THE NEW ZEALAND
LAW JOURNAL
21 OCTOBER 1991

LAWASIA 1991 Conference — 25 years on

The 12th LAWASIA Conference was held in Perth from 15 to 19 September 1991. It marked the 25th anniversary of the founding of LAWASIA on 10 August 1966. In the issue for August 1966 of a small publication called the *New Zealand Law Society News Letter* – the forerunner of *Lawtalk* – there is a brief account of the inaugural meeting of LAWASIA. Mr Denis Blundell who was the President of the New Zealand Law Society attended that meeting with Mr B C McClelland of Christchurch. Mr Blundell was elected one of the first Vice-Presidents of LAWASIA and Mr Justice Kerr of Australia was elected President. Both men were subsequently knighted and each became Governor-General of his country.

At the inaugural meeting there were leading lawyers from 18 countries in the Asia-Pacific region. The countries represented were Afghanistan, Hong Kong, Iran, Japan, the Philippines, South Korea, Republic of China (ie Taiwan), India, Nepal, New Zealand, Singapore, Thailand, Australia, Ceylon (now Sri Lanka), South Vietnam, Western Samoa, Indonesia and Malaysia. With the addition to the list of Bangladesh, Pakistan, Fiji, Papua New Guinea, and mainland China, and the deletion of Taiwan and South Vietnam these countries still constitute the membership of LAWASIA. One person who was at the meeting in Canberra 25 years ago was also at the Council meeting in Perth. He was Mr Jong Pyo Kim of South Korea who attended this year as a Councillor in his own right as a Distinguished Member of the Legal Profession.

The organisation has proved itself to be durable and stable despite the sometimes varying degrees of interest from different countries at different times. To some extent this has depended on personalities. The new organisation was specifically declared to be non-governmental and non-political. Among its stated objects were legal research in developing countries, furtherance of the rule of law and of human rights and the strengthening of the legal profession as an important democratic institution.

Mr Justice Kerr was at that time President of the Law Council of Australia. LAWASIA had been established on the initiative of the Australian Council. In his address of welcome Mr Justice Kerr said that the Conference was an historic event. He said that in coming together in Canberra, delegates had shown a common faith in the basic social character of the legal profession and of the law in developing societies. He continued:

> In this area of Asia and the Far East – or Western Pacific – there have been many pressures and reasons why we have all at last come to realise that we must abandon our traditional tendencies to look inwards and isolate ourselves from one another. We are now only too well aware that we are locked together in a rapidly shrinking world and that we can no longer afford the luxury – if luxury it was – of cultivating our own gardens in isolation. There is a breathtaking quality which characterises the speed of change and development in human affairs today. In this changing world, our region is stirring, and great human demands and needs are clamouring for attention. These demands and needs require much more effort within any particular country for their satisfaction. Their existence and the pressures they create make us dependent upon one another in a new and exciting way.

Mr Justice Kerr said the Asian and Western Pacific region was taking on a new life of its own. He then went on to say:

> How the future will unfold in the region is beyond our knowledge, but we do know now that we shall have, in a very real sense, a common future. Our bonds are linked over this great area and though we may have our conflicts and differences, we can never disengage from one another again.

The future from 1966 has of course unfolded. Changes have been dramatic. Attempting to draw up a detailed balance sheet for the region, political, social, economic and legal would be a pointless task because changes have varied so much from country to country. But the changes and developments overall must be considered to have been favourable. The very survival and continued vitality of LAWASIA is itself a positive sign of continued progress and general stability in the region. This is so despite historical and continuing political and economic tensions and tragedies in some areas.

LAWASIA has been fortunate in having had a succession of Presidents who were lawyers of outstanding distinction in their own countries. In addition to Australia, Presidents have come from Thailand, Malaysia, South Korea, the Philippines, India and many other countries in the region. The outgoing President is Mr David

This photograph was taken in Canberra in August 1966 during the Inaugural Conference of the Law Association for Asia and the Pacific (LAWASIA). It shows at the extreme right Mr Justice Kerr (President of the Law Council of Australia) and at the extreme left Mr E D Blundell (President of the NZ Law Society) who were elected President and Vice-President respectively of the new Association. Standing next to Mr Justice Kerr is Mr Lee Kim Yew, a member of the Singapore Bar Committee and standing next to Mr Blundell is Mr C G Tan, Chairman of the Singapore Bar Committee.

