nil award to an absentee husband.

In *Bryers v Bryers* (unreported, High Court, Christchurch, M 39/87, 17 August 1990, Wylie J) the defendant husband did not appear and was not represented when his wife applied under the 1976 Act for matrimonial property orders. The husband, so far as was known, had gone to Australia and had maintained no contact with the wife since their separation. Their marriage lasted for two years and three months and thus, as a "short marriage," attracted the provisions of s 13 of the 1976 Act. There was great difficulty in effecting service and, eventually, an order for substituted service was made for service on the husband's mother. There were no biological children of their marriage but the wife brought to the marriage two small children by a former relationship. They were, of course, children of the marriage for the purposes of the 1976 Act.

At the time of the separation the overall net value of the matrimonial property, matrimonial home and chattels included and taking into account properly deductible debts, was about $750 on paper. "Realistically", to use Wylie J's own words, "the matrimonial property then was nil. There may even have been a deficit." At the date of hearing, viz, some six years later, however, matters were materially different: the total net value of the matrimonial property was some $42,000, home and chattels included. The substantial increase in the value of the home since separation was attributable to inflation, though it had to be borne in mind that the wife had reduced the liabilities secured on it and had liquidated debts incurred by the husband, paying out some $17,500 in all. A bank loan, of some $1,500, raised to pay for the parties' removal expenses when they left Auckland for Christchurch, was still outstanding.

Wylie J summarised the spouses' overall situation thus:

> On the uncontradicted evidence before me I am satisfied that on balance the [husband] made at the best a very minor contribution to the marriage partnership. He brought nothing to it other than debts. Such contributions as were made by way of deposit on chattels (including motor cars) bought on hire purchase were substantially if not totally off-set by the imprudence of the purchases and the assumption of liabilities in excess of the worth of the items purchased which the [wife] has had to bear. His contributions to the household from earnings were limited compared to those of the [wife]. Eventually he totally abandoned the [wife] and her children on separation leaving her with the full responsibility for maintaining the home and meeting the indebtedness which remained. Those comments are not made to demonstrate conduct on his part as a factor leading to the breakdown of the marriage, but simply as relating to the extent of his contribution to the partnership . . . In terms of s 18 of the Act it is probably right to say that the [wife] has contributed by all the forms of contribution described in paragraphs (a) to (h) of [s 18(1)]. No doubt the [husband] can also claim contributions in terms of a number of the paragraphs of subs (1) but the inescapable inference to be drawn from the affidavits of the [wife] is that his contributions were limited in the extreme and were substantially offset by the debts he incurred. *The plain fact is that the parties were much worse off at the end of the marriage partnership than they were at its commencement.* [Emphasis supplied.] On the uncontradicted evidence that cannot be attributed to any obvious failure on the part of the [wife] but must be laid at the door of the [husband].

As far as the household chattels originally owned by the wife were concerned, it was held that s 13(1)(a) was applicable to them and they should accordingly be vested in the wife.

Wylie J then had to decide whether the case was one where, under s 2(2), he could properly fix the value of the matrimonial property as at the date of separation, which would mean, on the findings already made, at nil. He was of the view that the wife should be entitled to the benefit of the reduction by her of the indebtedness and that the husband had abandoned both her and the children of the family and the home. Since the separation he had not borne any of the responsibilities of ownership and, although legally liable for the indebtedness secured on the property he had "removed himself from the practical consequences by disappearing to Australia." The inordinate delay in the case coming on for hearing, which contributed to the inappropriateness of taking the usual hearing date under s 2(2) was "at least in substantial part the result of difficulty in effecting service on the [husband]." Further in the Court's opinion, had the wife not "made such valiant and successful efforts to reduce the indebtedness it [was] probable that the home would have been lost long ago. I think," Wylie J went on, "this is one of those exceptional cases where the interests of justice require the discretion to be exercised: cp *Bromwich v Bromwich* [1977] NZLR 613, *Meikle v Meikle* [1979] 1 NZLR 137."

The value of the matrimonial property was held to be the value as at the date of separation — nil. Consequently the fixing of the husband's share at 10% at that time was no effect and the whole of the subsequent increase in value accrued to the wife. In the result, the former home, together with all the household furniture and chattels, was vested in the wife. There was also an order cancelling the present joint family home certificate. No order was made as to costs in the circumstances.

P R H Webb,
University of Auckland

"Trans-Tasman" Family Law: First impressions of a New Zealand Family Solicitor practising in Australia

By Belinda Fletcher, Barrister and Solicitor of the High Court of New Zealand, Solicitor of the High Court of Australia, Solicitor of the Supreme Court of Queensland, and practitioner in the Brisbane firm of McInnes Wilson & Jensen.

This article considers the similarities and differences of aspects of family law between New Zealand and Australia. It is also noted that while there is a federal Court exercising jurisdiction in most States and Territories, this does not apply to Western Australia which has its own Family Court. The writer notes that there is a working party at present examining family law matters that have both Australian and New Zealand elements. The working party is aiming to eliminate jurisdictional problems, avoid conflicting proceedings and seek reciprocal recognition and enforcement of respective Court Orders.

Introduction

I arrived in Australia from New Zealand on January 16, 1991 and am now working in Brisbane. Prior to my arrival in Australia I had practised for ten years almost exclusively in the Family Law area in Nelson, Wellington and most recently in Auckland.

During my time practising in New Zealand I was regularly contacted by New Zealanders and Australians with Family Law problems with Australian and New Zealand elements. Queensland has a large New Zealand population and I already have a number of clients wanting advice on trans-Tasman matters. The matters range from the execution of documents and dissolution to complex matters of division of matrimonial property and custody. These problems highlight the need for practitioners to be alive to the Family Law in each country, more so than any other two jurisdictions.

Unfortunately these trans-Tasman problems are usually thrust upon the unsuspecting practitioner on Friday at 4.45pm when they are looking forward to a rare weekend far from the law.

Practising in Australia I have been provided with an excellent opportunity to study the specie, "The Australian Family Law". I have recorded some of my initial observations in the hope that it may be of some assistance to my fellow practitioners in New Zealand.

There are similarities between the New Zealand and Australian Family Law. The legislation, most importantly the Family Law Act 1975 and the Family Law Rules, and many of the principles on which Australian Family Law is based are similar to those upon which the New Zealand Law is based. Butterworths and CCH are the two main publishers in the Family Law area and as usual their texts provide good reliable guidance. The Family Court itself is similar to the New Zealand Courts. There is something reassuring about walking into a Court decorated "conciliatory" pink.

1 The legislation

The foundation of the Family Law Legislation is the Family Law Act 1975 and the Family Law Rules 1985. Additionally there are a number of other federal laws and State laws that govern Family Law matters. The Family Law Act and Family Law Rules are federal laws applicable to all Australia. The format of the statutes is different from New Zealand statutes. Care is necessary in quoting or referring to the statutes so as to ensure that correct reference is made, for instance the Family Law Act is divided into parts, divisions and sections but the Family Law Rules are divided into Orders, divisions and rules.

The language used in the Australian Family Law Act is to my mind far more formal than that in New Zealand. Phrases such as "matrimonial causes", "principal relief", "maintenance agreements", and "alteration to property rights" are all novel to the New Zealand practitioner and add to the confusion of practising in a different jurisdiction, but it is worthwhile to become familiar with these phrases as it will assist the practitioner in not only understanding the Australian Family Law but also in communicating with the profession in Australia.

2 Jurisdiction

When faced with a Family Law problem with Australian/New Zealand elements the first consideration must be whether Australian or New Zealand law or perhaps the law of both applies.

In the majority of Australian Family Law matters the Family Law Act 1975 would apply and be the guide as to jurisdiction. However, because not all Family Law matters are covered by the Family Law Act, for instance de facto relationships, adoptions and domestic violence are covered by State law, each State has a different law, consequently different jurisdictional considerations apply.

I will not expand on the jurisdictional difficulties in this article, that is a matter for the texts, but to be forewarned is to be forearmed.

3 The Courts

The Family Court of Australia is a Federal Court exercising jurisdiction over five of the States and two Territories, being Victoria, New South Wales, Queensland, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, with at least one Family Court Registry in each State and Territory. Usually that Registry is based in the State or Territorial Capital. The Registry receives documents for filing, deals with administration and counselling, and the Court hears cases on a regular basis. Additionally, each State or Territory may have a number of Family Court Registries which arrange counselling and where cases are heard on circuit but documents are not accepted for filing.

The Family Law Act applies and the Family Court exercises jurisdiction in respect of Norfolk Island.

Special mention has to be made about the Family Court of Western Australia which is differently constituted to the rest of Australian Family Law Courts. The Family Court of Western Australia is a State Court exercising jurisdiction in State and Federal Family Law matters.

The Family Court is the main Court for dealing with matters under the Family Law Act, but Courts of Summary Jurisdiction and, in some instances, the Supreme Court also exercise concurrent jurisdiction in certain matters. For instance, the Magistrates Court in Queensland has jurisdiction in respect of maintenance cases, undefended custody and access disputes under the Family Law Act.

An appeal from the Family Court lies to the Full Court of the Family Court and from there to the High Court of Australia.

Where State Law applies then State Courts or even Government departments may exercise jurisdiction.

The decision makers in the Family Court are: The Judges, the Judicial Registrars and Registrars. Both the Judicial Registrars and the Registrars are qualified Solicitors and/or Barristers having delegated powers with limited jurisdiction, similar to Masters. The Judicial Registrar has greater powers than the Registrar. This multi-tiered structure for decision-making allows Judges to attend to more complex matters while providing clients with skilled decision-makers to hear the balance of matters.

4. The Family Lawyers

There is considerable diversity in the professional organisation of Family Lawyers in Australia. In some States there is a fused Bar, in others a separate Bar. In some States, for example Queensland, it is common for Barristers to be briefed for Court appearances, trials, to give opinions and to prepare pleadings. This should be borne in mind when briefing agents.

5 Applications

In October 1989 the form of Family Court applications changed. There was a rejection of the Affidavit system (as used in New Zealand) and it was replaced with a pleadings system. The pleadings consist of the Initiating Application, a Statement of Financial Circumstances where the application relates to financial matters, the Answer and Cross-application and the Reply. The form of application is set out in the Family Law Rules.

No Affidavits are presented with the initial documents except in the case of Ex Parte Applications or when seeking interim orders. Normally Affidavits are not received by the Court until the pleadings are closed and then are restricted to one Affidavit from the applicant, one from the respondent, one Affidavit by the applicant in reply and an Affidavit for each witness.

The reason behind the change was to reduce the cost of proceedings, and more clearly identify the issues whilst avoiding the plethora of Affidavit material that was common in Family Law matters. Nearly two years on the profession still has difficulties with the pleadings system, but the Australian judiciary seems keen to persevere with it.

6 Counselling

Australia, like New Zealand, places great emphasis on counselling. Family Court counselling in Australia is done "in-house" by Court Counsellors at the Court. This is in contrast to the New Zealand system of co-ordinating counselling from the Court but using outside counsellors.

The Australian Family Court emphasises conciliatory counselling, assisting parties to a marriage who have decided to separate to make decisions as to their affairs. There is a particular focus on children's matters. The property/financial matters are usually dealt with by agencies outside the Court such as marriage guidance or other approved counsellors.

Many people seek counselling voluntarily before instituting Court proceedings. After the institution of proceedings for dissolution, custody and/or financial matters the Court has the power to refer parties to counselling. A referral is nearly always automatic in children's matters. However, in dissolution and financial/property matters there is not usually an initial referral, although counselling may take place as matters progress. The parties to a marriage may request Court counselling or attend an outside counsellor. Court counselling is free and confidential, although in special cases the Court can call for a Counsellor's Report.

7 Steps in Court proceedings

The basic steps in the Court process are:

Counselling (as previously mentioned)
The first return date or first call date
Directions Hearing
Order 24 Conference
Pre-Trial Hearing
The Hearing.

The Australian Family Court takes an active role in case management.

One particularly effective tool used to manage cases and to attempt to resolve disputes is the Order 24 Conference. This form of conference is used in respect of all types of applications but its effectiveness is most evident in its use to resolve property applications.

In New Zealand matrimonial property applications do not require a Court referral to Counselling or mediation. This gap has been filled to an extent by the Judicial conference procedure under the Matrimonial Property Rules. However, the opportunity for settlement still rests on a willingness of the parties and their solicitors to come together.

"Order 24 Conferences" are very well structured meetings which bring the parties together before a Registrar to discuss the proceedings in depth and to canvass the opportunity for settlement. Usually the solicitors see the Registrar alone first and present summaries of the issues and a list of the property. The parties then meet with the Registrar to discuss the dispute. If agreement is reached Consent Orders can be made. It is a requirement of those conferences that the costs of the proceedings be advised to the client before the conference. The Registrar can request that information from the solicitors. No doubt this is in the hope that the disclosure of the costs will be a wonderful mechanism for concentrating the mind of both parties on settlement. These conferences seem to enjoy a high rate of success.

8 Alternative Disputes Resolution

The Family Law Council of Australia released its discussion paper on alternative disputes resolution and mediation earlier this year. There was a recommendation in that report that mediation be utilised in Family Law matters.

The difficulty now seems to be what method of mediation is to be used and how it is to be brought into being within the existing Family Court system. Mediation is not yet part of the Family Court procedure although amendments to the Family Law Act 1975 are anticipated to include mediation in the Court process.

Representatives of the Australian Family Court have viewed the mediation process used in the New Zealand Court and it will be interesting to see if the Australian Court adopts a similar process and, if they do, what modifications will be made.

There are at present a number of private organisations doing mediation in Australia, most notably the Marriage Guidance Council. There are some excellent training courses in mediation offered by the Law Society CLE, Legal Aid and various universities throughout Australia. I am aware that there are some private mediators offering mediation outside the Court in New Zealand. In both Australia and New Zealand there is little publicity about the availability of mediation and the proper way to use the service. Practitioners need to educate themselves about mediation so as to be able to fully advise clients on all options available for resolving disputes.

9 Dissolution

An application for dissolution is one of the most common applications that might come before a practitioner in New Zealand or in Australia. To come within the Australian jurisdictional requirements either party to the marriage must be domiciled in Australia or an Australian citizen, or ordinarily resident in Australia, and have been resident for one year immediately preceding the filing of the application.

The Family Court exercises jurisdiction in respect of dissolutions in most States, although in Western Australia documents are filed in the Family Court but actually heard by a Court of Summary Jurisdiction located at the Family Court.

In Australia an Application for Dissolution can be made one year after separation. If a dissolution is applied for within two years of the date of the marriage leave of the Court must be sought unless a certificate is produced stating that the parties have considered reconciliation with a specified person or organisation. The sole ground for dissolution is that the marriage has broken down irretrievably.

It is possible for Applications to be served by mail both in and outside Australia.

The Application can be heard in the absence of both parties and without an appearance by solicitors where there are no children of the marriage. The Court requires an appearance from the applicant or a solicitor where there are children of the marriage under the age of eighteen years so they can determine whether or not proper arrangements have been made for their welfare. A dissolution cannot be granted unless a Declaration under s 55 of the Family Law Act 1976 is made stating that proper arrangements have been made for the children.

In the first instance a Decree Nisi is made and, in the normal course, one month later a Decree Absolute is granted.

10 Children

The Family Law Act applies to all children, whether they are children of a marriage or ex-nuptial children. However, not all matters relating to children are governed by the Family Law Act and the Family Court does not have exclusive jurisdiction over children's matters. Individual States still have State Law in respect of some matters relating to children and consequently Courts other than the Family Court and even government bodies exercise jurisdiction over children.

11 Custody and access

The Family Law Act covers matters of guardianship, custody and access. The persons who can bring applications in respect of children under the Family Law Act are the parents of a child, a child and interested parties. The standing of interested parties to make an application with respect to a child has interesting ramifications. For instance where New Zealand grandparents are wanting access to a child living in Australia, an application could be made in Australia under the Family Law Act.

Sensibly, guardianship and custody Orders can be made until the child reaches the age of majority at eighteen years.

The types of matters taken into consideration in custody and guardianship disputes are similar to New Zealand.

The familiar principle "that the interests of the child are paramount" is common to both Australia and New Zealand.

12 Child abduction

Recently New Zealand became a signatory to the Hague Convention. In Australia on 1 January 1987, the Family Law Child Abduction Regulations came into force, giving effect to the Hague Convention. It may be of assistance to New Zealand practitioners to consider the Australian cases with respect to the Convention as it may be some time before New Zealand case law is heard and reported. The Australian experience shows that the Convention itself is not a complete answer to resolving child abduction cases and there has been significant litigation in Australia, with respect to the Convention.

13 Adoption

Each Australian State and Territory has its own adoption laws; and in every State and Territory a different Court or body has jurisdiction to deal with adoption. For instance, in Queensland the Director of Children's Services makes adoption orders not the Court.

14 Maintenance for children

In Australia maintenance for children is governed by an intricate body of federal legislation which applies in all the States and Territories.

Maintenance for children is automatically assessed where separation occurred or children are born on or after 1 October 1989. The automatic assessment is done in accordance with a formula set out in the Child Support (Assessment) Act 1989. There is no application to the Court for maintenance.

This system must not be confused with New Zealand's liable Parent Contribution system. The Australian assessments are applied to all children whether or not the custodial parent is a beneficiary.

Collection of maintenance is governed by the Child Support Registration and Collection Act 1988. The Child Support Collection Agency is a division of the Taxation Department.

Like all well intentioned legislation designed to streamline and simplify, it is complicated by the fact that there are many exceptions to the new legislation. The new legislation only applies to parties who separated on or after 1 October 1989, or to children born on or after that date. It is interesting to note that the Child Support legislation only applies to persons who are resident in Australia for income tax purposes.

Where the Child Support legislation does not apply the Family Law Act applies and a maintenance application can be made to the Family Court or Courts of Summary Jurisdiction or an Agreement registered in the Court. The application and principles of law applied in assessing maintenance is similar to New Zealand.

The Court can make Orders for child maintenance until a child reaches eighteen years or beyond eighteen years if maintenance is required for educational or health reasons. The quantum of maintenance orders has tended to increase in recent years, possibly due to public policy that each parent should be financially responsible for his/her child.

New Zealand is likely to introduce new Child Support provisions in or about July 1992. Discussions have been taking place between Australia and New Zealand with respect to issues of maintenance and collection either side of the Tasman.

15 Maintenance for spouses

The Family Law Act covers spousal maintenance, this area of Family Law is alive and well in Australia. Spousal maintenance is commonly interlinked with alteration of property rights (property division), discussed later in this paper. A spouse may bring an application within twelve months after the date on which the Decree Nisi (in dissolution proceedings) becomes Absolute. An application may be made to the Magistrates or Family Court.

16 Property

"Growing up" with the New Zealand Matrimonial Property Act 1976, it is disarming to be faced with only a few sections of the Australian Family Law Act 1975 as the legislative guide with respect to property, although supplemented by a considerable body of case law.

Whereas in New Zealand we speak of dividing matrimonial property, in Australia we speak of alteration of property rights. In Australia there is no concept of "matrimonial property" as the New Zealand solicitor knows it. In Australia there is no presumption of equal sharing (*Mallett v Mallett* [1984] 9 Fam LR 447). There is no presumption that after three years of marriage the matrimonial home and chattels are divided equally.

The extent that each party shares in the assets is determined by contribution, the future needs and resources of the parties. The Family Court has regard to a number of factors set out in the Family Law Act being the contributions of the parties, financial and non-financial to property, contribution to the welfare of the family, contribution as a homemaker or parent, and factors such as financial resources, income, property and entitlement to superannuation.

It is to be noted that superannuation is not treated as property under the Family Law Act but is a financial resource to be taken into consideration. It should not be treated as a notional asset. Superannuation continues to present difficulties in both Australia and New Zealand. There is no one easy approach towards quantifying superannuation and the Australian Court has in fact indicated five different methods of valuation. The valuations of superannuation entitlements tend to be far lower in Australia than in New Zealand. Actuarial valuations are not used. The Australian case of *Coulter v Coulter* 13 FLR (1989) 13,421 provides useful guidance on superannuation.

Where a marriage has broken down and the parties are dividing their property the Family Court exercises exclusive jurisdiction. An application to the Court must be brought within twelve months of the Decree Nisi (in dissolution proceedings) becoming absolute.

The Family Law Act 1975 emphasises the need for final resolution of the financial affairs of the husband and the wife. When making orders for alteration of property rights the Court shall not make an order unless it is satisfied it is just and equitable.

Besides applications for alteration of property rights, the Family Court can make declarations as to a party's existing rights and/or title in property.

In Australia Ante-nuptial and Pre-nuptial Agreements can be made. However, such Agreements are not as popular as might first be thought. The main reason being that the Family Court has the power to make Orders, as the Court considers just and equitable in respect of property dealt with in the Agreement.

New Zealand solicitors should be aware of the Australian taxation implications when dealing with property where there are trans-Tasman elements. Stamp Duty and Capital Gains Tax may be assessable.

One of the most difficult areas with respect to property is the question of jurisdiction. What to do

when the domicile, citizenship or residence of the parties or the property is situated in Australia and/or New Zealand or in both. For example, which forum do you choose when the client permanently resides in Australia but the spouse is resident or domiciled in New Zealand and where the property in dispute is in New Zealand and Australia? I suggest that where a client may have rights in both countries, a practitioner should give careful consideration to the forum and not just opt for the forum that is procedurally convenient as it may not in fact be in the client's best interests.

17 De facto relationships

Australia, like New Zealand, is still grappling with the problems arising from de facto relationships. The methods of resolving de facto property disputes varies from State to State in Australia.

Some Australian States have forged ahead and legislated with respect to the property of people in de facto relationships. New South Wales has the De Facto Relationship Act 1984 and Victoria has the Property Law Amendment Act 1987. The rest of Australia continues to deal with the matter under the Law of Trusts.

There is much discussion and recommendations for law reform in this area.

Matters with respect to children of de facto relationships are dealt with by the Australian Family Court.

18 Form of the decision or Agreement

Maintenance, custody and access resolutions can all be recorded by either Court Order or registering an Agreement in the Court which then has the effect of a Court Order.

Property matters can be recorded by Court Order or Agreement called "Maintenance Agreements". Agreements are of two kinds, a Section 86 Agreement which is registered in the Court but does not finalise the financial affairs of the parties, and a Section 87 Agreement which does finalise the financial affairs of the parties and is in substitution of all rights the parties have against one another. These Agreements are commonly called "Maintenance Agreements" because they deal with financial matters including maintenance and property.

In Australia, entering into an agreement to resolve disputes is not as straightforward as in New Zealand. Each fact and legal situation must be matched to the particular type of agreement best suited to it. It is not always appropriate to cover all matters, for example custody, maintenance, property, in the one agreement. A dispute may require separate Child and Maintenance agreements and it may be appropriate to use a Section 86 Agreement for maintenance matters only and a Section 87 Agreement for property matters. If the correct type of agreement is not used to record resolutions then difficulties may arise later.

19 Costs

In Australia there is a scale of costs set by the Family Court Rules. The hourly rate is $104.40 per hour for a solicitor, and a slightly higher rate for Counsel. The Scale of Costs can be contracted out of, but strict rules apply.

When instructing Agents in Australia it would be advisable to inquire whether costs will be charged in accordance with the Scale and in turn when receiving instructions it might be courteous to advise (perhaps an unsuspecting Australian Principal) that New Zealand costs are not based upon a Scale. Never let it be said that lawyers don't do their bit for "CER".

20 Bridging the gap

Where people are moving between two countries as is happening between New Zealand and Australia, all types of legal questions and difficulties arise, some have been mentioned in this article. The greatest difficulties are probably jurisdictional.

Recently I attended a Family Law Conference in Australia at which Chief Justice Nicholson of the Family Court of Australia talked of his discussions with Principal Family Court Judge Mahony about resolving jurisdictional conflicts. There have also been discussions between the Attorney General of Australia and the New Zealand Justice Department, and between the Australian and New Zealand Family Law Committees. I understand discussions will be continued at the New Zealand Family Law Conference in September/October 1991.

At present a working party in Australia is examining Family Law matters that have both Australian and New Zealand elements.

The aims of the working party are:

(a) To eliminate jurisdictional problems between the two countries in Family Law so that all matters in dispute between the parties can be dealt with in the Court (whether in New Zealand or Australia)
(b) To avoid conflicting proceedings in the two countries
(c) To ensure as far as possible the reciprocal recognition and enforcement of the Orders of the Courts of each country without the need to reopen proceedings relating to such Orders.

New Zealand and Australia are close geographically, economically, historically and, to a lesser extent, culturally, but because of Australia's large area, its different form of government and its diverse ethnic population which is largely European and Asian, practical, procedural and philosophical differences have evolved and this is reflected in our Family Law systems. Accordingly, the effect is confusion as to the law for people with Family Law problems, particularly those who move between the two countries, and to Family Law professionals. In addition increased costs to the people with the problems, to the Courts and governments of both countries.

It is vital that we have an understanding and appreciation of each other's laws, that Australia and New Zealand work together to achieve better systems of Family Law for both our countries, law that is comprehensible, enforceable and cost effective.

This article is just a taste of Family Law in Australia and I hope is an aid in dealing with matters in this jurisdiction. There is much we can learn from each other and in the process we can provide a better service to the ever-increasing number of people who travel between the two countries, bearing with them a mixture of rights and obligations under Australian and New Zealand Law. □

Books

The Employment Contracts Act 1991: Some Key Legal Issues

By Dr Rodney Harrison, Continuing Legal Education Programme, Auckland District Law Society, 1991, 49 pp plus index and tables.

Reviewed by John Hughes, School of Law, University of Canterbury.

The Employment Contracts Act 1991 has generated a considerable number of seminars both within and outside the legal profession. This is to be expected of legislation which changes fundamentally the system of employment law in New Zealand and which was drafted in such haste that uncertainty surrounds the application of many of its key concepts. Dr Harrison's monograph is the most comprehensive attempt to examine the legal issues generated by the changes that this reviewer has seen and it succeeds admirably in identifying and clarifying many of the problem areas from a lawyer's perspective.

The areas covered by the monograph are certain legal aspects of employment contracts; the extent to which the 1991 Act applies to pre-existing contracts of employment; new provisions as to strikes and lockouts and issues of jurisdiction and enforcement under the Act. Dr Harrison focuses on areas of novelty and difficulty and finds no shortage of topics under the latter head and his work has already been favourably cited in one of the key early decisions under the 1991 Act (*Prendergast v Associated Stevedores Ltd*, unreported, Labour Court, 26 July 1991, ALC 84/91, dealing with the question of what terms survive an expired collective employment contract to be transplanted into individual contracts of the employee parties).

One of the themes of the study is the uneasy conjunction of concepts and phraseology carried over from the Labour Relations Act 1987 with the principles of contract law which underpin the markedly different 1991 Act.

Two illustrations will suffice. Underlying awards and agreements under the 1987 Act there were separate and subsisting individual contracts which continued indefinitely after the expiry of the collective document. Some of the language of the 1991 Act suggests that the continuation of this approach in relation to collective employment contracts and their individual counterparts may have been the intention of those who drafted that legislation. But, as Dr Harrison points out, there is a possible alternative construction: the expiry of a collective employment contract which is not renewed might be treated as would the expiry of any individual fixed term contract, with a consequential – and serious – limitation on the ability of employees to bring actions for unjustifiable dismissal where the employer does not permit them to continue in employment beyond the expiry date (cp *Actors Equity IUW v Auckland Theatre Trust Inc.* [1989] 2 NZLR 154). If this is so, much of the supposed protection arising from being party to a collective document will evaporate.

Similarly, the 1991 Act adopts the language of the 1987 Act in requiring that parties to a collective employment contract may only negotiate terms and conditions on an individual basis that are "not inconsistent" with the collective (as to which see *NZ Meat Processors Union v Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143 (CA)). However, as the author points out, whereas the 1987 Act specifically stated that any inconsistency would be resolved in favour of the collective document, the 1991 Act is strangely silent on the issue and contains several contradictory pointers as to its intention.

Analysis of similarly fundamental and unresolved legal issues runs through the monograph. There is a particularly telling study of the confused and potentially overlapping jurisdiction of the Employment Tribunal and the Employment Court. Whilst the Tribunal has jurisdiction over penalty actions and compliance orders arising from breach of employment contracts, only the Court has jurisdiction to make any order that could be made by the High Court or a District Court under the general law of contract (s 104(1) of the 1991 Act). Where does this leave actions based on breach of restraint clauses or threatened disclosure of confidential information? Does the Court's jurisdiction to hear and determine any action "founded on" an employment contract (phraseology which, as the author points out, contains significant ambiguities in itself) confer original jurisdiction on the Court in such cases? Or must cases of this type proceed through the Tribunal, whose adjudicator may lack training on the key legal issues? In other areas, does the Employment Court share jurisdiction with the High Court, notwithstanding the apparent intention to confer exclusive jurisdiction on the Employment Tribunal and Employment Court in this area? The author gives detailed and considered responses to these questions, as well as many incidental issues (including such questions as the likely approach to interpretation of contracts under the new regime, the application of the 1991 Act to existing contracts of employment and the viability of alternative dispute resolution procedures).

To a reviewer who – like most in the field – has spent a considerable time reading around the legislation, attending seminars on it and discussing its ramifications, it came as a salutary shock to realise that there were many more fishhooks within its brief and non-prescriptive provisions than had appeared even months after its introduction. Dr Harrison's observations are fresh, well-considered, and thoroughly documented. No one practising in this field – whether as a lawyer or as a lay adviser – can afford to ignore the issues raised by the monograph, which is warmly commended. □

Tracing the arc of the pendulum: The regulation of collective bargaining in New Zealand

By Peter Churchman, a practitioner of Dunedin

From August of last year the author, as the recipient of a Fulbright Travel Grant, was at the University of Pennsylvania completing an LLM degree. He has now returned to practise in Dunedin. As part of his course at Pennsylvania he studied the comparative history of collective bargaining in the United States and in New Zealand. This article is based on that study. It distinguishes between two possible systems which the author describes as the corporatist and the contractualist models. He argues that New Zealand has this year shifted from one to the other. For comparison he looks at the American situation and particularly at the Wagner Act of 1935. In the next article Mr Churchman will consider the implications of the great changes effected in recent years and particularly in 1991 to the system of labour relations in New Zealand.

Introduction

(a) Outline

There are two ideal models of industrial regulation adopted by Western countries. These are the corporatist and contractualist models. For almost 100 years the corporatist model established by the Industrial Conciliation and Arbitration Act governed industrial relations in New Zealand.[1] The present New Zealand government has now taken the radical step of rejecting corporatism completely and embracing a new contractualist model.[2]

In 1935 the United States adopted a contractualist approach to labour relations. Indeed the American system has been described as exemplifying in "exceptionally pure form"[3] the contractualist style of organisation. This article therefore discusses the development of the corporatist system in New Zealand from 1894 to 1990, comparing the features of that system with the American model. It will then examine the recent reforms in New Zealand and consider the extent to which they approximate the contractualist model adopted by the United States.

(b) Definitions

Before embarking on an analysis of New Zealand's system of labour relations we must indicate what is meant by the terms "contractualist" and "corporatist" and indicate what the relative positions of the New Zealand and American systems have been. The indicia of the corporatist and contractualist systems are listed by Tamara Lothian in her study of the two models. (See fn 3, at 1005-1008.)

According to Lothian, the contractualist model includes:

> voluntary unionisation; plural trade unionisation (that is, a variety of different types of trade union); voluntary determination of employment relations; relatively free play given economic forces and group militancy; the private character of the bargaining process; and the strict separation of the union structure from the welfare system. (at 1006-1007.)

In contrast the corporatist system involves:

> compulsory unionisation; a single type of union organised into a pyramidal structure; the downplaying of voluntary determination of wage and work conditions; the tight regulation of strike activity; and emphasis in the procedural framework of industrial dispute settlement on governmental intervention and the primacy of allegedly public interests; and the overt mixing of the union structure with the welfare system (at 1009-1010).

The system adopted by New Zealand since 1894 has incorporated many of the features of the ideal corporatist model described by Lothian, but few of those features are retained in the new system. In the form that it was introduced into Parliament the Employment Contracts Bill adopted a strongly contractualistic model. As a result of amendments made before passage, the Act itself falls short of achieving that contractualist model. In an ironic twist the new Act actually abridges some important contractual freedoms previously available in the employment contract area.

(c) New Zealand and The United States of America compared

To understand the historic relationship between the traditional New Zealand system and the American system it is useful to look at the analysis undertaken by Professor Nolan who closely studied the Australian, New Zealand and United States systems of labour relations in 1989.[4] He developed a more sophisticated version of the simple contractualist/corporatist classification by further subdividing these categories. He discerned four distinct models of labour regulation:

(1) Statism – which involves total government control of the terms of employment. This is achieved either by legislation, bureaucratic regulation, judicial rules or corporatist arrangements.

(2) Compulsory Arbitration – which is the mandatory determination of the terms of employment by an impartial neutral.

(3) Collective Bargaining – where employment terms are set by negotiation between one or more employers and one or more groups of employees.

(4) The Labour Market – in the absence of government regulation the economic laws of supply and demand set employment terms. (Nolan, fn 4 at 267-271.)

By treating these classifications as a continuum from 1 to 4 Professor Nolan observed that Australia (and New Zealand until 1984) fell between points 1 and 2. In 1989 New Zealand's position was between points 2 and 3 whilst the United States fell between points 3 and 4. Under the Employment Contracts Act New Zealand's system has swung from occupying the middle ground to the right end of the spectrum, much closer to the position occupied by the United States. However, the legal form of individualised contracts of employment governed solely by market forces has not been achieved. Collective bargaining is likely to remain a significant factor. More importantly the Act limits contractual freedom by seeking to impose standard terms into all contracts of employment whether individual or collective. In a major reversal of what was proposed in the Bill, the Act abolishes the right to have an action founded on an employment contract heard in either the District or High Courts. Such actions can now only be brought in the newly created administrative body known as the Employment Tribunal.

The system of compulsory conciliation and arbitration

(a) History

At a time when neither the United States nor Great Britain had addressed such basic questions as the role of the state in industrial relations, New Zealand acted early and decisively by enacting the Industrial Conciliation and Arbitration Act. The architect of this statute was William Pember Reeves, the Minister of Labour in the Liberal Government.[5]

Reeves chose to deal with New Zealand's incipient industrial conflict by institutionalising it. The four central mechanisms of the system of labour regulation developed under the I C & A Act were:

(1) The Registration of Trade Unions

Unregistered trade unions were not illegal, but the process of registration gave tremendous benefits, including an absolute right of representation free from challenge by competing unions and exclusive access to the mechanisms for the creation of an award under the I C & A Act.

(2) The Establishment of Independent Tribunals

Independent tribunals undertook conciliation and, if necessary, arbitration, to create binding awards. Once a dispute was initiated to create a new award, it went initially before a regional Conciliation Board whose decision could be appealed to the Arbitration Court.[6] The Arbitration Court consisted of one representative each from workers' unions and employers' organisations. It was presided over by a Judge. Up until 1921, that Judge was drawn from the Supreme Court Bench, but thereafter (s 2, IC & A Amendment Act 1921) the Arbitration Court Judges were appointed specifically to that jurisdiction. The Court's function was both arbitral and judicial; that is, it was responsible for issuing and interpreting awards.[7] The awards themselves were enforceable by filing a copy with the Supreme Court.

(3) The Availability of "Blanket" Coverage

An early amendment to the Act (s 86(3), I C & A Amendment Act 1900) provided for the ability to extend coverage of an award to all employers in an industry. This meant that all employers within the boundaries of the geographical area covered by the award would be subject to the terms of the award even if they had played no part in the conciliation or arbitration process that had produced the award and whether or not their employees were members of the union.

(4) Compulsory Union Membership

For almost all of the period of ninety years following the introduction of the I C & A Act, New Zealand effectively had compulsory union membership in one form or another.[8] Initially, awards made under the I C & A Act would contain either a "qualified" or "unqualified" preference clause. Following the decision of the Court of Appeal in *Magner v Gohns* [1916] NZLR 529 declaring that the Arbitration Court lacked authority to insert unqualified preference clauses in awards, the qualified preference became predominant. Under such a clause, an employer can only engage or continue to employ a worker who is not a member of the union having coverage where there is no equally qualified union member available. An amendment to the I C & A Act in 1936 (s 18) required that every award and conciliated agreement contain a clause making it unlawful to employ a person who was not a member of the relevant union. Later, Parliament also legalised (I C & A Amendment Act 1961) the insertion of unqualified preference clauses. During the 1970s, there was some legislative tinkering with the mechanisms for obtaining preference clauses and experimentation with ballot procedures but, other than for a brief period in 1983 and 1984, some form of compulsory union membership provision has been legislatively sanctioned until the passage of the Employment Contracts Act.

(b) The system in operation

The essence of a system of compulsory arbitration is rejection of the use of economic weapons. The quid pro quo for the state providing the unions with a structure that compelled the employers to submit wage disputes to a neutral decision-making body was that strikes, and other forms of coercive industrial action were prohibited. The Act succeeded in the early years of its operation in severely curtailing although not entirely eliminating strikes, and it resulted in the country having a very egalitarian wage structure. Reeves' primary goal was clearly to contain industrial strife. The Act also had the consequence of legislatively adjusting the inequalities in the employer/employee relationship. Some commentators have assumed that this was also a goal of the legislation but in reality this was

merely an unintended consequence.[9]

One of the main reasons that the I C & A Act led to a national uniformity of wage structure both by occupation and area was the approach adopted by the Arbitration Court to the settling of an award. In any system of compulsory wage arbitration the criteria applied by the arbitrator in fixing appropriate awards are of crucial significance.

The only criterion provided by the Act was that the Arbitration Court was to determine matters in accordance with "equity and good conscience" (s 61, I C & A Act 1894). It is surprising that a legislature that was prepared to so comprehensively regulate the employment relationship would offer so little guidance to the arbitral body that it had entrusted with the task of setting the nation's wages. The reality of the matter is that it would in practice have been impossible for the legislature to lay down criteria for the Court to apply that would have produced a result that both parties would have consistently regarded as fair. Given that Reeves' primary purpose had been the institutionalisation of industrial conflict rather than a fairer distribution of the nation's wealth, then what mattered most was compliance with the conciliation and arbitration procedure itself not the criteria used to fix an award.[10]

The Court rejected any approach of determining an award on the basis of an employer's ability to pay or even on the needs of the worker. In the later years of the Act's operation there was often a close relationship between the increase in the cost of living and adjustments to awards. But, in the early years measurements such as the consumers price index were unknown and it was very difficult for the Court to make any accurate assessment of just what the cost of living had done in the period since the last award. The Court therefore adopted the approach urged on it by the unions of adjusting wages on the basis of "relativities". There were two types of relativities. Relativities within an award (margins for skill) and relativities between awards (the relationship of the wage between the members of the different trades).[11]

These relativities rapidly became entrenched so that once one of the leading awards such as the Engineers Award was settled the majority of awards would fall in line like dominoes. (Harbridge and McCaw, fn 11, at 151). The relativities were clear and widely known. Therefore, there was little point in the parties taking the process of wage fixing right through the full procedure of conciliation and arbitration when they knew in advance what the award of the Court was likely to be.[12]

(c) The weaknesses of the system

As the years went by it became increasingly apparent that the system of compulsory conciliation and arbitration suffered from several weaknesses that were becoming more pronounced. Harbridge and McCaw (fn 11 at 151) set out seven perceived faults:

1 Entrenched relativities.
2 The absence of criteria to guide the Court and the "predictability" of results.
3 The "lowest common denominator" aspect of award wage rate. That is, wages were set at the lowest minimum adult rate that the poorest employer could pay without going bankrupt.
4 Failure of the bargaining process to consider macro-economic issues.
5 Employers argued that the practice of "second tier" bargaining or secondary bargaining to obtain additional benefits beyond those in the awards needed rationalisation.
6 Both unions and employers agreed that composite and enterprise bargaining needed to be encouraged.[13]
7 Union structures needed to become more effective.