Ferguson of Australia, and he has been succeeded by Mr Anil Divan of the Bar of the Supreme Court of India. The Secretariat has been throughout these 25 years situated in Australia, first in Sydney and for the last two years in Perth. LAWASIA has been very fortunate in having as its first Secretary-General Mr Justice Wootton and for some fourteen years Mr David Geddes. Mr Geddes' remarks about his term of office were published at [1987] NZLJ 246.

The present Secretary-General is Mr John Healy. It is expected that the Secretariat will be transferred to an Asian centre within the next five years.

At the time of the 1991 Conference there were three ancillary meetings. There was the annual Council meeting with 15 countries represented; an informal meeting of some of the Presidents of Law Societies and Bar Councils; and an informal meeting of some of the Chief Justices. New Zealand was represented in some way at each of these meetings. There was a relatively small New Zealand group at the Conference; but the presence of the Chief Justice Sir Thomas Eichelbaum added considerably to the status of the group. Sir Thomas himself had been a LAWASIA Councillor when he was President of the New Zealand Law Society.

The Council is the governing body of LAWASIA. New Zealand was represented at the Council meeting by Mr Bruce Slane who is a Vice-President, by Mr P J Downey as Councillor and Miss Marilyn Wallace as Alternate Councillor.

The Council dealt with the normal business of a governing body including the inevitable questions of finance and membership. During the Conference special interest groups held meetings and the Council is endeavouring to make the organisation more effective and of direct relevance by establishing a number of Sections. Some of the Sections, Energy, Judicial and Family Law are already active. These Sections will be represented directly at the Council table. One of the Sections that is already in operation, the Family Law Section, was represented at the Council meeting by Mr Stuart Fowler, who subsequently attended the Family Law Conference held in Auckland at the beginning of October. There is a Labour Law Standing Committee of LAWASIA, and a comment by Mr Bernard Banks on the significance of the Conference in that area of the law has been published in the September issue of *Mazengarb's Industrial Law Bulletin*, [1991] ILB 62. Among other special interest groups were those for instance on Banking and Finance, Intellectual Property, Communication and Media Law, Administrative Law, Taxation, Criminal Law, Aerospace, Comparative Constitution Law, Young Lawyers and Women Lawyers.

The papers at the Conference varied as much in quality as they did in the geographical areas they referred to, or the legal categories they dealt with. This variation is inevitable in a Conference such as this. But for those with an interest in any particular legal topic there was a unique opportunity to gain an international perspective and so avoid having too insular an attitude. Indeed there was the chance to learn of developments and legal experience against which to test the legal norms that we have here in New Zealand and tend to take for granted.

The next Conference, in 1993, is to be held in Colombo, Sri Lanka. No dates have yet been fixed but the suggestion is for early September. LAWASIA has survived and developed over the past 25 years; and the 1993 Conference should aid further in achieving the objects stated in 1966 of furthering the rule of law and strengthening the legal profession as an important democratic institution in the Asian and Pacific region.

P J Downey

Case and Comment

Burdens of proof and the New Zealand Bill of Rights Act s 25(c).

R v Rangi [1991] BCL 1706

In *Rangi* the Court of Appeal held that where a person is charged under s 202A(4)(a) Crimes Act 1961 with

> having a knife or offensive weapon or disabling substance with him in a public place without lawful authority or reasonable excuse

the Crown has the persuasive onus of proof beyond reasonable doubt in an indictable prosecution; and

> If there is raised on the evidence an issue about the existence of such authority or excuse, the Crown must prove beyond reasonable doubt that it did not exist (per Casey J, at p 10).

This is in accordance with s 25(c) New Zealand Bill of Rights Act 1990, which provides that:

> Everyone charged with an offence has . . . the right to be presumed innocent until proved guilty according to the law.