This latter complaint arose from the fact that the process of registration was at once the kiss of life and kiss of death for the unions. Registration secured the benefits of what in practice proved to be virtually perpetual exclusive recognition and representation rights but at the same stroke it deprived the union of lawful use of its basic economic weapon, the strike, and made the unions almost totally dependent on the state for its continued existence. As a result of the preference provisions unions did not even have to make any real efforts to sign up new members. In substance the registered union often served little function other than as the formalistic partner necessary if there was to be fixing of wages by arbitration.[14]

To the above seven weaknesses, Professor Nolan would add an eighth; the criticism that unions and employers did not always honour their awards and agreements, particularly that unions would often strike in breach of the specified procedures for personal grievances and other rights disputes. (Nolan, fn 9, Ch II(b).)

The American approach

(a) Conciliation and Arbitration

Although the United States, since 1935, has formally adopted a contractualist model of labour regulation, there has been a considerable amount of experimentation with compulsory arbitration. During World War II, in particular, the War Labor Board administered systems of grievance and interest arbitration. In the years after the war there was vigorous opposition to the spread of compulsory arbitration. Interest arbitration (that is arbitration for the purpose of setting wages and terms of employment), as opposed to grievance arbitration, has remained unusual. Following the spread of collective bargaining to the public sector most states and the Federal government have adopted some form of compulsory arbitration for such categories of public employees as firemen. However, outside the public sector, such practices remain relatively rare.[15]

(b) Development of the American system

In the United States in the early colonial era, there was some governmental intervention in the employment relationship and the regulation of wages by statute such as the Massachusetts Bay Colony Code of 1648.[16] Later there was also some flirtation with wage fixing by arbitration by the Massachusetts Board of Conciliation.[17] However, by the end of the 19th century the employment contract was firmly established as a private arrangement that should be free from both state regulation and the influence of collective action. In a series of cases culminating in *Lochner v New York* 198 US 45 (1905) the Courts ruled the following laws were an

unconstitutional interference with the freedom of contract: a state law requiring coal mines to install scales for weighing coal and to pay miners tonnage rates; a state law requiring employers to pay wages in money rather than in goods; and a state law requiring payment of extra compensation for work exceeding eight hours.[18] In the *Lochner* case itself, the Supreme Court held unconstitutional a state law relating the number of hours that bakery workers could work.

In addition to stressing the private nature of the employment contract the 19th century American Courts drew heavily on the common law doctrines of conspiracy and tortious interference with contractual relations as a basis for suppressing collective action by workers (see Stone, fn 16, at 1518.) In the *Philadelphia Cordwainers case*[19] in 1806 the Court held that the old English doctrine of criminal conspiracy applied in America and held workers guilty of criminal conspiracy for engaging in collective action. Following *Commonwealth v Hunt*[20] in 1842 the focus shifted from criminal liability to civil tort liability.

After the passage of the Sherman Antitrust Act 1890 26 Stat 209 (1890) the Courts increasingly used the Act's prohibition of every contract or combination in restraint of trade against collective action by unions. The first labour case that was heard by the Supreme Court under the Sherman Act was the Danbury Hatters case (*Loewe v Lawlor* 208 US 274 (1908). This was a private action for damages rather than an injunction.) In this case the Court held that the union's instigation of a boycott of retail stores that sold boots produced by a struck manufacturer violated the Act. The state Courts had already demonstrated their willingness to issue injunctions in the employment context and now the federal Courts began regularly to deal with[21] labour injunction applications with no legislative guidance other than the direction that contracts or combination "in restraint of trade or commerce" would be unlawful. This led to a period when the principal instrument of labour relations regulation was the injunction.[22]

(c) Legislative action

For several years Congress experimented with legislation regulating labour relations on the railroads. Then it finally took its first hesitant steps toward general legislative regulation of the employment contract by passing the Norris – La Guardia Act (47 Stat 70 (1932)) in 1932. This Act withdrew the power of the federal Courts to issue either temporary or permanent injunctions in non-violent labour disputes. However, it was not until 1935 that Congress comprehensively addressed the regulation of the employment contract by statute.

The Wagner Act (National Labor Relations Act, 49 Stat 499 (1935)) dealt with both the issues of the proper level of state regulation of the employment contract and the question of adjustment of balance of power between employers and employees. Like the I C & A Act the principal object of the Wagner Act was the elimination of industrial strife.[23] Unlike the I C & A Act the Wagner Act rejected the comprehensive and rigid governmental intervention that characterised New Zealand's system. Also in contrast to the I C & A Act, the Wagner Act expressly stated the legislative purpose of attempting to balance the inequality of bargaining power of the parties to the employment contract. Section 1 of the Act declared that industrial unrest had resulted from "The denial by some employers of the right of employees to organise and the refusal of some employers to accept the procedure of collective bargaining . . .". Later in section 1, there is a declaration that ". . . protection by law of the right of employees to organise and bargain collectively safeguards commerce from injury . . . (and restores) equality of bargaining power between employers and employees".

The threefold remedies provided by the Wagner Act were:

(1) Legislative prohibition of the specific practices which were perceived to have caused economic warfare.

(2) The creation of a specialised agency (the National Labor Relations Board) to enforce these prohibitions.

(3) The affirmation of the right of employees to:

> . . . form, join or assist labor organisations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Section 7, National Labor Relations Act (Wagner Act) (1935).)

The model of union organisation chosen to be the appropriate vehicle for participation in collective bargaining was that of exclusive representation by the majority in the bargaining unit. The National Labor Relations Board determined any disputed question of what the appropriate bargaining unit should be. This grant of exclusive representation rights to the majority mirrored the arrangement in a political democracy. There were other aspects of the labour relations system established by the Wagner Act that were evocative of democratic structures. This has led many observers to conclude that in addition to the expressly stated objectives of the Act, (the prevention of industrial strife and the restoration of equality of bargaining power between employers and employees) the further goal of the Act was to achieve "industrial democracy".[24]

An interpretive tradition has developed among those who view the Wagner Act in terms of democratic objectives. This has been called "industrial pluralism" which has been defined as:

> . . . the view that collective bargaining is self-government by management and labor; management and labor are considered to be equal parties who jointly determine the conditions of the sale of labor power. The collective bargaining process is said to function like a legislature in which management and labor, both sides representing their separate constituencies, engage in debate and compromise, and together legislate the rules under which the workplace will be governed (Stone, fn 16, at 1511.)

It is strongly argued by Professor Stone (fn 16) that this interpretive tradition has had a profound influence over the interpretation of the Wagner Act, fostering both judicial deference to the "new

institution of self-government,[25] and reinforcing the idea of government non-intervention in industrial life.

(d) The System of Collective Bargaining in Operation

As an instrument for achieving industrial peace on the national scene by equalising bargaining power and promoting collective bargaining, the Act has not achieved its stated objectives. For those who set the Act's objectives in terms of industrial democracy the Act has been an even bigger failure. One of the most important reasons for this has been the reluctance on the part of the Courts, particularly the Supreme Court, to acknowledge the Act's objective of the equalisation of bargaining power. Since the passage of the Act the Courts have consistently construed it in a manner which negated this objective.[26] A commonly cited example of this is the *MacKay Radio* case (*National Labor Relations Board v MacKay Radio & Telegraph Co* 304 US 333 (1938).

The Wagner Act had granted the right to strike because possession of the weapon of threat of withdrawal of labour was the only way collective bargaining could be made effective. However, the Supreme Court was not prepared to interpret that right in a manner which protected the jobs of striking workers. The Court held that although employers could not dismiss striking workers they could lawfully hire permanent replacements and refuse to give striking workers their jobs back at the end of the strike. The statutory right to strike was thus narrowly interpreted.[27]

The Wagner Act has failed to alter the anti-union animus that has been endemic among most employers. Even the Act's attempt to proscribe what it categorised as unfair labour practices has been rendered ineffective by the unsympathetic interpretation of the Courts. Although retaliation by employers for union activity is nominally prohibited, in the Darlington Manufacturing Company Case (*Textile Workers Union v Darlington Manufacturing Co* 380 US 263 (1965)) an employer closed down one of its manufacturing plants to punish employees for voting for union representation. The Supreme Court held that an employer had the absolute right to close his entire business for any reason he chose but conceded that if only part of a business were closed for anti-union reasons then the Wagner Act could possibly be infringed.

If the Courts have been unsympathetic to the Wagner Act's objective of equalising bargaining power, employers have remained downright hostile. As Professor Summers has observed: "Rather than supporting and encouraging industrial democracy employers have vigorously resisted it." (See fn 23, at 37.) Systematic and flagrant breach of the Act's unfair labour practice provisions is widespread. The National Labor Relations Board is not empowered to award punitive sanctions, but only back pay. This fact, together with the delays inherent in the system, have meant that a determined employer effectively can deprive an employee dismissed for protected union activity, of any meaningful remedy. This has meant that many employers have engaged in discriminatory activity at will. They have treated the National Labor Relations Board procedures simply as the "licence fee" for dismissing trade unionists.[28]

(e) Actual bargaining structure

For the vast majority of employees in the private sector the bargaining structure mandated by the Wagner Act is largely irrelevant. This results from the deep seated antagonism of employers both to the objectives of the Act and to unionism in general. Only about fifteen per cent (15%) of the private workforce is unionised. The National Labor Relations Board has generally approved bargaining units limited to a single plant or company and bargaining is therefore highly decentralised (See D Bok and J Dunlop *Labor and the American Community* 207-228 (1969).) Given the hostile environment of most workplaces, if unions are to successfully organise at all they require strong and aggressive grass roots organisations. This has resulted in union strength being at the workplace. The decentralised nature of bargaining and locus of union power has meant that on the national stage while the unions may have had some political power they have seldom been able to wield any effective industrial power. Control of both the content and scope of collective bargaining has remained firmly with the individual bargaining units themselves. The other significant feature of the American system is that after establishing the legality of collective bargaining in the Wagner Act, Congress has largely left the shaping of the labour relations system to the Courts. This has resulted in the system of collective bargaining in place today owing its character as much to the Courts as it does to the legislature.

In the 56 years since the Wagner Act was passed there have only been two significant pieces of legislation in the labour law area (The Labor Management Relations ("Taft-Hartley") Act 1947 (61 Stat 136) (1947) and the Labor Management Reporting and Disclosure ("Landrum-Griffin") Act 1959 (73 Stat 519) (1959).) Neither has deviated from the basic contractualist approach of the Wagner Act. Congress has proved itself either unwilling or unable to become involved in shaping labour law reform.

In 1977 at President Carter's suggestion a bill was introduced into Congress to make minor changes to the Wagner Act to streamline processing of cases before the National Labor Relations Board and to provide more realistic remedies for employer breach of the Act. The bill passed the house but failed before a filibuster lasting 19 days in the Senate (See Stone "The Future of Collective Bargaining: a Review Essay" 58 *U Cin L Rev* 477, 486 (1990).) Given that a Democrat President and Democrat-controlled House of Representatives cannot pass labour legislation that was supported by the labour movement it seems unlikely that any of the present calls for legislative reform will be answered in the near future.

Therefore although the American system of labour relations is clearly both collectivist and contractualist in legal form, the reality owes more to the ingrained attitudes of the participants in the industrial system. Although the threat of a unionisation campaign can often be a powerful incentive to match or approach union rates of pay it is clear that the contractualist model favoured by the Wagner Act is in fact irrelevant to the majority of Americans in the private sector. In this sector "market forces" are a

more important determinant of the terms of the employment contract.

Up until the mid-1980s New Zealand and the United States adopted approaches to the regulation of industrial relations at opposite ends of the spectrum. Despite calls for reform of the American system it remains largely as it was in the 1930s.

In contrast to this the powerful economic forces experienced in New Zealand in the 1970s and 1980s have led to a rethinking of the most basic concepts upon which the system was based. The next part of this article deals with New Zealand's reforms of the past two decades leading to the complete rejection of the old corporatist structure and its replacement by the new regime found in the Employment Contracts Act 1991. □

1 (Hereafter "I.C.& A. Act" 1894). In 1904, following the federation of the six former colonies into one country, the Australian Federal Government adopted a system of compulsory conciliation and arbitration modelled on the New Zealand Act of 1894. Today the process of compulsory conciliation and arbitration continues to provide the framework of Australia's system of industrial relations.

2 This is contained in the Employment Contracts Act 1991 the major provisions of which became law on 15 May 1991 and the balance of which came into effect on 19 August 1991.

3 Lothian "The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared" 7 *Cardozo L Rev* 1002, 1011-65 (1986).

4 Nolan "Regulation of Industrial, Disputes in Australia, New Zealand and The United States" 7 *Otago L Rev* 266 (1990).

5 The Act was not an isolated piece of legislation but part of a series of statutes including the Truck Act 1891; The Workmen's Wages Act 1893; The Factories Act 1901; The Shops and Offices Act 1904; The Coal Mines Compilation Act 1905 and The Wages Protection Act 1899 which comprehensively regulated the contract of employment.

6 In 1901 the Conciliation Boards were abolished in favor of direct access to the Court but were reintroduced under the name of Councils of Conciliation in 1908: See I C & A Amendment Act 1901 s 21 and I C & A Amendment Act 1908.

7 Initially there was some doubt as to the extent of the Courts' legal power but this was clarified by the I C & A Amendment Act 1947 s 9 which provided that the Court was deemed to have always had power to give its opinion on the construction of an award or agreement or of a statute relating to matters within the jurisdiction of the Court. Section 9 (2) also provided that the Courts' legal jurisdiction was discretionary in that it could decline to give its opinion when it deemed it advisable to do so. (For the brief period 1973-1977 the legal and arbitral functions were divided between the Court and the Industrial Commission.)

8 For a detailed discussion of this topic see: Walsh "Union Membership Policy in New Zealand: 1894 – 1982" in *Voluntary Unionism* 15-12 (Brosnan ed – 1983).

9 For a discussion of these issues in the context of a thorough and detailed analysis of the history and operation of New Zealand Labour Laws see Nolan "New Zealand's Unfinished Revolution in Labor Law" (In the forthcoming issue of the *Comparative Labor Law Journal*)

10 For a discussion of the Courts' attempts to establish some form of principled approach to the essentially subjective task of determining what wages were "equitable" see: Nolan, fn 9, Chap II.

11 See: Harbridge and McCaw "The first wage round under the Labour Relations Act 1987: Changing relative power" *New Zealand Journal of Industrial Relations* 149, 151 (1989).

12 For a discussion of the way relativities operated see: Grills "Labour Market Flexibility: wage relativities under the Labour Relations Act 1987" *New Zealand Journal of Industrial Relations* 157, 159 (1988).

13 As a consequence of the fact that, upon registration, unions obtained exclusive rights of representation and virtual immunity from challenge by a competing union, union structures had ossified. In the late 19th century the predominant type of union was the craft or occupational union. It was these unions which had gained the benefits of registration and had no incentives to change their structure. The scope of the awards they were a party to was often nationwide in extent. This resulted in a large plant employing more than one occupational group often having numerous different national awards applying to different segments of its staff.

14 For a discussion of this point and reference to other critical comment on the nature of New Zealand's registered unions see: Nolan, supra fn 9, Chap II (b).

15 See Stone, infra fn 16 at 1523 - 1524; Lothian supra, fn 3 at 1012 and 1053; Nolan supra fn 4 at 277; W Gould: *A Primer on American Labor Law* at 137 (1982) and generally J Loewenberg "Compulsory arbitration: in the United States" in *Compulsory arbitration: an international comparison* (J Loewenberg ed) (1976).

16 Reprinted in *Readings in American Legal History* 230 (M Howe ed.) (1949) as quoted in Stone "The Post war Paradigm in American Labor Law" 90 *Yale L J* 1509, 1512 (1981).

17 See K Sinclair *William Pember Reeves, New Zealand Fabian* (1965) at 297 as referred to in Nolan, supra, fn 4 at 4.

18 *Millet v People* 117 Ill 294, 7 NE 631 (1886); *Godcharles & Co v Wigeman*, 113 PA 431, 6 A 354 (1886) and *Low v Rees Printing Co.*, 41 Neb 127, 59 NW 362 (1894) and see generally Stone, supra, fn 16 at 1512.

19 *Commonwealth v Pullis*, Mayor's Court Philadelphia 1806; noted in C Summers, H Wellington and A Hyde *Labor Law Cases and Materials* 2nd ed 2-3 (1982).

20 45 Mass (4 Met) 111 (1842), In this case the Court dismissed an indictment against Boston Journeymen Bootmakers and upheld the right of the union, through the mechanism of a closed shop, to force workmen to comply with the terms of a collectively bargained agreement.

21 See generally, C Summers, H Wellington and A Hyde supra, fn 19 174-335 and for specific reference to extensive use of injunctions and antitrust law in the construction industry see Evans and Lewis, "Union Organisation, Collective Bargaining and The Law: an Anglo-American Comparison of the Construction Industry" 10 *Comp Lab Law Journal* 473, at 503 (1988/89).

22 In 1914 Congress had passed the Clayton Act (33 Stat 730) (1914) which was interpreted by the trade unionists as removing their exposure to antitrust law. However following a very narrow interpretation of the Act by the Supreme Court in *Duplex Printing Co v Deering* 254 US 443 (1921) it soon became apparent that a more specific legislative announcement was required to achieve this result.

23 See J Atleson, *Values and Assumptions in American Labor Law* (1983) and Summers, "Industrial Democracy: America's unfulfilled promise" 28 *Clev St L Rev* (1979).

24 See, eg, Summers supra fn 232 and Stone, "Re-envisioning Labor Law: a Response to Professor Finkin" 45 *Maryland L Rev* 978, 1013 (1986). For a different view of Congress' intentions regarding industrial democracy see Finkin, "Revisionism in Labor Law" 43 *Maryland L Rev* 23 (1984).

25 Cox, "Rights under a Labor Agreement" 69 *Harv L Rev* 601, 604 (1955-56) as quoted in Stone supra fn 16 at 1526.

26 For a detailed critique of the Courts' role in this regard. see J Atleson, "*Values and Assumptions in American Labor Law*" (1983); Klare, "Judicial Deradicalization of the Wagner Act and the origins of modern legal consciousness 1937-1941" 62 *Minn L Rev* 265 (1978).

27 Although legal, permanent replacement with strike breakers was not common until the 1980s when the changing balance of economic power and the political climate under the Reagan administration led to the practice becoming widespread. For a recent casenote on *Mackay* which asserts that the Supreme Court was correct in its interpretation of the Act see Estreicher, 43 Proceedings of the New York University Annual Conference on Labor 18-20 (1990). For a discussion of the limitations on the right to strike and of use of other economic weapons see R Gorman, *Basic Text on Labor Law: Unionisation and Collective Bargaining* 210-373 (1976).

28 See Gould, supra, fn 28 at 125. Gould cites the example that in 1975 J P Stevens Co had 96 different unfair – labor practice cases against it pending before the National Labor Relations Board.

Between 1963 and 1976 the J P Stevens Company had been found by the National Labor Relations Board to have illegally discharged or disciplined no fewer than 282 employees for engaging in union organisation activities. See Summers, Wellington and Hyde supra n 34 at 406.

In the *Darlington* case itself, on remand the Board found that the closed factory was in fact an integral part of the employer's wider operation and that the purpose of the closing had been to inhibit unionisation. The employer was able to delay the litigation about the arrears of wages for so long that 26 years after the original action the employees settled for an amount substantially less than the administrative law Judge had found was owing.

Will a Court appoint a Receiver at the request of a negative pledge lender?

By Jonathan Stone, LLB(Hons), BCom, of Auckland

This article looks at the historical background to the appointment of a Receiver by a Court. It considers the matter in relation to a negative pledge lender by whom is meant a legal person who is an unsecured creditor and who has required his or her debtor to enter into a negative pledge deed which is one containing a covenant not to create, give, or permit to subsist any mortgage, pledge, lien, charge or other encumbrance of all or any of the assets or revenues of the debtor. This is the first of three related articles. In this article the author argues that a Court should not appoint a Receiver on an application of a negative pledge lender either because damages are adequate or there is a statutory provision available for appropriate winding up and schemes of arrangement.

1 The nature of receivership

In *Gaskell v Gosling* [1896] 1 QB 669, 691 Rigby LJ discussed the historical basis of receivership. Because of the heavy duties imposed by the common law on mortgagees[1] who entered into possession of mortgaged lands, the Courts of Equity were very reluctant to decide that possession had been taken and encouraged any means which enabled the mortgagee to obtain the advantages of possession without its drawbacks. Initially a mortgagee was allowed to insist that the mortgagor appoint a receiver to receive income and pay interest. Eventually mortgagees stipulated that they themselves would appoint the receiver to act as the mortgagor's agent. The historical basis for receivers was therefore clearly associated with the right of a mortgagee to enter into possession.

Where the agreement between debtor and creditor contains a provision for appointment of a receiver (as was the case in *Gaskell v Gosling* [1896] 1 QB 669), there would appear to be no objection to such an appointment. Despite the historical routes of the device, there should be no requirement that the creditor be secured, for instance, before such a provision can take effect. A receiver appointed under an agreement is merely an agent for one of the parties to the agreement, usually the company. While the device of receivership was initially used by mortgagees, it has been held to be effective when included in floating charge debentures (See *Re Vimbos* [1900] 1 Ch 470) and in *Hobson v Jones* (1869 – 1870) 9 LR Eq 456 a provision for the appointment of a receiver under a deed of inspectorship was upheld. That case is of interest because it demonstrates that a receiver may be appointed under an agreement where the creditor has no legal or equitable interest in the debtor's property. It involved a scheme under which an insolvent debtor agreed to the appointment of certain inspectors who would ensure that the debtor's business was carried on in a manner satisfactory to his trade creditors. The inspectors had a right to appoint a receiver to collect all debts and moneys due to the debtor. Lord Romilly MR considered such a receiver to be in an analogous position to "a receiver appointed in a mortgage-deed" (supra at 460).

There would therefore appear to be no objection to a negative pledge deed providing that on breach of certain covenants, the creditor may appoint a receiver to receive moneys due to the debtor's business. The ability of the debtor to allow the creditor to appoint the debtor's agent would be entirely a matter of contract.

A more interesting issue arises as to the situations when a Court will appoint a receiver on application of the creditor. A Court-appointed receiver will not be the agent of either party, but an officer of the Court. (Lightman and Moss *The Law of Receivers of Companies* (1986) at p 244.)

It is clear that in certain circumstances the Court will appoint a receiver on application of a floating charge debenture holder, even although the debtor has not breached the deed. In *Re London Pressed Hinge Company* [1905] 1 Ch 576 Buckley J cited *Davey v Williamson* [1898] 2 QB 194, a case which gave an uncrystallised debenture holder priority over an execution creditor, as helping to justify the appointment of a receiver at the suit of the debenture holder because, at [1905] 1 Ch 576, 582 "the appointment of a receiver [did] not . . . disappoint the execution creditor of anything which otherwise would be his right".[2]

Furthermore, the possibility that the company would discharge its debt to the execution creditor in the ordinary course of business, and so prejudice the debenture holder's prospects of recovery was seen as justification for the appointment of a receiver. (This, it is submitted, is the real reason for the decision.) In essence, the debenture holder's security was in jeopardy.

The equitable jurisdiction to appoint a receiver was therefore based around preservation of property. (See *Halsbury's Laws of England*, (4th edn), Vol 16, para 1280.) This was similar to the origins of the jurisdiction to grant injunctions. As Turner LJ stated in refusing an injunction in *Attorney-General v Sheffield Gas Consumer* (1853) 43 ER 119, 125 "it is on the ground of injury to property that the jurisdiction of this Court must rest".

In the case of a negative pledge, the creditor is unsecured. He has no legal or equitable interest in the property of the debtor. Can it therefore be said that his "security is in jeopardy"?

In *BNZ v Assets Realisation Board* (1905) 7 *Gazette Law Rep* 483, 485, "security" was said to simply mean "something that enables or makes money due more readily recoverable as distinct from a mere acknowledgment (like an IOU)". It was said that a security does not require anything to be pledged. (See also Stroud's *Judicial Dictionary* for a similar definition.)

Under this definition some may consider a negative pledge to be a "security", although just because the negative pledge clause makes the money more likely to be recovered, does not mean it is more readily, that is more promptly or easily, recoverable. All that it does is prevent other creditors recovering "more readily" than the negative pledge lender. (A negative pledge lender, like all unsecured creditors, still must resort to judgment and execution in order to recover his debt.)

This said, it is submitted that in relation to receivers, and the requirement that the "security be in jeopardy", the word "security" does not have the meaning prescribed in *BNZ v Assets Realisation Board*, supra. The cases that have mentioned this requirement (eg, *In Re London Pressed Hinge* (1905) 1 Ch 576) have all mentioned it in relation to legal and equitable proprietary interests. Furthermore the requirement must be defined in terms of Halsbury's view that the purpose of receivership is to preserve property. (*Halsbury's Laws of England*, (4th edn), vol 16, para 1280).

But just as the existence of a proprietary interest is no longer a necessary requirement in injunction cases[3], recent dicta seem to suggest that it is also not required for the Court to appoint a receiver. Intervention of Equity in both injunction and receivership cases now appears to turn solely on the adequacy of the remedy at law. A case on point is *Bond Brewing Holdings v National Australia Bank* [1990] ACLC 330 (SC of Victoria); 1990 ACLC 366 (HCA). This case concerned an application to the Court by a syndicate of banks seeking appointment of a receiver to the Bond group of companies. The syndicate had extended credit to the first defendant (BBH) by way of a funding facility and a letter of credit. BBH in turn lent the funds to its trading subsidiaries in exchange for certain charges. A right to appoint a receiver when the security became enforceable was given to BBH, who in turn appointed the trustee for the plaintiff syndicate of banks as its agent to exercise the power of appointment. As to the loan between the plaintiff and the first defendant, certain subordination agreements were entered into between the plaintiff and certain other unsecured creditors to effect the subordination of those other unsecured debts to the plaintiff's. Additionally the defendants entered into a negative pledge deed with the syndicate.

The plaintiffs claimed that certain covenants entered into by the defendants had been breached[4] and sought appointment of a receiver and manager to protect, collect and receive the assets of each defendant. It is emphasised that the case did not concern the appointment of a receiver under the security arrangements between BBH and the trading subsidiaries, but concerned an application for a Court-appointed receiver by the syndicate.

In the Supreme Court of Victoria (1990) *Australian Current Law* 35-418, Mr Justice Beach appointed receivers, appearing to take the view that the appointment of receivers was in substitution for the administration of a commercially-embarrassed company. He noted that s 62(2) of the Supreme Court Act 1958 (Victoria) did not restrict the power to appoint receivers to creditors who have a proprietary interest in the assets and, at any rate, the agreement between the plaintiff and the defendants provided for specific assets which were to be used to provide a specific fund from which the principal and interest would be repaid. Since the plaintiffs could obtain an injunction to prevent disposal of those assets, it had sufficient interest to entitle it to the appointment of a receiver. His Honour further noted that the Court had an inherent power to preserve property by appointment of receivers.

The defendants appealed to the Full Court of the Supreme Court of Victoria (1990) ACLC 330 claiming that Beach J had erred in appointing a receiver because an applicant must have a proprietary interest in the subject matter of the application before a receiver may be appointed, and additionally, because a receiver ought not to be appointed to administer the property of an insolvent or nearly insolvent company. The Full Court considered the nature of receivership, stating (supra at 340) that it was "one of the oldest remedies of the Court of Chancery". (See also *Horlins v Worcester & Birmingham Canal* (1868) 6 LR Eq 437, 447.) It was said to be "an extraordinary and drastic remedy to be exercised with utmost care and caution and only where the court is satisfied that there is imminent danger of loss if it is not exercised". ([1990] ACLC 330, 342.)

As to the general requirement for an interest in property, the Court considered that defence counsel's admitted exceptions to the rule, namely mareva receiverships[5], equitable execution[6], and receivers for deceased estates[7] indicated that there was no basis for the "supposed general rule" ([1990] ACLC 330, 344). The reason the Court normally looked to the existence of an interest in property was because "the appointment of a receiver, or for that matter any peculiarly equitable remedy, [was] to be had only where the remedies which the applicant could obtain from a Court of Law [were] inadequate to meet the ends of justice." (The Court cited Pomeroy *Equity Jurisprudence* (5th edn) at para 136 - 222). The Court went on to say that

> In the case of a simple debt, the creditor's remedy at law is regarded as adequate. But if he has a right to be paid out of a

> fund, then if his legal remedies are not adequate to protect that right, equity may be prepared to appoint a receiver. ([1990] ACLC 330, 344).

The Court also noted that a shareholder, notwithstanding that he has no interest in the company's assets, may in some cases obtain the appointment of a receiver where the directors are mismanaging the company's affairs. (See *Duffy v Super Centre Development Corp* [1967] 1 NSWLR 382.) They concluded

> In the present case, the plaintiffs had in the negative pledges, contractual rights against the first five defendants. Just as those rights may be protected by injunctions restraining the defendants from acting in breach of them, so a receiver may be appointed on application of the same principle . . . that the legal remedy . . . is inadequate . . . the idea that an injunction will be granted only in aid of a proprietary interest has long been exploded, a contractual right will suffice. That which would induce equity to intervene by granting . . [an] . . . injunction might also induce it to . . . [grant] . . . a receiver. ([1990] ACLC 330, 345.)

The syndicate of banks had argued that as negative pledge lenders, they had taken far more than the debtor's promise to pay and that while they were not secured creditors in the conventional sense, they were in a much more advantageous position than ordinary unsecured creditors. The Court considered that while it was open to the plaintiffs to argue this point, a much less serious and more appropriate remedy would have been to grant an injunction to the plaintiffs.

As to the defendant's submission that receivers should not be appointed to administer companies which are in financial difficulties, the Court agreed. While in the United States a practice has developed by which an ordinary contract creditor may gain the appointment of a receiver for the purposes of conservation of the debtor's assets for later execution, the Court said that this was not the law in England or Victoria.

> A receiver is not to be appointed by way of substitution for an administration in bankruptcy or winding up order. ([1990] ACLC 330, 351.)

While jurisdiction existed to make the appointment, that power would not be exercised.[8] It was said that while the plaintiff, "like the witch in Hansel & Gretel may want a receiver to cage the defendant, and fatten him up so he will make better eating" (at [1990] ACLC 330, 351), the Court will not either by injunction (see *Lister v Stubbs* (1890) 45 Ch D 1) or receivership require the defendant to give security for the plaintiff's claim.

The Full Court allowed the appeal on this ground, but more importantly on the grounds that the trial Judge had failed to properly consider the harshness of the order and not extracted an undertaking as to damages from the plaintiff.

While an appeal to the High Court of Australia was dismissed ([1990] ACLC 366), the Court stated that in their view circumstances could arise in which the appointment of a receiver of assets of a company which is not expressly alleged to be insolvent would be justified even on the application of an unsecured creditor (at 367).

2 The application of bond in New Zealand

While in Victoria, the Supreme Court Act 1958 confers a power on the Court to appoint a receiver whenever it is "just or convenient" to do so,[9] New Zealand's Judicature Act 1908 does not confer similar powers.[10] However the existence of the inherent jurisdiction vested in the Court of Chancery to appoint a receiver is retained by the High Court. This was recognised in *Evans v Robertson* [1923] 2 NZLR 771, where the power was said to be used by the Court where an execution creditor could not succeed in enforcing judgment against the debtor's property by a common law writ. And while Beach J appeared to use the power given to him by the Supreme Court Act 1958 to appoint a receiver in the *Bond* case [1990], merely mentioning the existence of the inherent jurisdiction, the Full Court (at [1990] ACLC 330) seemed to base their discussion of receivers on the inherent jurisdiction of the Chancery Courts. They did not discuss whether an appointment would be "just or convenient" in these circumstances, and did not mention the Act in this part of their judgment. Rather they based their conclusion on both the previous exercise of the inherent jurisdiction to appoint a receiver and the fact that customarily equitable remedies such as injunctions are only used when the remedies provided by the common law are inadequate.

It is therefore submitted that the Full Court's judgment is applicable in New Zealand as it concerns the inherent jurisdiction to appoint receivers.

The question remains as to whether the Full Court's view is correct as to what must be present before the jurisdiction can be exercised. It is clear that the origin of the Courts of Chancery lay in the deficiencies of the common law Courts. (See *Halsbury's Laws of England*, (4th edn), vol 16, para 1202.) Indeed, the remedy of specific performance was developed for those cases where damages were insufficient to compensate a plaintiff for what he had lost. Where the subject of the contract was land, or a rare or unique chattel, specific performance would be ordered. If however, the contract concerned the sale of a readily available chattel (bread, for example), the common law remedy of damages was considered sufficient. Additionally, with regard to an injunction, the plaintiff had to prove inter alia that an award of damages would not leave him in all respects in substantially as good a position as if he had obtained enforcement in specie. (Spry, *Equitable Remedies*, 3rd ed, at p 366.) Indeed, as previously stated the remedy of receivership grew out of a dissatisfaction by Courts of Equity with the stringent requirements of the common law remedy of a mortgagee in possession.

As to the fact that receivers were first appointed by Courts to protect proprietary interests of plaintiffs, there would appear to be little justification for limiting the jurisdiction to such cases. Injunctions too were first used in connection with proprietary interests, specifically to prevent waste to a landlord's estate by a leasehold tenant.[11] But the remedy was also used to prevent a litigant

from taking proceedings in other Courts where this was considered unconscionable (see, for example, *Settlement Corp v Hoschschild* [1966] Ch 10, 15 - 17) and more recently to prevent breach of negative covenants in contracts. (See. *Lumley v Wagner* (1852) 42 ER 687.)

Receivers too have been used in those non-proprietary situations referred to by the Full Court in *Bond v National Australia Bank*, supra at 344. While mareva receiverships[12] and receivers of a deceased debtor's estate[13] are comparatively rare instances, equitable execution is quite common, its basis being the inability of the debtor's property to be taken under a common law writ of execution. (See *Evans v Robertson* [1923] NZLR 769, 771.)

If use of Court-appointed receivers can be extended from the situation of a mortgagee in possession to that of an unsecured judgment creditor who cannot recover his debt by ordinary execution at law (see *Wills v Luff* (1888) 38 Ch D 197, 200), it is submitted that there is no reason why it cannot be used in other circumstances where the common law provides an inadequate remedy. The question must then be asked whether the remedy of a negative pledge lender could in some circumstances be inadequate at common law and so justify the appointment of a receiver by the Court?

The negative pledge lender's remedies at law include an action for damages for breach of contract as well as statutory rights of liquidation and schemes of arrangement. (See (1900) *International Business Lawyer*, vol 18 (No 6) at p 242.) It is submitted that in evaluating whether equity should step in and exercise its remedies in a new area, both common law and statutory remedies available should be considered. Traditionally, Equity does not act where it need not act. (See *New Brunswick & Canada Railway v Muggeridge* (1859) 62 ER 263, 268.)

The first step is to evaluate what the negative pledge lender bargains for. Certainly, it would appear that he bargains for something more than the mere contractual right to have his debt repaid. In extracting the negative covenant from the debtor, he gains a further legal right against the debtor which gives him greater control over the debtor's assets and undertaking than he would otherwise have. The debtor is restricted in his freedom to charge his assets and thus the carrying on of his business.

While this advantage that the negative pledge lender has over ordinary unsecured creditors may be "no substitute for good old-fashioned security," (*Bond* [1990] ACLC 330, 336) it is nevertheless something that he has bargained for and is entitled to be compensated for if lost. But generally common law damages will be an adequate remedy for breach of the negative pledge. It is submitted that the remedy of damages will only be inadequate for a negative pledge lender when the debtor is insolvent. In a case where the loan is on terms particularly favourable to the lender, the debtor is solvent and the pledge is breached, the damages awarded to the lender will take account of his expectation loss. (See *Hadley v Baxendale* (1854) 9 Ex 354 as to the measure of damages for breach of contract.) In the case of insolvency, the question arises as to whether the remedy of damages should still be considered an adequate remedy, despite the fact that it will not yield substantial results. Spry considers that it should not (at p 65). He cites a number of American authorities[14] as justifying his view that

> A significant risk that a legal remedy such as damages will be ineffective on the grounds of the insolvency of the defendant . . . will of itself justify the conclusion that it is inadequate.

Horack ((1917-18) 31 *Harv Law Rev* 702, 719) agrees with this view, submitting that

> The legal remedy giving judgment for a money sum cannot be considered adequate against an insolvent person no matter how perfect it may be against a solvent defendant.

However, he goes on to state that specific performance should only be ordered on these grounds

> Whenever this can be done without injury to third persons.

While this writer agrees with the view that damages are an inadequate remedy for a creditor of an insolvent debtor in that the creditor cannot be properly compensated for the loss of that which he has bargained for, the statutory principles applicable to winding up (in particular the pari passu rule[15]), along with the general rule that equality is equity, should prevent the Courts stepping in to aid an unsecured creditor by exercising its equitable jurisdiction to appoint a receiver where a company is insolvent. A particular unsecured creditor should not be given the opportunity to gain greater control of an insolvent company's affairs than other unsecured creditors and so possibly prejudice their interests.

This would accord with the view of the Full Court of the Supreme Court of Victoria in *Bond* that a receiver will not be appointed to manage the affairs of a company in financial difficulties on the application of a negative pledge lender ([1990] ACLC 330, 349). The suggestion of the High Court that a receiver could in certain circumstances be appointed to such a company was based on the decision of the English Court of Appeal in *Derby & Co v Weldon* (No 2) [1989] 1 All ER 1002. But that case concerned the appointment of a receiver for similar purposes as a mareva injunction is used, that is to prevent the flight of assets from the jurisdiction.

As the Full Court stated in *Bond* [1990] ACLC 230, 352, the mareva is an exception to the *Lister v Stubbs* (1980) 45 Ch D 1 rule that a plaintiff may not obtain an interim order to increase his chances of recovering if he ultimately obtains judgment. The mareva exception operates to prevent abuse of process and not to aid a particular plaintiff. In the case of an insolvent debtor who is not engaging in abuse of process, the statutory framework which provides for equality for unsecured creditors must take precedence. Even if a negative pledge lender can be said to have a right to be paid out from a specific fund, he is certainly not secured in the conventional sense that he has rights in rem against the debtor's assets.