Section 25(c) codifies the common law presumption of innocence, expressed by Viscount Sankey in the seminal case of *Woolmington* [1935] AC 462 as follows:

> Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to . . . the defence of insanity and any statutory exception.

However, for prosecutions laid summarily under s 202A Crimes Act or charges under s 13A Summary Offences Act 1981 (possession of a knife in a public place without reasonable excuse), s 67(8) Summary Proceedings Act 1957 will apply. The presumption of innocence does not appear to override this section. Section 67(8) states:

> Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but . . . need not be negatived in the information, and whether or not it is so negatived, no proof in relation to the matter shall be required by the defendant.

There is little doubt that in New Zealand this section is considered a statutory exception to the *Woolmington* principle, and cases certainly since *Akehurst v Inspector of Quarries* [1964] NZLR 621, have held that a persuasive onus rests on the defendant where s 67(8) applies.

It is also the case that the words "without reasonable (or lawful) excuse", qualifying offences, have been held to be matters of excuse, exemption or qualification, and that therefore in summary trials s 67(8) Summary Proceedings Act applies, where such words are used.

In *Watts v Police* [1984] 1 CRNZ, a summary charge under s 202A(4)(a) Crimes Act 1961, Barker J concluded that s 67(8) applied, and the onus was thus on the defendant to demonstrate lawful authority or reasonable excuse, though he noted that "the situation may well be different for trial by jury".

Likewise in *Police v Wineera* [1989] 4 CRNZ 449, Greig J found the phrase "without reasonable excuse" in s 13A Summary Offences Act 1981 amounted to an excuse or exception within s 67(8). He reviewed both New Zealand and recent English authorities including the leading House of Lords decision in *Hunt* [1987] 1 AC 352, and concluded that there was no doubt that when s 67(8) applies, a persuasive burden falls on the defendant, to the balance of probabilities.

So the situation now is, as Casey J says in *Rangi* (supra, at p 5) and Barker J predicted in *Watts* (at 229), that in cases of possession of a knife or offensive weapon in a public place, there is one rule for indictably laid offences (persuasive onus remains on prosecution throughout), and another for summarily laid offences (defendant has persuasive onus of proving lawful authority or reasonable excuse).

This was a situation the House of Lords aimed to avoid in *Hunt* [1987] 1 AC 352. Lord Griffiths commented that:

> The law would have developed on absurd lines if, in respect of the same offence, the burden of proof differed according to whether the case was heard by the magistrates or on indictment (at 373).

And Lord Ackner referred to what he thought would be a "remarkable anomaly" if the burden differed according to whether a Crown Judge was sitting with Justices hearing an appeal from the Magistrates Court, and advising them as to burden of proof in a summary trial, or was explaining the onus to the jury in a trial on indictment for the same offence. (at 856-6)

> Such a remarkable situation cannot in my judgment be attributed to the presumed intention of Parliament.

Certainly consistency of the law between trials on indictment, and summary trials is desirable. But it may not be necessary for New

Zealand to adopt the *Hunt* solution – that is, wherever an offence creates an exemption, proviso or qualification, the persuasive onus is on the person charged to prove he falls within it. It is respectfully submitted that *Rangi* was rightly decided despite the "remarkable anomaly" it creates.

M A Kennedy in her article, "Possession of Knives in Public Places" [1990] NZLJ 177, submits that s 67(8) does not transfer the legal burden to the defendant to prove reasonable excuse on the balance of probabilities, but merely an evidential burden to raise a reasonable doubt.

This is not in fact the law at the moment as described above, but if s 67(8) could be so interpreted there would be both consistency with trials on indictment and with the New Zealand Bill of Rights Act s 25(c), the presumption of innocence. Another possible, and probably more preferable solution, would be to repeal s 67(8), and for the legislature to ensure that in situations where it has decided the defendant should bear an onus, it is an evidential one only.