So it is submitted that a Court should not appoint a receiver on an application of a negative pledge

continued on p 319

Constitutional myths and the Treaty of Waitangi

By Dr Paul McHugh, Tutor of Sidney Sussex College, Cambridge. His book, The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi, *will be published by Oxford University Press in September.*

This article is a rejoinder to the article by Mr G Chapman published two months ago at [1991] NZLJ 228. It is Dr McHugh's contention that Mr Chapman is out of date in respect of "legal scholarship" on the Treaty. Dr McHugh's article was referred to Mr Chapman. Pressure of work, including having to go overseas at short notice, has meant that Mr Chapman could not respond within the publishing deadline. He advised however that having read Dr McHugh's rejoinder he does not wish to retract any of the points made in his original article. He noted with a little surprise the personal nature of the rejoinder and does not accept the personal implications of some of the criticisms — particularly that most of the points he made were founded on mostly racist suppositions.

A call for scholarship

Guy Chapman's article ([1991] NZLJ 228) is an example *par excellence* of the type of scholarship which for decades has inhibited the legal profession's understanding of the Treaty of Waitangi. His article is based upon an apparent unfamiliarity with the history of British imperial and constitutional practice, recent scholarship and the character of the relevant caselaw. He recycles outmoded orthodoxies without any evident awareness of their infirmity. He perpetuates dangerous and crass generalities from another generation. Most of the points made by Mr Chapman against imbuing the Treaty of Waitangi with legal status have long since been exposed as founded upon dubious (mostly racist) and inaccurate supposition as well as suspect methodology.

The purpose of this article is first to make a general plea for practitioners in the field of Treaty law to make an effort to acquaint themselves more conversantly with the new legal scholarship of the Treaty of Waitangi. This is more than school-masterly self-advertisement: One cannot understand the legal position of the Treaty or its place in Anglo-American constitutionalism simply by reading a few chapters of Claudia Orange's book, Ruth Ross' legally suspect but otherwise excellent article and a few of the cases over the past century in the New Zealand Courts.

Treaty rights as pure policy

An immediate danger of the approach advocated by such as Messrs Chapman and, to a lesser extent, Gerritsen ([1991] NZLJ 138) is that the Treaty is assigned to a legal vacuum, or, more accurately, ghetto, where it is viewed solely and simply as a policy document. It is depicted as a "pact" requiring Parliamentary response, yet one otherwise bereft of legal consequence.

There is in that approach a hidden and ultimately condescending patriarchism. Whatever Maori may have agreed to when they adhered to the Treaty, they certainly did not agree to an absolute Hobbesian authority being vested in the Crown. Moreover the history of the common law, so we are led to believe, is characterised by its interposition between an executive claiming absolute power and the subject. This role is one of the important features of the rule of law described by Dicey — a jurist to whom Mr Chapman, at least, takes instinctive attachment.

One presumes the Maori are subjects of the Crown (per article III of the English version of the Treaty) and one hopes the common law is as equally equipped to protect them as other subjects of the Crown. Yet the theme of Mr Chapman's article is that the Courts should not intervene on Treaty matters so that the Crown's relations with a particular segment of the country's population are placed beyond legal reach.

There is an unwitting irony — one is tempted to use a stronger term — in the approach which would keep Treaty issues solely in the policy realm, out of Court except to the limited (and always read down) extent of Parliamentary response. Mr Chapman says that Judges and academics are building a myth about the events of 1840. Yet he opens his article with a passage from Professor Wade's article ("The basis of legal sovereignty" [1955] CLJ 172) which itself discloses reliance on another myth, namely the events of 1688.

Parliamentary supremacy is not legal doctrine writ in stone. It is an English historical phenomenon to

which the Courts have responded. Its basis in the end is not inflexible, immutable law but the Whig myth of history reduced (speciously) to legal principle by Dicey. Mr Chapman's approach is itself based upon a constitutional myth – the Glorious Revolution – from which we are taught grew the doctrine of Parliamentary supremacy. The myth, like all constitutional myths, has been useful even though it is rapidly becoming overtaken by the facts of modern-day (political) life. It seems rather paradoxical behaviour to debunk one set of mythmaking – that associated with the Treaty of Waitangi – whilst at the same time relying in argument upon another myth.

The constitutional function of myths

The truth is that mythmaking is a vital part of constitutionalism. It is a way in which we make sense of the future through mythologising the past. That is the classic function of mythmaking and it has accompanied every epoch of constitution-making and evolution. Myths are useful. They are vital. They are a part of every framework of government, tribal or post-tribal. There is hardly a system of government in the world which does not resort to some form of myth. They are an inevitable fact of constitutional life.

To put it in a way which Anglo-Saxon lawyers should grasp : Magna Carta (1215) and the Glorious Revolution (1688) have for centuries been exalted as symbolising constitutional predicates fundamental to Westminster government. Yet the historical reality of these events will hardly sustain the myth which has been implanted into them: Historical reality and myth have become severed with identities and histories of their own.

The thrust of Mr Chapman's article is an insistence upon historical purity (and even then his depiction of it is woefully incomplete). That is to say, he mistakes myth for historical reality, not realising that each has its own space or, to paraphrase the Waitangi Tribunal, aura of its own.

Myth-making, then, is not a pejorative term nor a process necessarily to be debunked. It is simply a way of using the past to make sense of and delineate strategies for future governance. It is not rewriting history so much as inventing another.

It is precisely upon this methodology of the myth that the doctrine of the supremacy of Parliament rests. The starry-eyed Whig vision of the potency of representation in the legislature co-opted English constitutional history to this myth. The actual history of English constitutionalism itself defies this Whig superimposition yet that has become unimportant in as much as the myth has acquired a life – and with it, legal stature – of its own.

The mythmaking surrounding the Treaty of Waitangi should be a cause of celebration in that it displays the availability of a source of indigenous constitutionalism. In the end, it may be preferable for the New Zealand legal system to build a myth around the events of 1840 rather than those of centuries previous which occurred in a land with a history from which a sizeable proportion of this country's inhabitants have been excluded. The Treaty of Waitangi, if it is to become mythologised, is at least our own myth and it can so acquire a meaning pertinent to the governance of this country.

This is not a process to be deprecated but a sign of an emergent, independent constitutional identity: As myths which arrived as intellectual baggage of nineteenth century England are shed, others more local and attuned to national circumstances can evolve.

There is, of course, separate from this process the historically pure account of what happened in 1840. But, as the Treaty of Waitangi becomes part of the national constitutional fabric, the known facts of 1840 become less a concern than what it was thought by the treaty parties might ensue from the events of that year. In other words, the values represented by and associated with an event holding such constitutional overtones assume a history divorced from the actual event. Those who resent this process – and would cling instead to their own dying (Anglocentric) myths – seek to curb it by holding up this gulf as emblematic of its inherent bankruptcy. In truth, it is simply another way of refusing to surrender an older, certainly more comfortable myth for the uncertainty of the new emergent one.

There can be no doubt that the Treaty of Waitangi has become "constitutionalised" over the past decade (D V Williams "The constitutional status of the Treaty of Waitangi: an historical perspective" (1990) 14 NZULR 9) and that some vision of the basis of government in this country is being founded upon it. Yet the fact remains that the Crown's sovereignty over the country derives from this document too easily derided as "amateurish" by its detractors – charges as easily applied to any of the major landmarks of Anglo-American constitutionalism. Quite simply: the Treaty of Waitangi is as fundamental to government in New Zealand as Magna Carta and the Bill of Rights.

"Myths for beginners"

It seems rather surprising, but it is perhaps salutary, that with the Treaty discourse at its present stage of intellectual sophistication, certain legal points should need rehearsal. Plainly, these points are not as fully assimilated by the legal community as one would have supposed. Mr Chapman's article illustrates how incompletely legal scholarship on the Treaty has been grasped by the profession.

A good example with which to begin is the exhumed assertion that the Treaty of Waitangi was not a treaty of cession at all.

One need only consult the well-known work of M F Lindley *The Acquisition and Government of Backward Territory in International Law*, a book written in 1926, to negate that argument. Lindley shows how from the first the European powers recognised the treaty-making capacity of tribal polities and used these treaties as the basis of their territorial title. The limitation of treaty-making capacity to so-called "civilised" polities was an invention of an unrepresentative group of English writers in the late nineteenth century. These opinions, although reflected in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, were never absorbed into British practice.

Moreover, the foreign affairs prerogative includes the power to

recognise and enter into treaties with foreign potentates. Recognition of the sovereign status of these bodies is entirely a matter for the Crown. The Courts can hardly inform the Crown that it has entered (or proposes entering) into treaty-relations with a nonentity for to do so would be contrary to their accustomed position on matters of foreign policy. In 1840, the Crown recognised the sovereign capacity of the Maori tribes at least to make a cession of that sovereignty. The Crown did not subscribe to any "standard of civilisation" as a basis for its recognition of that treaty-making capacity. Any residual doubts did not alter the fact that the Treaty was concluded.

It is absolutely clear that the Crown regarded Maori consent as a precondition to any formal assertion of sovereignty over New Zealand. The Treaty may have been part of a process, as Mr Chapman indicates, but it was the pivotal part of the process. Without any formal Maori consent annexation would not have occurred. The fact that this was not a rule of law which the Crown's Courts could enforce did not diminish the perception of it as a legal prerequisite.

Legal positivists tend to cast back into the past their own contemporary methodology. In 1840 law was not regarded as the coercive Austinian "command". The regard for the rights of tribal peoples was incorporated into formal British practice from the early seventeenth century and so, as nineteenth century Judges as Chief Justice Marshall and Mr Justice Chapman were to indicate, the common law rules affecting colonies drew sustenance from accepted norms of British imperial practice. This is the common law in its original, "un-Austined" condition, being drawn from practice and usage regarded as binding.

One might also point to long-established tenets of Anglo-Saxon constitutional thought, in particular the anti-absolutist principles emergent from the early seventeenth century. By these the lawful basis of government was seen as resting on the consent of those subject to it. The Treaty of Waitangi is fully in accord with this honourable and noble tradition, yet Mr Chapman would take the absolutist Stuart view: He would depict the Crown's governance over Maori as a divine right. He thereby excludes Maori from centuries of Anglo-Saxon constitutionalism — so much for the promise of the rights of British subjects guaranteed by the third article of the Treaty of Waitangi.

Any denial of the Treaty as an instrument of cession is founded upon unfamiliarity with (a) British imperial practice, (b) the role of Courts in relation to the foreign affairs power, (c) the character of international law (not least its intertemporality and history on the status of tribal societies, (d) deepseated themes of Anglo-Saxon constitutionalism, (e) the limitations of positivist methodology.

The legal status of treaties of cession

The terms of instruments ceding the sovereignty of territory were described as "sacred and inviolable" by Lord Mansfield in *Campbell v Hall* (1774) 1 Cowp 204. This has been taken as describing a limitation of the Crown's executive powers in relation to such territory *save where those powers are derived from Parliamentary authorisation.*

Lord Mansfield did not base his propositions on the "civilised status" of France and Great Britain nor on the fact that neither signatory was giving away sovereign status. Indeed, he criticises the view of Sir Edward Coke in *Calvin's Case* (1606) as "strange" and "extra-judicial". In that case Coke had insisted that treaty relations with infidel societies were unlawful. Lord Mansfield felt this approach was an "absurd exception" better left unmentioned for the memory of Coke. Clearly, then, Mansfield would not have limited his propositions to treaty relations between Christian "civilised" powers.

It is apparent from *Campbell v Hall* that Lord Mansfield's propositions describe the power of the Crown over ceded territory irrespective of the religious or cultural status of the non-British treaty party. The recognition of the capacity of the other party is in itself sufficient.

Mr Chapman has difficulty with extending Lord Mansfield's propositions to the Treaty of Waitangi solely on the discredited basis that it was not an instrument of cession. His conclusion, however, is also implicitly based upon an unfamiliarity with the history of British imperial practice. Throughout this history there are examples of the Crown refusing to exercise a prerogative power in derogation of the terms of any treaty of cession. Such derogative activity required Parliamentary approval.

An example, one predating the Treaty of Waitangi, is the grant of *diwani* (1765) which gave the East India Company powers of governanace in the provinces of Bengal, Bihar and Orissa. Eventually regarded as a cession of sovereignty by the Mugal potentate, this instrument ensured the customary laws and legal systems of the regions. Warren Hastings, as Governor, maintained these indigenous legal systems. When Cornwallis eventually meddled with these laws with his regulations of 1793 he relied not on some supposed prerogative constituent power to erect Courts to discharge English law or a prerogative legislative power in a "ceded colony". Instead he derived his authority from an Act of Parliament (21 Geo III, cap 65, section 23).

This is an example of a treaty of cession being regarded as a limitation of the Crown's powers. The treaty of cession acts as a brake or check upon executive capacity.

The "act of state" cases which demand the legislative incorporation of promises in a treaty of cession do not disturb that conclusion. These cases usually involved an attempt to set treaty rights up against valid legislation or an attempt to revive rights which the act of state had effectively suspended. It does not follow from those scenarios that treaties of cession are completely devoid of legal cognisability. Indeed, a closer inspection of this caselaw rather than the regurgitation of misleading quotable quotes shows that Courts must on occasions consider and give effect to treaties of cession.

This jurisprudence has been explained and analysed elsewhere (see McHugh, *The Maori Magna Carta*, chapter 7). [In fact, virtually all of the arguments Mr Chapman makes against the Treaty are covered in my doctoral dissertation which is lodged in the Davis Law Library at the Auckland Law School. Many of the points made in this brief reply are covered there in more detail.]

Whose fallacies?

Mr Chapman states:

> The "principles of the Treaty", undefined, unstated and unknowable (except by judicial contrivance) as they are, should on no account be elevated to the status of the legally cognisable, let alone to a putative "higher law" status.

There is one difficulty with this comment. Parliament itself, rather than the Courts, has given legal cognisability to the "principles of the Treaty". By the accepted rules of our legal system, the Courts must enforce statutes. If statutes incorporate Treaty "principles" what option do the Courts have but to respond? Should the statutory reference to the Treaty "principles" be disregarded?

A similar issue arose in relation to Maori property rights at the beginning of the century. The tribal title to their customary land was, we know, guaranteed by the Treaty. Numerous Imperial and local statutes made references to this "native" or "customary" title yet local Courts still refused to acknowledge that such references gave the property right and legal basis. In *Wi Parata* (1877), Chief Justice Prendergast had said that a statute could not call what was non-existent (Maori rights under the Treaty) into being.

This was an attitude with which the Privy Council expressed extreme impatience in *Nireaha Tamaki v Baker* (1901). Lord Davey said such an argument was "rather late in the day". It was "the duty of the Courts to interpret the statute which plainly assumes the existence of . . . [Maori rights] which is either known to lawyers or discoverable by them by evidence" ((1901) NZPCC 381 at 382).

It seems strange that today a similar argument should be advanced by which Courts are required to ignore the plain words of an Act of Parliament. Mr Chapman would have us believe that a statute cannot call what is non-existent (the "principles of the Treaty of Waitangi") into being. One must reply that if the Courts have ever elevated these principles into a position of priority in the various legislative schemes it can only be a consequence of statutory permission. The various judgments of the Court of Appeal, not least those of Sir Robin Cooke, labour this point.

Mythmaking reconsidered

If the Courts have been making myths through the "principles of the Treaty of Waitangi", it is because Parliament has given them this task. This mythmaking has been no bad thing for it has meant that we have begun to scrape away the Anglo-Saxon surfaces of our constitutionalism. This is a prospect from which both conservatives (such as Mr Chapman) and radicals (such as Jane Kelsey) shy for it shows the law responding to a momentum within society which these groups would leave either as neglected or to burst forth in (a projected) eventual violent upheaval.

Any style of legal reasoning which sees the law as dynamic and responsive is thus disputed by the conservative and radical. Occasionally this dispute is dressed in pseudo-technical language and reasoning. However, when looked at more closely, it is superficial and based upon a poor grasp of historical development and method. It confuses mythology with historical reality.

No one pretends that the language of "partnership" and "fiduciary obligation" was exchanged on the seaside promontory at Waitangi in 1840. The Courts have stressed their construction of what amounts to a contemporary mythology of the Treaty. However, this constructive activity has a sure legal underpinning to it. The Courts are taking legal doctrine into the ghetto, the eyesore which the folks that live on the hill would rather neglect. From this, new mythologies may be arising and, in consequence, old ones dying. Neither human society nor its law is static and that, in the end, is what the conservatives and the radicals in the Treaty discourse resent most bitterly. □

continued from p 315

lender, not because the negative pledge lender has no proprietary interest in the debtor's property, but because pre insolvency, damages are adequate, and post-insolvency, the statutory framework for winding up and schemes of arrangement should prevail. □

1 The duties included a duty to account not only for what he actually received, but for what he might have received without wilful default.

2 If an execution creditor takes subject to the rights of a floating charge debenture holder whose charge has not crystallised, this fact alone should not help the debenture holder in securing the appointment of a receiver as he could hardly say that his security is in jeopardy. However if, as a number of cases state (see *Evans v Rival Granite Quarries* [1910] 2 KB 979), the execution creditor can take priority over an uncrystallised floating charge debenture holder, the levying of execution would put the security in jeopardy and justify the appointment of a receiver.

3 Spry (*Equitable Remedies*, 3rd ed, Law Book Company) at p 325 suggests it was never a necessary requirement at any rate. For example, from the earliest of times, injunctions were issued to restrain defendants from taking action in a Court of law where this would be unconscionable in the eyes of Equity.

4 Notably "upstreaming" and "sidestreaming" of money through Bond subsidiaries to other subsidiaries or to the parent, Bond Corporation Holdings Limited.

5 This is an alternative remedy to a mareva injunction, used to prevent a defendant taking assets out of the jurisdiction. The rationale behind the mareva is that it avoids an abuse of process. The mareva receivership was used in *Derby v Weldon* [1989] 2 WLR 412.

6 Equitable execution is a process by which the Court allows a judgment creditor to obtain payment of his debt by appointment of a receiver where ordinary execution at common law is inadequate.

7 A receiver may be appointed to a deceased estate where the personal representative is mismanaging the estate.

8 The Court cited *Harris v Beauchamp Bros.* [1894] 1 QB 801, 811 and *Bakal v Petursson* [1953] 4 DLR (2d) 449.

9 The Judicature Act in England confers a similar power.

10 However, there are still powers to appoint receivers in certain anomalous situations; for example, to enforce an interlocutory order under R277.2(f) of the High Court Rules.

11 See *Goodeson v Gallatin* (1771) 21 ER 346, where it was stated that the Court took its jurisdiction to grant injunctions from the writ of prohibition of waste.

12 These are unusual, an injunction normally being used.

13 This would appear to be based on the same principle as is used by the Court to appoint a receiver on application of a shareholder, namely, that the personal representative (or directors) are mis-managing the affairs of the estate (company).

14 For example *Hodgson v Duce* (1856) 2 Jur NS 1014, *Parker v Garrison* (1871) Illinois 250 (US).

15 In New Zealand, this is brought into the insolvency code for the winding-up of companies through s 307 of the Companies Act 1955, which incorporates s 104 of the Insolvency Act 1967.

More letters from the law library in Minsk

By Nigel J Jamieson, at Belgosuniversitet in Minsk

To my dear but still much misunderstood common lawyers in New Zealand,

1 March 1991

Greetings again from the law library of the Lenin State University in Minsk! Sorry for the delay – postage in and out of the Soviet Union takes many weeks. Just now it is notoriously delayed. Airmail takes more than a month.