Janet November

NZ Dairy/Waikato Valley merger — Application of the failing company argument

NZ Co-operative Dairy Company Limited and Waikato Valley. Co-operative Dairies Limited v the Commerce Commission (unreported, High Court, Auckland, CL 36 & 37/91, 23 July 1991, Wylie J)

Background

The proposal for the acquisition by New Zealand Co-operative Company Limited ("NZ Dairy") of Waikato Valley Dairies Limited ("Waikato Valley") highlighted the scope of the failing company argument in New Zealand.

NZ Dairy is primarily involved in town milk supply in the upper North Island, and the production and distribution of a wide range of dairy products. Waikato Valley is also a farmer co-operative. It is based at Cambridge and has similar business activities to those of NZ Dairy. As with NZ Dairy a majority of its dairy production is exported.

In May 1991, the Commission declined to give clearance or grant an authorisation to the proposal finding a strengthening of dominance in the two markets, being:

(a) the processing and wholesale delivery of town milk in Auckland, Bay of Plenty, Thames Valley, Waikato, Rotorua, Tokoroa, Taupo and surrounding areas; and
(b) the supply/acquisition of unprocessed milk in South Auckland, Hauraki Plains, Eastern Coromandel Peninsula, Waikato and the King Country.

Commerce Commission findings

NZ Dairy argued that Waikato Valley was a failing company. The Commission noted the United States origin of the failing company argument.

The Commission rejected the failing company argument which was raised by NZ Dairy and Waikato Valley. It noted:

> the rationale for the failing company doctrine is that, in the absence of the proposed acquisition, the supply from the target company would disappear from the market in any form and so would never represent any competition to the acquirer . . . *The failing company test requires that the supply presently offered through the company in question would cease.*

The Commission while noting that no failing company exemption exists in New Zealand as such, analysed the failing company argument under a number of heads:

(a) What is the basis of the claim that the firm is a failing company?
(b) What alternative solutions to a merger are available?
(c) is the proposed acquirer the only available purchaser?
(d) what evidence is there that all good faith efforts have been made to find other potential acquirers which might pose a less severe danger to competition?
(e) is the proposed acquirer the least anti-competitive acquirer available, in order to prevent assets leaving the industry?
(f) will the apparent causes of failure of the firm be addressed by the new acquirer?
(g) is the potentially failing company going to fail irrespective of whether or not clearance/authorisation is granted?

The Commission acknowledged that Waikato Valley has financial difficulties. It did not accept that in the absence of merger with NZ Dairy, the supply of Waikato Valley would disappear from the market in any form and thereby never represent any competition to NZ Dairy. *The Commission's concern was with competition not with a specific competitor.* The Commission was of the opinion that the supply would in the future continue to be placed in the market, whether through Waikato Valley, through a restructured Waikato Valley or through other channels and organisations. The failing company argument could not be construed to support the proposed acquisition or to remove competition concerns about this activity.

High Court findings

The High Court overturned the Commission's decision. The Court's reasoning made significant use of the failing company argument.

The Court stated that there was no failing company "doctrine" in New Zealand, nor should there be. The Court stated:

> Put simply, we think that the question of actual, imminent, or probable failure of a participant in a merger proposal is nothing more than a question of fact to be determined by the tribunal and taking into account in assessing questions of dominance and, if necessary, public benefit.

The Court likened their approach to that taken by New Zealand Courts to the essential facilities doctrine. The Court concluded that:

> The Tribunal's function is first to determine as a question of fact whether a participant, the subject of a merger proposal, has in practical terms already failed, or is in the process of failing so that its demise is imminent, or, if the process is not so far advanced, its failure can be foreseen as inevitable or even probable within a time span which will render what might otherwise be seen as a resulting dominance merely

transitory. Second, having so determined the facts, to apply those facts as part of the overall circumstances of the particular case in determining whether dominance or a strengthening of dominance will, or is likely to, result, and if so, to proceed to the further stage of the Tribunal's enquiry, in order to assess the impact those facts have on the overall assessment of public benefit to flow from the merger proposal.