All our inward mail is opened. We post our outward mail in faith. Even the official party-line news of *Pravda* would become suspect through the post. Accordingly we must be content to write history rather than report current events.

Some Soviet citizens complain that their mail is never delivered. Perhaps that is why history is still being written here on the Russian plain. It is only in the west that fast reporting has reduced history to the subliminal advertising of current events. The slow Soviet postman is a very important person – no less pivotal than his Tzarist counterpart in Gogol's *Inspector-General.*

Of course as lawyers you will realise that slow postage does not account for all the delay in your receiving this letter. The fact remains that time is stretched in the Soviet Union. If it takes three times as long for any letter to be delivered it takes six times as long for it to be written. There is no point in our apologising. Russians never do. And to survive here one must accommodate, perhaps even succumb to the Soviet way of life.

We have already met some westerners here who refuse to adapt. They are businessmen who keep on trying to make up for lost time. They are genuinely hopeful of changing the culture of this vast Eurasian plain, but sometimes, exhausted by their own efforts and angered by the apathy of others, they lash out in the Soviet press against the current lack of commercial realism. Of course they are all businessmen, highly motivated Americans, whereas in learning to adapt to the concept of extended time, we are privileged to be academic and polynesian.

2 March

All the same there are some things we should have told you about long ago. Now it seems as if they are out of time. But earlier on we were just feeling our way. The pavements then were still all covered with ice, and to travel faster meant coming a gutser. To have begun by describing the law library in Minsk, or to comment off the cuff on Gorbachev's recent visit to Byelorussia, or to hint darkly about the forthcoming referendum on 17th March, seemed all too premature. After all, this was not to be a diary of current events in the Soviet Union – which today's television will always pre-empt. Our aim was rather to write some letters reflecting on how a common lawyer from New Zealand might live and work for four months in Minsk.

Meanwhile you may well ask why we go on addressing these letters to common lawyers as being very much misunderstood. When we first wrote to you we did not explain this expression. Did we intend to give you time to think? Perhaps we just mistook the remark for being self-explanatory. After all, we wrote it at a time when we ourselves were feeling rather lonely. We were experiencing what it was to be a common lawyer far away from home. Besides which, all the pavements were still covered with ice. Time and again we got caught up in conflicts of culture that left us sprawling on the sidewalk. We had come another gutser and so, once again, found ourselves much misunderstood.

One trouble was that we were the first of western lawyers to come as we had done, to study law and society at the law faculty of Lenin State University in Minsk. The experience wasn't just new for us but new for them. Breaking through the intellectual barrier in any society is hard enough but winning a place in the hearts of the people requires more time and patience. Those who led unhappy lives or were low in self-esteem suspected us of ulterior motives. How could we avoid appearing as spies when we went around carefully observing things and even making notes? Might we not have been strategically placed in the faculty – if not to spy for the west then worse still to report back as the President's men? On the other hand those who were overanxious to please nearly killed us with kindness. They burdened us with commitments that were impossible for us to keep. So for the first few weeks we were like freshmen on any academic campus. We had to steer a straight course between those who were for us and those against.

Perhaps just to break the ice of those early days (the temperature outside was minus six) people asked us all sorts of questions about New Zealand's legal system. We answered those questions as best we could, but obviously shocked a lot of people by our answers. How could we still be a monarchy? How could we pretend to have a legal system without a written constitution? Many concluded that we must have come from outer space.

"No, no, no," we replied. "We're just common lawyers". This response only doubled their disbelief in the efficacy of our legal system. Were there still places on earth that relied on Judge-made law? Somewhere, somehow,

especially when one is still suffering from the jet-lag of round the world travel, one has to find the place at which to draw the bottom line. It was then that we would shyly add (more by way of appeasement than explanation) — "We're from down under, you know, from New Zealand". Despite the need to extricate ourselves from such discussions we felt we thereby let our country down — badly.

Without some more objective standard of legality by way of Hebraic, Roman, or Canon law, this kind of academic argument can go on interminably. Given such extreme provocation as Soviet scepticism of Judge-made law, it is hard not to retaliate with a common lawyer's response to the Soviet legal system. Then it can be a surprise to find ourselves, as New Zealanders, all alone. Despite centuries of opposition, England has finally received Roman law through her membership of EEC. Her centuries-old unwritten constitution is now bureaucratically controlled from Brussels. Winston Churchill's prophetic proposal for a United States of Europe is almost realised. This leaves New Zealand, once a fringe colony of the British Empire, now the sole custodian of the English common law. In defending the world's last unwritten constitutional monarchy so far from its Anglo-Saxon birthplace, is there any way in which the New Zealand common lawyer can avoid being very much misunderstood? No! From both east and west, as sometimes also from within himself, the antipodean common lawyer is seen to be a grotesque anachronism.

3 March

On a blackboard in one of the lecture rooms of the law faculty in Lenin State University some student has scribbled the words — "Lenin no longer holds the soft spot he once held in my heart."

4 March

Byelorussia is back to normal. We know, that for the last five years at least, every Byelorussian would strenuously disagree with that conclusion. All we mean to say is that President Gorbachev has come and gone.

President Gorbachev arrived relatively unannounced on 26 February. For several days his tour through Byelorussia occupied prime television time. Then as suddenly as his visit began it was all over. We take the risk of speaking light-heartedly by saying that he hasn't been seen in Byelorussia since. Of course, the Soviet Union is a big place. The President has many other calls on his time. We could presume that he has returned to Moscow, but believe that he is visiting regions of high radioactive risk in the Ukraine.

Who knew when Mihail Sergeevich — as it is perfectly proper to call the Soviet President — would arrive in Minsk? Who knew where he would want to go — to visit the Tractor Works or the Academy of Sciences, or both? Who knew when he would head off home, or instead travel on to Kiev?

In the west we still have the equivalent of Court calendars, but the Soviet Union is full of surprises for the ordinary citizen. The highest ranking officials can suddenly appear, like schoolmasters out of otherwise clear skies on sports days, in the most unexpected of places. "Look", said one of my friends as we were crossing the street the other day, "a real live general — you can tell by the stripes down his trousers — and he's quite a young one too".

So it was with President Gorbachev's visit to Byelorussia. Was it really Mihail Sergeevich we saw in Lenin Avenue? We wonder if anyone hauled him over the coals for not publicly announcing the exact moment of his arrival. When we first came to Minsk we were taken to task for not forwarding on that critical information. It had seemed redundant to do so, for as we approached immigration counters one Soviet official had usually nudged another, saying "There's your man", or "Look, here he comes", or "This one's yours". Nevertheless, without proclaiming our arrival we were obviously pretending to hold the presidential status of dropping in unexpectedly, and so deserved to be taken down a peg or two.

If anyone apart from the upper echelon knew in advance of Gorbachev's arrival, it would have to be the editorial office of the *People's Journal* — the official newspaper of the Byelorussian Supreme Soviet. As other journalists phoned this office, the President's cavalcade was passing beneath its windows. It is much more exciting to meet a real live President in this way than it is to meet a real live general. Although the general has stripes on his trousers these soon disappear from sight as the man gets caught up in the crowd, whereas the President wears a very fashionable new fur hat which still remains visible as he moves out among the people.

We need to say more about this hat. It is not black. It is not red. It is not white. If we were a Gogol or a Chekhov no doubt we could adequately explain its significance. But we are neither of those authors and so we must be content to say that it is blue-grey and, as it seems to us, something of a compromise between a western homburg and eastern *shlyapa*. Its style is very reassuring to the west. If we had one of these we could drop in anywhere at anytime and always be sure of being made welcome. It is the sort of hat that makes lesser individuals envious, and so draws their fire away from the person.

Clothes not only maketh the man but maketh the nation. This new hat that Mihail Sergeevich is wearing proclaims the westernising influence of *perestroika* throughout the Soviet Union. It does so to the point of *glasnost* without compromising the Slavonic character. That Gorby keeps this hat on his head is just as vital to *perestroika* as that Gorby keeps his head. Carlyle's *Sartor Resartus* ought to be compulsory reading for the KGB no less than Gibbon's *Decline and Fall* was compulsory for the British Civil Service.

We wear hats or go bareheaded, as often to observe a ritual as to rebut the weather. Russia is full of ritual: don't lean on balconies — they might disintegrate; don't walk on draincovers — they've been known to disappear; don't spit in the Metro — you've had your chance elsewhere; and when anyone stands on your toes tell them to do so "lightly, lightly".

All joking apart, the ritual of receiving bread and salt as symbols of hospitality when one first arrives in Byelorussia is a lovely ceremony. When extended to the President of the Soviet Union, as it was to Mihail Sergeevich on this visit, it can also have a political as well as a cultural

significance. It serves to emphasise the status of Byelorussia as an independent and autonomous republic.

Having already received the ritual extension of hospitality shortly after touchdown at Minsk airport, it only remains for Mihail Sergeevich as Soviet President to observe the second ritual required of visiting dignitaries. This entails laying a wreath at the foot of Lenin's memorial – a massive monument outside the Byelorussian Supreme Soviet in Lenin Square. This is done even though Lenin himself categorically prohibited this kind of personality cult.

Even allowing for our living in Minsk we would have missed most of this but for the extensive coverage of Gorbachev's visit to Byelorussia on Soviet television. For hour after hour of solo performance, Gorbachev comes through, even under intense stress, as one of the world's most impressive political leaders. By no means does he get everything his own way. Meetings between the president and ordinary citizens are very tense and outspoken affairs. Mihail Sergeevich has made it this way by force of *glasnost*. The whole relationship of the presidency to the union and of the union to the republics comes through on this level as a very fragile one. It is precariously poised on the personality of the president, not as a cultic leader but in terms of his answerability to the republics at a grass roots level.

We watch and listen to Gorbachev on the first day of his tour through Byelorussia. First he visits MTZ – the Minsk Tractor Works. He meets with workers on the factory floor, speaks from the podium of their Palace of Culture and answers questions calling for improvement in the life of the ordinary individual. Later he visits the Byelorussian Parliament where the deputies are debating the use of police power. Finally he visits the Academy of Sciences where he speaks to the intelligentsia. This all takes place on the first day of his arrival in Byelorussia. On the next day he will be visiting Gomel and Mogilev – two of the regions hardest hit by the Chernobyl disaster.

On this first day Gorbachev has made three major speeches – from the Tractor Works, from Parliament, and from the Academy of Sciences. They are delivered in that order, so that the President has gone first to the working people, then to the people's deputies, and lastly to the intelligentsia. This accords with Soviet legal theory which puts the full power in the hands of the working people. There is no recognition given to the doctrine of the separation of powers, or to any need for a system of checks and balances, but in his speech to the intelligentsia at the Academy of Sciences, Gorbachev takes the opportunity to recognise the role of the intelligentsia in the full functioning of Soviet life. And the roles are also reversed in releasing the texts of the speeches over television. The President's speech to the Academy is broadcast before that delivered to the Tractor Works.

In all three speeches the President speaks spontaneously. He may have notes but he refers to them sparingly. He communicates eyeball to eyeball with his audience, obviously committed to the policies he is advocating. In his third and last speech to the Academy of Sciences, he begins low-key, obviously tired after the day's gruelling ordeal, but, warming to his subject, continues with impassioned conviction. He answers very searching questions from the floor. He deals with them just as directly as he deals with questions from housewives and shoppers about the economic crisis. He will go on tomorrow, as he knows, to answer just as searching questions from those who have suffered the catastrophe of Chernobyl. The situation he is dealing with is critical on all fronts, political, social, and economic and one cannot conceive of any other leader doing a better job.

5 March

In one of his speeches from Minsk, Mihail Sergeevich referred to the fact that the Soviet Union was not alone in its problems. Even the USA, despite its higher productivity was not immune. Next day the *People's Journal* published a cartoon showing a weary and tattered traveller coming to a crossroads. His further progress in all directions is blocked by a tombstone on which is written the words "everywhere is just the same".

6 March

The time has come to tell you something about the law faculty of the Byelorussian State University of Lenin in Minsk. It is from the law library of the law faculty that these letters are written. Why are we so cautious about approaching this subject? After all, these letters are a product of the situation in which they are written, and cannot help but already account for it.

There is always a vast gap between the external appearance and the internal operation of every institution. The gap is wide enough in the west, where it may pass unnoticed for many months, but one has only to step inside an eastern building and one is struck by the fact that the outside appearance and the inside workings bear very little relation to each other.

From the outside, the law faculty of Lenin University in Minsk stands about nine floors high in Moskovskii Street. It rises round the corner from the Institute of Culture that gives its name to this part of town. For any western lawyer tempted to translate his profession into a technique for making money, it is nice to relax for a time in the reflected glory of not just scholarship but culture. It suits us, too, to see this law faculty here in terms of its real title – *juridicheski fakultet*. This name emphasises jurisprudence rather than law. Nevertheless that is all we propose to say about the law faculty for today.

7 March

Novelty appeals to youth. Adolescents can be captivated by the diversity of human character. When one grows old, however, one quickly tires of odd characters. Then, having had too much of Chichikov in Gogol's *Dead Souls*, or of Bobchinski and Dobchinski in his play *The Inspector General* (which Gogol wrote as a serious comment on Russian society but has been mistaken for a comedy ever since), one can always have a rest by closing the book and putting it away.

It is different in Russian life. These are real characters that still exist in Soviet society. Some sort of Taras Bulba can be found on every

crowded bus, some sort of Oblomov in every official position, some sort of Marmeladov in every downtown bar. We have encountered Bobchinski and Dobchinski in a swank hotel as a couple of middle-aged bell-boys who wouldn't leave our room until they got a bigger tip. We have seen faces from the Dostoevskian underground wandering through slums where the corpses of dead rats lying on the roadway have been rolled over so many times by heavy trucks that they are paper thin. These are parts of Russia which you cannot escape from simply by closing the book. These archetypal characters still exist, and those who go to the Soviet Union cannot choose just to look on, but must play out their own life in response to them.

The divide, if there is one, between fact and fiction is so narrow in Russian literature, that Soviet society is often literature sprung to life. For example, we often thought our own Russian teacher Nicholai Daniloff a one-off character until we read Nabokov's *Pnin*, and one has only to visit Russia to find that there are many of them. This closeness between fact and fiction is very critical for academic work in the Soviet Union. As in every society that talks a lot about data, scholarship in the Soviet Union, especially in law and the social sciences, often has an unconscious element of fantasy through wishful thinking and unrealised aspiration. A lot of would-be scientific fact is no more than science fiction. This is especially the case with law books round which revolves the pseudo-scientific obsession of keeping them up to date. In the west this is done by publishing new editions but east of the Urals the same effect is achieved by periodic pogroms of books from libraries.

8 March

Can commerce cope without contracts? The Soviet Union began by outlawing what the west takes for granted as the basis of commercial law. The Soviets have spent the last eighty years trying to cope without contracts. Those who advocate radically different ways of doing business now in the west ought first to study the comparative jurisprudence provided by the Soviet experience.

Today's direction of commercial travel in far-western New Zealand towards standard contracts and contrat d'adhesion can only be described in the context of Soviet experience as unashamedly communistic. One example of this (so we learn from home) is the new Employment Contracts Bill. That instance is not unique to New Zealand, however, but reinforced by earlier legislation covering school charters, medical service contracts, and university education.

The paradox for the west is that much of this new-look legislation can only be described as severely Soviet. If the individual wants to work, he has to conform not just to collective but to state-enforced standards. If the majority of teachers, or doctors, or preachers do not want such terms of employment nevertheless to remain employed they must work in what then become gulags or forced labour camps. The paradox intensifies when one considers that this characteristically Soviet legislation is being proclaimed in the west at a time when the west is championing the east in its espousal of private enterprise and full freedom of contract for the individual. Notwithstanding this tidal ebb and flow, the fundamental question still remains, whether commerce can cope without contracts?

9 March

Today we found ourselves in the *komissionii* or State second-hand shop. We had been looking for a sports shop, because, after standing in one long queue to buy skating boots, and then standing in another long queue in the same shop to buy blades for the boots, we had found outselves the purchasers of boots without blades because there were none in stock to fit the boots.

"Such things sometimes happen in the Soviet Union", our friends quaintly told us. So here we were, almost approaching the thaw when ponds would relinquish their ice in favour of frog spawn, still looking for a sports shop that would sell blades to fit our boots. And it was then that we found what would be otherwise very hard to find were we not scouring the city for something else — a Soviet *komissionii* or second-hand shop.

Needless to say a long queue marked the entrance to the *komissionii* which was not yet open. Some customers carried suitcases presumably containing things to sell. And when eventually the doors opened, the crowd surged forward carrying us with it enveloped in an air of good humoured expectancy, as if entering Aladdin's cave. What prices — 400 roubles for an old fur hat (the monthly wage for a senior lecturer is 180 roubles); but also some bargains — the pick of best quality worsted wool overcoats for 20-30 roubles; and beautifully tailored women's garments — some very cheap, some very dear — their prices determined not by quality of cloth or tasteful design but by current fashion. These clothes were all second-hand, as were refrigerators for 700-1000 roubles, and the old but renovated upright piano in the corner for 2000 roubles; but there were obviously lots of imported electronic goods, double, triple or higher than their equivalent prices in the west. These, perhaps, the *komissionii* was selling direct.

What has all this got to do with commercial law? On the face of it the only difference in the Soviet Union from the west is that the State runs the second-hand shops. Underneath, however, the situation is vastly different. In the Soviet Union it is illegal to sell anything second-hand except through the *komissionii* shop. The shop only sells on behalf of customers. It does not take the risk of buying from them and selling on its own behalf. And it charges the commission (from which it takes its name) — variously reported at from 10-100 percent.

The *komissionii* is thus popularly regarded as a rip-off. We are inclined to think this must be so, otherwise by the law of supply and demand, *komissionii* shops would do a thriving business and be spread throughout the land. Remember there is no other way in which the Soviet citizen can legally sell second-hand. The principle behind this practice is to avoid speculation. Once individuals were allowed to trade, even to sell second-hand, this would break the back of the State monopoly on commercial law.

One consequence of this rigorously enforced monopoly is State capitalism — a contravention of Marxist-Leninist theory. Another

consequence is the growth of the black market, for if the State does not observe its own political principles, why, so some argue, should its citizens?

The Soviet black market is not simply that of the spiv so beloved by British comedies, but instead something very dark and sleezy. It is Mafia-like in its counter-code of culture, imbued with violence and corruptly evil. During the currency reforms of late last January its practitioners could be seen operating openly in the streets, up and down the queues outside the banks, buying up people's life savings at a pittance. From day to day it still operates outside, and sometimes even inside the foreign tourist hotels, like Hubileinaya on Minsk's Machereva Avenue, where one can be approached with illegal offers of far more lucrative rates of exchange, and even the official bank is overlooked by the bar from which the racketeer can observe his victim.

Being a revolutionary society, the Soviet Union is authoritarian rather than authoritative, collectivist rather than individualist in operation, and conservatively law-abiding in principle – at least until the next revolution. The way in which the Soviet citizen escapes the *komissionii* yet keeps within the law is to revert to barter. The result of State capitalism is thus the reversion of society to an earlier form of commerce. We can see this too with the reversion to green money under a similar threat of State capitalism in the west.

All over Minsk, at bus stops and wherever else people congregate, are pasted notices that someone wants to exchange this for that. Each notice has a frayed edge on which is written half a dozen times, the telephone number of the offeror. One has only to tear off a telephone number and ring to make contact and carry through the transaction. Who wants to swap a country house for a computer or a fishing rod for skis?

Often, outside the local supermarket, a more elaborate barter board will be provided for advertisements. The fact that these notices can survive the winter tells you how dry can be the weather.

[The cover illustration of the *Journal* shows a barter board erected outside the *univermag* in Lyubimova Avenue in Yugo-zapad or the south-west suburb of Minsk.]

10 March

Today is the equivalent of Mothering Sunday. Since Friday the flower kiosks have been doing a roaring trade. It is odd to see people carrying bunches of blood-red carnations through freshly fallen snow. A good carnation costs five roubles, and it is traditional to give an odd numbered bouquet – with seven flowers the optimum number. The macho male in the Soviet Union has no qualms about being seen carrying flowers.

11 March

Today we visit the offices of central government. The building is very wide and so belies its height. Dimensions are very hard to gauge in the Soviet Union. What appears to be a small building close at hand turns out to be a large building far away. Urban architecture still maintains the atmosphere of the steppe, and distances are deceptive.

From the top of the central government building the Byelorussian flag flies very high. It is the only point of colour in an otherwise drab landscape. It seems very tiny and far away compared with the massive statue of Lenin that rises up from the ground.

We submit to the usual security check after going in the front door, and soon we are discussing problems of legislation and constitutional law with the Chairman of the Legislation Committee. Many Byelorussians are interested in creating the right conditions by which to encourage the growth of parliament. Later we dine at the Byelorussian equivalent of Bellamy's. It is very plain fare – but lo and behold, we have potatoes! On the way out we can buy a bag of *pryaniki* or gingernuts. At the moment these are impossible to obtain elsewhere. Bellamy's is Bellamy's the whole world over.

12 March

At the top of the downward escalator to the Metro in Lenin Square stand a very large and overweight middle-aged-to-elderly couple. The husband is trying to persuade his wife to step out onto the moving track. The wife has never seen the likes of a moving staircase before. Little boys push past them and jump onto the escalator in high glee. The wife is all of a flutter and becoming a little hysterical. "Don't be afraid", calls out a passerby. "There's nothing to fear", calls another. "Kia kaha", we murmur under our breath, as we step out into space and travel downwards like Maori warriors. But the wife doesn't take strength. When we look back from the bottom of the escalator the couple are still there. What becomes of them we don't know.

13 March

Too many laws are worse than too few. Lots of little laws nibble away at, and some big ones take big bites out of the everyday lives of ordinary citizens. *One Day in the Life of Ivan Denisovich* is not just Solzhenitsyn's factual account of life in a Soviet labour camp. Its literary punch lies elsewhere. It is also an allegorical account of everyday life in the Soviet Union where everything is done to rule. And its forcefulness extends beyond Russian literature, and we all share the same sympathy for Ivan Denisovich because the whole world is overlegislated. Too many laws have made a forced labour camp of the working world. The paradox is that only the unemployed escape the overlegislation by which State capitalism insists on taking the lion's share in both east and west.

15 March

Ex-president Nixon has just arrived in the Soviet Union. Is it only for old-times sake that he has been given prime time on Soviet television? "The New World Order", so he says, "requires the re-structuring of the Soviet Union".

How much does the average Soviet citizen remember of the Watergate Affair? Ex-president Nixon does not seem to be the right sort of person to promote confidence in *perestroika*. Indeed, as we listen to him, we begin to have severe misgivings even about the up and coming referendum. This New World Order that Nixon proclaims is the alter-ego of the New Age Movement. Is that the explanation for so far distant places as the Soviet Union and New Zealand being nowadays restructured according to a very similar set of values?

"This is my seventh visit", says Nixon. "It is significant that I come just on the referendum." Significant for whom? The effrontery of the fellow is enormous — as if he, a disgraced ex-president of the United States were responsible for the referendum in such a way that it couldn't be held without him.

What if that were true — what if Nixon, as a representative of the increasingly powerful New Age Movement, and despite or even perhaps because of his part in Watergate is really needed here for the holding of the referendum? What does that mean for the progress of *perestroika* and the continuance of the Soviet Union? Who knows — but Nixon himself publicly proclaims the significance of his being here. The paradox is that as most of the constituent republics prepare to vote for the continuance of the Union, something else is happening on a vastly different political level. The entire Soviet system is in process of being demolished (just as surely as the Berlin Wall) in favour of the New World Order as implemented by *perestroika*.

16 March

Tonight is literally "on the eve" of the referendum. On the face of it, the referendum will decide the continuance of the Soviet Union. But by reason of this referendum, whatever its outcome, the Soviet Union will never be the same again. To the extent that the Union will continue, its autochthonous roots have changed. To the extent that some republics will not hold the poll, or may vote against the Union, then (as some of them are already saying) other older and still living roots have been reasserted.

The first mention of being "on the eve of the referendum" we noticed was in the *Evening Minsk* of 20 February 1991. One could make a collection of comments on the significance of the situation. We mention only two, both made by the Central Committees of the Communist Parties of Byelorussia, the Russian Soviet Federated Republic and the Ukraine, as published in *Pravda* 1 March 1991. The first was to describe it as "a critical moment in the life of our multinational homeland", and the second described it as "the most dramatic stage in the life of the Soviet peoples".

The referendum was first announced over five weeks ago. In terms of the immensity of the electoral process and the complexity of the situation which gives rise to it, a month is but the last hour of living "on the eve" of whatever is about to happen. The adjectives "immense" (*ogromni*) and "complex" (*slozshni*) are those invariably used by the Soviet press to describe the referendum and its surrounding situation.

Tonight we went with a lawyer friend to sit in one of the schools which will serve as a polling booth for tomorrow's voting. Our friend was there to advise citizens who had any questions about tomorrow's referendum. We sat in a large room surrounded by the paraphernalia of the Young Pioneers — a semi-political youth organisation. Nobody came — everybody knows what to do — the press and television have been explicit. The unanimous advice is to vote "yes" in favour of continuing the Union.

17 March

How simple some things are in a one-party state. At the same time as holding a general referendum the government can persuade the people how they ought to vote. In many ways this has reduced the adrenaline flow required to generate an air of expectancy.

"On the eve" has come and gone. Readers of Turgenev will recall his novel of the same name. *Nakanunye* or *On the Eve* means that something big is going to happen. Cross-culturally, the American equivalent is probably *High Noon*.

It is now high noon on the day of the referendum. Of course it is a Sunday. In the Soviet Union all such big political events are set for Sundays. We have just been to a music concert for school children in the Civic Concert Hall. The compere kept children of all ages highly motivated to hear a classical programme of violin, piano, and recorder music, together with solo and choral singing. He asked questions about the music, gave prizes for the correct answers, told stories and cracked jokes in the course of his highly educational but also entertaining teaching. This is the first time in over a month of our stay in the Soviet Union that we have observed people obviously at ease in enjoying themselves. Interestingly enough that it should mark today as the date of the referendum.

Later, and outside after the concert, we go for a walk and wander through the city. So many shops are closed "for renovations" as the sign says in their empty windows. It would be a joke were the situation not so serious. Here is a prime example of official disinformation.

We pass and re-pass several polling booths. The usual red flags hang outside. Not once do we see anyone going in or coming out. Are there no voters, or is voting over? When will the results come out? "Not for a few days" most people say.

18 March

The headlines in tonight's *Evening Minsk* proclaim "Yes to the Soviet Union". The irony of this headline is that it doesn't differ much from many newspaper headlines before the referendum. This makes it rather hard to distinguish what before was persuasive from what now is decisive. According to the preliminary figures, out of 1,173,032 citizens of Minsk enrolled, 834,175 citizen took part in the referendum. Of those who voted, 65.6% voted in favour of continuing the Union.

19 March

Lithuania, Latvia, Moldavia, Armenia, Georgia and Estonia refused to hold the referendum. The results so far show that in the RSFSR 75.4% of the population went to the polls, of which 71% voted in favour. In Ukraine 83% went to the polls, of which 70% voted in favour. In Byelorussia the figures were 83 and 83; in Uzbekistan, 95 and 93.7; in Kazakhstan, 89 and 94; in Azerbaijan, 75 and 93; in Kirghistan, 93 and 94.5; in Tadjikistan, 94 and 96, and in Turkmenistan, 97.7 and 98. People forecast massive rises in the cost of living.

20 March

The Soviet Union is a land of signs and slogans. Wherever you go there are rules to be read, instructions to be understood and wise sayings to be taken to heart. This makes it a literary paradise for the student of the Russian language. There is a risk

in all reading, however, as demonstrated by one of the characters in Gogol's *Dead Souls*, that one becomes so habituated to reading the words as to be left unmoved by the substance. And so one shrugs aside what is now the commonest sign in the Soviet Union — "closed for repairs".

21 March

The ambulance came an hour ago and took our fourteen-year-old daughter into hospital with acute appendicitis. Westerners live in fear, here, of having to enter a Russian hospital. The ambulance trip is not exactly a sleigh ride. Our gearbox emits a high-pitched whine as we accelerate through heavy traffic towards the city centre, and our suspension makes a dull thud as we hit every pothole. The law faculty comes up on our left, looking empty and forlorn, but outside its doors on Moskovskii Street they are running a raffle for two antique chairs from the back of a pickup truck parked on the pavement. We are travelling slower now, through constantly increasing traffic, past the main corpus of the university masquerading as part of the metro in the main square. How long ago was it that whenever we sought the university we found outselves buying a ride on the metro, and whenever we wanted the metro we ended up checking in our hat and coat at the university? On the other side of the square stands Lenin at least five times as large as life. He looks down from his podium outside the Byelorussian Supreme Soviet. "What are you doing in Minsk?" he calls out to us across the square. We escape the question by accelerating fiercely down Lenskii Prospect, heading towards the Academy of Sciences beside which is situated First City Hospital.

22 March

How can westerners be so rude and boorish as to be afraid of Russian hospitals? Any westerner in need of treatment will be welcomed into a Soviet hospital — a far cry from America where aid is often refused unless one holds medical insurance. As a privileged guest of the Soviet Union the westerner may be given a whole ward to himself while Soviet citizens are crowded two to a bed down the corridor. Likewise the westerner has first claim on drugs and medicines. These may be so limited in supply that many other patients must do without. The westerner receives specialist consultations as a matter of course, and his day to day treatment is most carefully monitored, discussed and documented. Hospital staff do their utmost for him, as much to express their personal love towards, and professional commitment to relieve the suffering of a fellow human being, as to show their support for the State in its welcoming in a westerner. At the same time any jingoistic promotion of international understanding, formerly allied to aspirations of world communism, is now obviously irrelevant. The medical help is given simply for its own sake, and no one takes advantage of the situation. When the westerner leaves hospital he will receive a written statement setting out all the details of his clinical history. In so many different ways the western patient is better treated in the Soviet Union than at home. So how can westerners be so *nyekulturni* in their fear of Russian hospitals?

For a start, Russian hospitals like other Soviet buildings are very badly built. Doors don't fit, steps slope at different angles, lifts won't work. Paint comes off on your clothes — you daren't brush up against a wall. Even the joinery isn't joinery — the gaps are too wide apart. The fear is that if you need surgery they will stitch you up the same way. Then there is the atmosphere. Chloroform constantly contaminates the air. One can barely think straight. People seem to float along corridors, glide up and down stairs, and speak as if from very far away. Is it merely the narcotic atmosphere that makes everything seem so rundown and shabby? For the last week the theatre trolley has stood in the corner with flat tyres. Space is at a premium — a long line of young children still waits for attention in the basement. If you need a nurse in the middle of the night there is no bellpush, and you know that they will make fun of you, in their own strange dialect, if you wet the bed. The shortage of medical supplies encourages a reliance on folk remedies and alternative medicine. A saline drip becomes a luxury item. Yet despite or because of all these material shortcomings there is far more loving kindness here than under any capitalist system of user pays. As the chloroform clears away you can see someone coming to clean the toilets. These are the staff toilets which as a privileged westerner you have been allowed to use. They have been incredibly dirty with an open bin of used sanitary pads in the corner, and faecal matter smeared over the only washbasin for as long as one can remember. Suddenly, however, it is spring today — the toilets are all made bright and shining. One can begin to think straight, and hope begins anew. Maybe even the constant chloroform is needed, and is part of God's purpose in a place like this where it works as a comprehensive disinfectant.

23 March

Our daughter is not responding to her medical treatment. We try to convince the hospital authorities that her case is more than one of appendicitis, and that after her operation, her recovery should be more assured — but our comments seem to fall on deaf ears. It is obvious to us, her parents, that something else is radically wrong. What can we do? Whatever reservations we express are met with the fullest reassurances. "We have nothing to worry about. The wound is not septic. Everything is going according to plan. Appendectomies are commonplace." We are reminded of the old Russian proverb that "for every word a doctor says he has two more under his tongue".

The fact is that our daughter's strength is failing fast. As her father I feel not only helpless but responsible in having brought her to Minsk. Do you remember how Karl Marx was criticised by the Webbs for working on while his daughter lay ill and dying? Well I have just been asked to give a series of lectures on economic jurisprudence. My wife insists that it will do me good to give the lectures. She herself, however, will continue to sleep at the hospital.

24-29 March

The results of further tests show that Sasha our daughter has salmonellosis. The medical

continued on p 332

Environmental Law I: An international conference overview

By Bridget Nichols, a Wellington practitioner

Environmental issues are of international significance. The law in individual countries has environmental implications well beyond the borders of any particular jurisdiction. This fact lay behind the recent NELA/LAWASIA International Conference on environmental law held in Bangkok, Thailand, from 4 to 7 August 1991. Bridget Nichols was one of the participants and she was asked to report on the Conference for the New Zealand Law Journal. *The first part of her report is published in this issue, and the second part will appear next month. Issues raised included the need for action and not just talk, and the consequent necessity of involving people at all levels.*

1 Introduction

A "Discover Thailand" brochure described Thailand as being the world's most stimulating and rewarding travel experience. The same brochure describes Bangkok as a mixture of history and tradition, of East and West, a city of vitality and excitement and a huge and sometimes confusing city.

Such words struck me as so easily being transposed to a description of the NELA/LAWASIA Second International Conference on Environmental Law held in Bankgok in early August and from which I have just returned. The Conference was indeed a stimulating and rewarding learning experience for the 140 delegates from 15 countries. The papers provided a history and background to the developing environmental law, a traverse across East and West practice and problems and a voyage through the huge in volume and sometimes confusing regulatory and legislative provisions and policy statements that are now emerging throughout the world. The vitality and excitement was engendered by the speakers, all so very highly qualified and dedicated and who, in some cases, can only be described as "heroes to the cause".

The Conference spanned a mere three days but during that intense period some thirty papers were presented followed in many instances by commentaries and by a question and discussion time. It would be impossible to summarise each and every one of these papers in an article such as this but I have attempted to highlight certain issues and weave together the strands that have run through the Conference.

I believe it could be easy for New Zealand lawyers to perhaps become complacent and smug following the passing of the laudable and forward thinking Resource Management Act but this paper will, I trust, be useful in putting the New Zealand model in the wider world setting and encourage New Zealand practitioners to think and, perhaps, act in an international, or at least, regional and pro bono way.

2 Opening addresses

The importance of the Conference in the eyes of the host country was demonstrated by the presence of Dr Paichitr Uathaweekul, the Minister attached to the Prime Minister's office overseeing environmental subjects, to open the Conference. The Minister informed the delegates that Thailand was a high growth developing country but that it faced three major problems, namely, income distribution, public health and environmental degradation. He acknowledged the need for appropriate legal frameworks to tackle the problems and stressed that any such frameworks or programmes must exhibit three characteristics: they must be practicable, effective and continuing.

The Monday opening ceremony was graced by the attendance of two most eminent speakers. The first was Professor Sanya Dhamasak, a Professor of Law, former Prime Minister of Thailand and now a Privy Councillor and Councillor to the King of Thailand. He related the many environmental projects initiated by the Royal Family of Thailand, who, he said, are highly aware of the need for environmental action.

The Professor did not deny that Thailand was in an environmental crisis and that urgent steps were needed to mitigate and ultimately overcome that crisis, but he rightly focused on the real difficulty of law administration and enforcement in this area. He said that the environmental crisis worldwide is manmade, complex and vast and can only be cured by law – but law without sanctions is no law.

The Professor expressed his wholehearted support for the international Conference as a forum not only for airing and sharing experiences but for the promotion of co-operation and understanding between lawyers in developed and less developed countries. He stressed that any decisions or plans for the conservation and remediation of the environment must be fair and pragmatic and a happy compromise between claimants. He considered lawyers have as important a role to play as scientists in raising the consciousness of country and community leaders that the world and its peoples are fighting for their very survival and time is running out.

The second eminent speaker of the day was Justice P N Bhagwati, former Chief Justice of the Supreme Court of India who delivered the Keynote Address. This was a remarkable address, traversing the whole spectrum of local and global, national and international environmental problems facing us today. I cannot attempt to encapsulate it – every word was precious and significant, but as I turn to the various themes of the Conference I will refer to his words of wisdom whenever appropriate.

I shall now expound on the themes of the Conference as I extracted them.

3 Rhetoric is easy but action is what is required

The last two decades have seen environmental rhetoric enter the vocabulary of international law and affairs. The buzz words are now "sustainable development" and "ecodevelopment". However, there is a real risk that such phrases and words are merely bold pronouncements "full of sound and fury and signifying nothing". It is so easy for politicians and others to give lip service to caring for the environment and the need for environmental policies and action without actually effecting anything except kudos for his or her sentiments. Similarly, there are often spurts of green enthusiasm among sectors of the community but unless these become a steady stream they are inconsequential.

Perfect examples of the failure of action to match the rhetoric are provided by an examination of the controversial World Bank's programmes in developing countries in recent years. This was the subject of a disturbing paper by Bruce Rich, Director, International Project, Environmental Defence Fund, Washington, DC. He adopted the catchphrase "green rhetoric, brown reality" as a true description of the World Bank's policies on the one hand and its operations on the other. Non-Governmental Organisations ("NGOs") in the environmental arena are of the view that despite the World Bank committing itself to well publicised environmental reforms in 1987, four years on it has not turned out to be "the benign green giant they hoped for but an environmental Frankenstein armed with a chain-saw". The bank's largest and fastest growing lending sectors are energy and forestry, in both of which areas the Bank has purported high environmental commitment towards conservation. The World Wildlife Fund International described the "forest management and protection" component of a $23 million project for Guinea as actually increasing deforestation. The Bank's money was to support the construction of forty-five miles of roads around two humid forest reserves totalling 150,000 hectares of which some 106,000 hectares are still pristine rainforests. The Bank agreed in the project to two-thirds of the remaining 106,000 hectares of intact forest being opened for timber production. Other forestry projects supported by the Bank allow similar activities and lead Rich and the World Wildlife Fund to the conclusion that much of the Bank's forestry lending appears to be based on the premise that tropical forests are first and foremost timber resources that can be sustainably exploited!

In May 1991 a new Forestry Policy (the third draft) was promulgated but has been highly criticised as indicating little in the way of specific directions and commitments beneath the green rhetoric.

The World Bank has financed many energy projects, mainly large dams and coal fired plants which have destroyed sensitive and valuable ecosystems, threatened human health, necessitated the forced resettlement of thousands of indigenous people and contributed to a marked degree to global warming through increased CO_2 emissions.

Rich comments that despite the rhetoric the Bank is failing to pursue investments in energy efficiency and conservation.

> Clearly the question is not one of the need for more or improved environmental policies or regulations since what is at issue is the gap between such policies and operational reality.