In finding that Waikato Valley *was* a failing company the Court was able to find against any strengthening in the town milk market. Had not the failing company argument been satisfied, the Court indicated that it would have found a strengthening of dominance in the town milk market.

The Court did not undertake any analysis similar to that of the Commission with respect to the failing company argument. Instead it looked purely at whether Waikato Valley was a failing company. It found that it was because of the payout differential, the imminent transfer of its suppliers and the loss of the support of its bankers. The Court concluded that Waikato Valley would not survive as an independent dairy company and that its failure as such was imminent.

Comment

As stated by the Court, there is no need to establish a failing company doctrine as such. Rigorous guidelines are not appropriate.

The Court did not, however, consider whether NZ Dairy caused Waikato Valley's imminent failure and, if so, the consequences of that.

Nor did the Court consider whether the supply provided by Waikato Valley would remain in the market in some form. NZ Dairy had capacity to take approximately one third of Waikato Valley's suppliers. Without Waikato Valley's plant it could not, it appears, take the other suppliers. The Commission indicated that it was unlikely that Waikato Valley's plant would not be utilised by some other entity due to the advanced state of that plant. Thus the supply would arguably have continued to be a competitive restraint on NZ Dairy.

There is no doubt that the failing company argument will play an increasingly important role in the consideration of future acquisitions in New Zealand. It is to be hoped that emphasis is placed on competition rather than on a specific competitor.

Kevin Jaffe

Correspondence

Dear Sir

It is with interest that I note solicitors involved in commercial property over the past twelve months or so insisting that their lessee clients sign up leases without ratchet clauses.

It is almost as if they have just discovered the existence and effect of such clauses.

Where were they during the boom years when rentals were escalating rapidly? The worst time from a lessee's point of view to sign up a ratchet clause is during times of high escalating rents.

Experienced property personnel understand that the property market, like anything else in life, is cyclical. It is a basic foundation in the law of nature that for every action there is an equal and opposite reaction. The property market is no exception.

It then follows that during the property boom of the mid-1980s, it was inevitable that a massive crash would follow. The trick of course is to predict the timing. Paul Tuck of the AMP Society, as we all know, was a lone voice sounding this warning.

For solicitors to insist on the deletion of ratchet clauses now when the market is at a very low ebb is not entirely logical. While it is acknowledged that market forces played a strong part in forcing lessees to sign up leases with ratchet clauses, I was not aware at that time of any lawyers advising their lessee clients that while they were, by circumstances, probably forced to go along with ratchet clauses, they could be caught out in future.

To insist upon the deletion of ratchet clauses now is largely irrelevant. While rentals could still decline over the next few years, in some cases they are at such a low level now that they can almost go no lower. Therefore, a ratchet clause in a lease now is largely irrelevant.

Likewise the insistance upon gross leases being signed up and the comments of a number of solicitors to myself in the past twelve months that net leases are onerous to lessees, leads me to make the following observation. For example, if a lawyer insisted upon a tenant signing up a gross lease as at say, May 1989 and with the ensuing abolition of land tax, that tenant would now be paying more than the same lessee signing up under a net lease at that time. When this has been pointed out to lawyers, many of them had not thought of this situation ensuing. With inflation now at less than 3%, it is quite possible that even such things as rates could decrease and gross leases could therefore be disadvantageous to tenants. Indeed, in some cities where revaluations have taken place, the rates liabilities on some properties have declined. The tenant signing up on a net lease in this situation has effectively had his total occupancy cost rental reduced.

The essence of all of this commentary is that, as always, what seems to be a good idea one day can often be proved to be the opposite the following day. Hence, a blanket comment such as "the deletion of ratchet clauses on all leases and/or the adoption of gross leases for all leases is always advantageous to lessees" is not necessarily a valid statement. Sometimes you win, sometimes you lose.