Another illustration of the difference between the written or spoken word and reality was explained by Panat Tasneeyanond in relation to forestry in Thailand. The national Forestry Policy requires 40% of total land area to be "forest" but this is not to say that the land is now in its natural forested state and "forest" is not what it seems as it is defined in Thailand as "land which has not yet been acquired by any person under land law"! The 40% forest target is to comprise 15% protected conservation forest and 25% economic forest but, again, the areas identified for forest to meet these targets are areas used for cultivation and settlement by 87 million people. In such circumstances, how can the reality match the hyperbole?

Lastly, Bryan Bachner, a lecturer in law at City Polytechnic of Hong Kong, in a comparative analysis of chemical regulation in the USA and the People's Republic of China related the history of environmental pronouncements and development of environmental protection in the Republic. He concluded by saying that regardless of the promulgation of laws and the establishment of offices the institutionalisation of environmental protection was more illusion than reality and that the Chinese policy on the environment has remained a merely rhetorical approach to law, content to promote but unable to do anything substantial. However, on a more optimistic note, he continued on to explain how change now appears to be underway in this area.

4 Act locally: Power to the people

The presentations at the Conference by Lalanath de Silva from Sri Lanka, Karl Yalo from Papua New Guinea and Panat Tasneeyanond from Thailand to name just a few, were united in the call that power must be given to or remain with the indigenous peoples to manage their resources in a sustainable way.

De Silva in an erudite and thought-provoking paper entitled "Law and the Alternate Development Paradigm" denounced what he called the "Ruling Paradigm of Development" which gives primacy to economics and which equates development with economic growth. He considers that this ruling paradigm has its origins in colonialism and the industrial revolution and is premised upon the conception that some people are superior to others and, therefore, qualified to control others' development. It is this which has given rise to the description of

countries as developed, under-developed and developing. He referred to the fact that Third World countries continue to export natural resources, especially minerals and timber, to the industrialised world resulting in environmental degradation in those countries as well as declining incomes and resource bases. He dismisses the term of "sustainable development" as unworkable and considers that substainability and development are contradictory.

De Silva told the Conference that a new Non-Governmental Organisation has been formed in Sri Lanka called the Public Campaign on Environment and Development which he believes is unique because it is seeking to write a citizens' report based on views expressed at nationwide public hearings at the village level. The fundamental proposition that has emerged to date is that people want to take control of their lives, their destiny and their resources. The message emerging is that people are quite capable of managing their resources as they have done so in a sustainable way for years. The obstacle lies in government control and intervention in the name of development.

"Sustainable development" to indigenous cultures is not an invention of the future but a discovery of the past. By way of example De Silva refers to fisheries in the past where defined areas of the sea were allotted to different villages with each village family having rights over given areas or to fish given species or to fish by given methods. This system assured that the resource was not overexploited and that the benefits of the resource were equitably distributed. However, this resource management system was eroded by the British colonial government and continues to be so eroded by the present independent government who apply the Roman rule of open access to the sea.

The alternative development paradigm demands a bottom to top approach to resource management whereby the village/community manages its resources and the interests of the village/community are above those of national interests. De Silva is advocating the decentralised ownership and management of resources. He concluded by saying that the traditional laws of Sri Lanka evolved out of communal systems. The tribal and provincial laws in Papua New Guinea and in India are also excellent sources of wisdom. In these systems lie the wisdom of communal resource management.

Karl Yalo in his paper on the "Inter-relationship between environmental considerations, cultural obligations and development – a Papua New Guinea perspective" drew on the issue of forestry or perhaps more accurately, deforestation, to substantiate his plea. He comments that his country is faced with the daunting task of trying to exploit its resources while at the same time preserving the cultural, biological and scenic value of the nation. He explained how the forests are a vital resource for the rural people and an integral part of their lifestyle and culture but deforestation is a major problem being caused by shifting cultivation, commercial logging operations and clear felling of forests for cash cropping. Yalo contends that problems have arisen because of the lack of knowledge of local people about the environmental consequences of clear felling, the temptations placed before the customary land owners by the logging companies to which they naturally succumb – "carrots" such as the building of roads, schools and clinics and money and the inability of the rural people and the failure of the government to monitor the logging companies' activities to ensure that environmental safeguards incorporated into agreements are honoured. Fault also lies with the government in as much as if the government met the health, education and transportation needs of the rural people, the inducements that are offered could easily be declined. Yalo concluded by saying that the people must be educated about the consequences of deforestation and the need for sustainable management of the valuable resources still intact.

I would like to interpolate here by saying that from my personal experience working in the Solomon Islands, Yalo's summary of the situation in Papua New Guinea with regard to deforestation echoes the situation in the Solomon Islands which is facing the same environmental degradation for the same reasons, all of which must be urgently addressed.

Finally, in tune with Karl Yalo, Panat Tasneeyanond of Thailand recommends the concept of community forests for the country as advocated by conservation groups because rural people will not benefit from the government's economic plantations of eucalypts, they will not necessarily be employed by the plantation investors and rural people know traditionally how to maintain and manage resources for sustainable yields. The right to control and manage must be given back to the people but there are practical problems to be overcome in Thailand before such a policy – if it were to be adopted – could be implemented.

5 Help people to help themselves!

This phrase readily triggers two related topics which were the subject of several papers and much discussion at the Conference, namely, the role of foreign aid and the role of environmental and/or public interest lawyers. I will address each of these in turn:

(a) The role of foreign aid

Accepting the thesis propounded by the previously described speakers that local communities in developing countries not only have a vested interest in long term conservation of natural resources but they are better equipped than national or international planners to manage these resources, it is important that aid donors take cognisance and incorporate this tenet in their aid programmes. Mention has already been made of the failure of the World Bank, as just one example of international lending agencies, to do so. However, there is a trend in the right direction. Canada, for example, in its 1988 Official Development Assistance Charter included as one of its principles that foreign aid should be geared to educating and training indigenous populations to develop their own environmental management capabilities and strengthen the human and institutional capacity of developing countries to solve their own environmental and developmental problems. Integrating the indigenous population into its own environmental management enables developing countries to make their

own educated decisions. In a 1989 report the Canadian Institute for Research on Public Policy said: "The question of sustainability, however, can be assessed only within the context of the vision, values and institutional and political cultures of the recipient community. Any model is culturally bound: it must be to be useful. A model evolved in a developing country might reflect the value that people are a part of the ecosystem rather than, as in the case of Western cultures, separate from it."

As a brief aside, there is an argument that the imposition of environmental conditions on aid projects can be viewed as a form of First World imperialism which represents an unpalatable "holier than thou" attitude, and further as an infringement of a nation's sovereignty. However, it seems to be accepted that environmental conditions do not violate the fundamental right to develop as development which is not sustainable is not development at all. Further, bilateral aid is responsive to and supplied only upon the request of the developing country and donor countries can sweeten the imposition of environmental conditions by using the concept of "additionality" or the provision of the necessary additional funding to enable the conditions to be met.

The Australian aid programme is adopting a similar stance to Canada. Bob Stensholt of the Australian International Development Assistance Bureau (AIDAB) explained in his paper that there has been a move away from large infrastructure projects towards projects aimed at improving institutional capacity in recipient countries, education and training assistance with domestic policy and legislation relating to environmental issues. "Small is beautiful" sums up this desirable trend – and it must be hoped that the World Bank and the other world lenders also take the policy on board. Stensholt continues on to say that AIDAB recognises that if natural resources around the world are to be managed in a sustainable way it is essential that the communities which depend most closely on those resources be given responsibility for their long-term management. This necessarily involves complex issues such as land rights, community decision making and the facilitation of women as managers of natural resource. Of course, as has already been stated, the ability to make informed decisions about resource use and protection also depends on adequate knowledge so environmental education (at a variety of levels) is a key component of any long term social solution to environmental degradation.

Although there was no contribution from New Zealand on this issue I can attest to New Zealand directing its aid programme to environmental education of indigenous peoples having witnessed the funding of such a project in the Solomon Islands.

(b) The role of environmental and/or public interest lawyers

It was this subject which perhaps more than any other demanded the delegates to re-examine their consciences and make resolutions for the future. Challenges were thrown up time and again by lawyers from around the world to each of us to play our part, however small, in this area. As the subject was one that caught the imagination of each of us present, I do not apologise for proceeding to report in some detail on the presentations made.

Professor John Bonine of the School of Law, the University of Oregon, USA raised a smile by saying that there is something "soft and green" about the term "environmental lawyers" but warned that words are notoriously slippery – giving as an example the trend for calling the destruction of the rainforests as "harvesting" (as if they had planted the trees) whereas, in his opinion, "mining" is a far more apt word. He amusingly drew the analogy of the terms "tax lawyers" which, after all does not neccessarily say that those lawyers are in favour of taxes or "criminal lawyers" which one must assume does not mean that they are "pro crime"! Sadly, in the American context, "environmental lawyers" are not necessarily "pro the environment" being employed by companies to avoid or reduce compliance with environmental regulations! However, leaving that aside, Bonine continued on to stress the importance of local legal expertise in the environmental area. Local lawyers are more important than all the Western lawyers jetting around the world to give aid! Brazilian environmental groups call some of these lawyers and Non-Governmental Organisations "parachutists" – they drop out of nowhere and after a few months of an environmental campaign are gone, leaving no stronger local institutions to continue the work.

Bonine rightly pointed out that the very presence of the expert outsider on a case may work to discredit the local volunteers. He asks; "Isn't the very definition of 'expert' someone from out of town?"

He suggests that there should be a rule that when a Non-Governmental Organisation or a law firm seeks to assist in developing countries, local lawyers – if available – must be involved.

The challenge to lawyers is to help a colleague in a developing country adopt a public interest law effort by providing some funding or by organising an information support network. He asks us to remember that public interest lawyers in developing countries are usual sacrifice makers and risk takers – risks often to life and limb.

The very difficulties and risks faced by public interest lawyers in developing countries were presented to the Conference by a number of impressively committed lawyers.

Antonio A Oposa Jr, an innovative and intrepid lawyer, has recently established a small private and public interest environmental law office in the Philippines which action he eloquently described as an

> attempt, valiant if not foolhardy, to arrive at the golden mean between, on the one hand, the need to survive in the world of material realities, and on the other, a burning interest that trembles on the brink of passion.

In his moving address, he listed as essential initial resources to the opening of the practice, an air-conditioner, basic office furniture and enough capital for the maintenance of the office and family for at least two months. "One does not need the aggravation of short term insecurity when he is venturing solo flight into thin air"! He referred to the dual duty of an environmental lawyer, namely his or her duty to the client and to the

conservation of the environment and he told of how working with government can be tricky where there is active corruption and corruption is an accepted behavioural norm. Having said that, he wanted to put it on record that the Department of Environmental and Natural Resources of the Republic of Philippines is one of the best and cleanest government offices in the country but he fears that it may be exposed to the winds of politics in the near future.

Following this fighting talk, there was a presentation by David O'Donnell about establishing and managing an environmental law practice in a large firm of lawyers in Australia and the contrasts with that of the Philippines experience were great! The computer research technology requirements alone demonstrated the benefits that today we almost take for granted.

Mr Gurdial Singh Nijar, a lawyer in private practice but who makes time to work with the Consumers Association of Penang, and one who has been banned for life from Singapore for his environmental/public interest work, detained in Malaysia and is only now released on police conditions, described the very different and difficult stage on which lawyers play in Malaysia. He explained that democractic institutions are weak and ill-developed in that country and the theory of the government being the custodian of public rights as dubious in fact. Any lawyer or person challenging a Government decision is deemed to be a subversive. Lawyers, Judges and the populace at large operate under "an ominous culture of fear bolstered by a vast array of repressive legislation".

By way of illustration he mentioned the case of the brave residents of Bukit Merah, a township in North Malaysia who challenged a Mitsubishi-owned plant over the production of radioactive waste. The residents were faced with obstacles at every step of the way: the public gallery of the Court was filled with police personnel to prevent residents from attending; the Court grounds were manned by riot police; the Special Branch Police put the residents, their witnesses and lawyers under surveillance; the residents were charged with unlawful assembly for walking together from the village to Court and some were prosecuted for dissemination of information among themselves and the community leaders and a lawyer were arrested during the trial under the Internal Security Act which permits of indefinite detention without trial by Executive decree. The government took the view and propagated it through the mass media, which is almost totally government-owned, that this litigation deprecated an attempt by the residents to frighten off existing and potential foreign investors.

Mr Nijar called for the growth of a strong creative and pro-active bar to help the dispossessed, the repressed and the poor.

Mas Achmad Santosa also referred to the prevalent attitude of bureaucrats in Indonesia towards Non-Governmental Organisations and public interest lawyers in voicing the interest of the public as "meddling" in government business and who are, therefore, treated with suspicion and resentment. He spoke about the difficulties in funding the Indonesian Legal Aid Foundation which has eleven branches through Indonesia and works in the environmental advocacy and human rights fields. There are small but unreliable domestic sources of funding but the dependency upon foreign funding creates an unhealthy and precarious condition as foreign funding donors can reduce the independence of the Foundation and the Government can at any time stop the source of funding.

A further Foundation has now been set up to raise funds from legal scholars and business people to ensure that work can continue.

The need for lawyers to beat the odds in developing countries was further demonstrated by Professor Bonine's tale of an environmental law firm in Ecuador called CORDAVI meaning Corporation for the Defence of Life which was set up by two pioneering environmental lawyers. They filed a petition in Ecuador's Tribunal of Constitutional Guarantees arguing that it would violate the Forestry Law and the Constitution to allow oil development in a national park . . . and the Tribunal was persuaded! However, government and corporate reaction was swift. Within days US oil companies operating in Ecuador privately threatened government officers that they would paralyse all oil investment development in Ecuador unless the Tribunal's decision was changed. Members of the Tribunal were contacted, pressure exerted and a few weeks later the Tribunal reconvened a special session and reversed its earlier decision. The issue has received worldwide publicity thanks to CORDAVI and following the installation of a new tribunal that firm is now petitioning again to reinstate the original decision.

The conference delegates were next encouraged by Brian Hayes to consider the establishment of Environmental Law Associations (ELAs) drawing on his experiences in founding the National Environmental Law Association of Australia (NELA) the co-sponsor of the Conference. He said that it is vital that Environmental Law Associations should be open to non-lawyers so that the body has a multi-disciplinary character. Dissemination of information is probably the most important factor influencing the development of environmental law and is, therefore, one of the most important functions of an Environmental Law Association.

Finally on this topic Bonine informed the Conference about ELAW, Environmental Law Alliance Worldwide. This is a new organisation funded by grassroots public interest lawyers in Asia, Latin America, North America and in Australia to help support local environmental lawyers operate in their own countries by providing research and mentoring assistance across international boundaries. It responds to the philosophy that the expert is not someone from out of town but rather the local on the spot lawyer who understands his or her own legal system, his or her own people and the special circumstances of his or her own country. ELAW is a network of independent autonomous public interest law firms who have chosen to offer their support and advice freely to one another.

I understand that to date there is neither an Environmental Law Association nor a cell of ELAW here. The time is perhaps ripe for New Zealand practitioners in the environmental law field to get together and examine their role in

the national and international environmental and public interest arena.

A positive step was taken by the Conference, in response to a challenge from Mr Justice Wilcox, to set up a directory or register of public interest law firms and private practitioners involved in pro bono environmental law. This is to be undertaken under the auspices of NELA in Australia but New Zealand practitioners should give serious consideration to registering their interest. It is intended that the register will be circulated to lawyers and Non-Governmental Organisations practising or operating in LAWASIA countries.

6 Rest and recreation time

No Conference is a Conference without time for conviviality, social intercourse, rest and recreation and the Bangkok Conference was no exception. I think all the delegates took the opportunity to see a little of Bangkok and in particular to visit the Grand Palace complex marvelling at the Royal Chapel with its gilded pavilions, stupas with glittering spires, the murals depicting the Ramayana epic and the Temple of the Emerald Buddha. I also believe that all delegates took to the water at some time during their Bangkok stay either to tour the klongs and floating market early in the morning, to commute along the river between hotels or to relax with a drink or three on board a converted rice barge at sunset to view the illuminated Temple of the Dawn. Some of us also travelled the local way, catching the water bus express — the permanent rush hour people carrier. It is quite an experience, this 5 baht (a few cents) ride. First one faces the battle to keep one's feet whilst waiting on the floating landing stage when the express reverses at some considerable rate of knots into the stage sending it rocking precariously! Then one must make death-defying leaps to board quickly or disembark even faster before the express speeds away to the next wharf — all the while the "navigator" standing at the stern, whistle in mouth, directing the helmsman in the bows by a battery of high pitched whistles — a performance I can only compare to that of frantic Kiwi sheep-dog trialists!

I indulged in a four hour trip on the Chao Phaya river from the old capital of Siam, Ayutthaya, a trip which I found fascinating from start to finish. The river presents a miscellany of images as one floated down through islands of floating hyacinth, through a sea of craft — a highway indeed. First impressions are of the "fixtures" — the villages and houses on stilts, verandahed and trellised with steps weaving down into the water; telegraph poles and stick palisades lining the shores, the latter fortifying them against invasion by the weed; the factories adjacent to and constrasting with the decorated pagodas, pergolas, summer houses, shrines and Buddhas and the inescapable advertisements — at one point a huge Pepsi can! Yet the more interesting to me was the river traffic, the boats of every shape, size and description.

First the swan boats, their long necked prows high out of the water, their long tailed propellor shafts churning up a wide white wake as they ply or should I say plough up the river — to say nothing of their noisy and polluting outboards! By way of contast, there are the strings of barges, in every case being towed far ahead by a tow rope of at least forty metres, by the most elegant and fragile looking tugs — traditionally high and blunt prowed and painted in two or three pastel shades (pale turquoise, sand and white seemingly the most favoured) — in whole appearing more to be colonial lake steamers than powerful workhorses. The barges themselves: some are the distinctive wide and low teak rice barges, a few still used for the purpose but others converted into house boats, restaurants and bars; others are high sided black barges, forbidding by their size and colour but often exhibiting by way of relief the individuality of the owner by the painted cabins. One I espied was white with blue spots! Perhaps the most amazing of all to me were the sideless barges for their decks were always underwater and they seemed to defy the laws of nature by failing to sink! Dwarfed by all these are the tiny skiffs still paddled by local people. Patriotism is not dead in this country — although perhaps it is by regulation — but every craft was flaunting the Thai flag of red white and blue stripes which I was told represented respectively nation, religion and king. □

continued from p 326

authorities now take every opportunity of impressing on us the seriousness of this situation. Do we want Sasha to be transferred to the infectious diseases hospital? This salmonellosis is now the scourge of Europe. When did we last eat chicken? But maybe we should be tested for AIDS. After all, we are foreigners. Why was it that we left New Zealand (which possibly they confuse with Haiti) without being tested for AIDS? The former reassurances are all gone, and the implication now is that we have misled the authorities. Doctors and patients are the same the whole world over — this has only marginally to do with Minsk.

29-31 March

Russian friendship is fantastic. It could not possibly exist anywhere else. There is simply not any more space on the world's surface for this wealth of friendship. This is no doubt the reason why God has allowed the Soviet Union to become such a big place. At heart it is still Holy Mother Russia — big-bosomed and all embracing.

For the last ten days friends have surrounded and safeguarded us with love and affection. Alexander looked in frequently at the hospital to confirm and translate reports. His wife Natasha made special breakfasts for Sasha. Elena rose from her own sickbed to make a special drink from cranberries. Victor delivered it. Yuri who had arranged the urgent ambulance kept in touch to see what he could do for us day by day. Yaroslav and Vladimir arranged a car to go down to Kamarovski Market to get produce unobtainable in the local shops. Alexander and Natasha tried to relieve our anxiety by taking us to the opera. Members of the English Language Class arranged a night out to hear chamber music. And so Sasha, praise the Lord, is now well on the road to recovery.

[to be continued]