Yours,
APPRAISAL PARTNERS LTD

Peter M Ward,
Director

David v Goliath:
The state of the play of judicial review in the '90s

By John Fogarty, QC of Christchurch

This article is a very slightly edited version of a talk given by the author at a Wellington District Law Society Seminar. It has been left in the style of a talk as delivered by a practitioner to other practitioners. As stated in the opening paragraph the paper considers the role of the Courts in protecting the individual against abuse of power. Among other matters the author notes the application in this area of judicial review, of the common law requirement of fairness, while emphasising the absolute need for careful study of the statute in question. His final point is to stress that general discretions set out in a statute are in fact fettered by context, so that if the statutory purpose is narrow, general words will be construed within the narrow scope.

The focus of this talk is the traditional conception of the role of the Courts, protecting individual rights in the face of government policy. It is the picture of the little man against the giant. The role of the Courts in judicial review of administrative action is to protect the individual against abuse of power.

In late 1989, Dr Graham Taylor and Mr John Timmins presented an excellent NZLS seminar: *"Administrative Law — the changed role of Government"*.

That seminar dealt inter alia with the official information regime. This is arguably the best weapon that has been given to David for decades. Most of us, as practitioners, are still novices in its implementation. Those of us who practise in administrative law should be familiar with and able to use the official information regime.

Before I go further, may I also declare the maxim by which I practise in this field, and that is that administrative law cases usually turn upon mastery of the particular statute applied to a full appreciation of the facts. Never neglect careful study of the statute. Very often the best arguments will be found there, rather than from the case law. The statute is usually more determinative than the administrative law principles.

It is in the construction of the statutes that administrative law finds its authority. Administrative law can be understood as the presumptions which are applied by the Courts when construing administrative statutes, and (in the absence of statutes describing the scope of prerogative powers). In that sense, I think that too much emphasis can be given to concepts in public law, over statutory reality.

These presumptions have not changed much over the years. The core presumption is that Parliament will not take away an individual's rights, be they personal rights or property rights, except by a fair procedure, under law. This concept dates back to the Magna Carta. It is still at the heart of modern administrative law. But in any particular decade there are changes of analysis and different emphasis given to different presumptions. In this way, the Courts react as they consider appropriate to the political landscape.

The thesis of the Taylor/Timmins 1989 papers was that we have witnessed the high water mark of judicial intervention into administrative decision-making. And they explain that judgment by arguing that there will be natural judicial reaction to the governmental reforms. "A lesser role for the State means a lesser threat from administrative decision-making to the individual and therefore a lesser need for "red light judicial review". In the long run that may be true. But during the current process of restructuring the need for judicial review may be as great as when the Welfare State was at its greatest.

So, I personally have yet to be convinced that Graham and John are right. As government alters its traditional roles, it seems to me there is an obvious need for fair procedures to be adopted in a process of reallocating resources. This must be particularly so where people have become dependent upon a status quo, and have in the past been consulted on any changes.

In the last few years there have been many attempts to challenge the politics of restructuring, without any success. I list some of these challenges:

(i) The closure of Post Offices

- *Wellington Regional Council v Post Office Bank Limited* (22/12/87 Greig J *Capital Letter* 11/6 p 7)
- *Westland United Council v Prebble* (15/2/88 McGechan J, *Capital Letter* 11/12 p 7)

(ii) Local body amalgamation

- *Waitaki County Council v Local Government Commission* (22/12/87 Greig J, *Capital Letter* 11/5 p 7)
- *Green Island Borough Council v Local Government Commission* (23/12/87 *Capital Letter* 11/5 p 6)
- *Devonport Borough v Local Government Commission* [1989] 2 NZLR 204
- *Auckland Regional Authority v Local Government Commission* (25/8/89 *Capital Letter* 12/35 p 5)

(iii) Area Health Board Planning

- *Whare-ora Hospital Inc v Wanganui Area Health Board* (Neazor J, High Court, Wanganui CP73/89 21/12/89 *Capital Letter* (1989) 3/4B)
- *Gore Borough Council v Southland Area Health Board* (Fraser J, High Court, Invercargill, CP 95/89; 11/10/89 (1989) *Capital Letter* 43/4/C)

(iv) Restructuring of Education

- *Universities of Auckland and Canterbury v GR Hawke et al* Wellington Registry, CP 900/88 Ellis J, 12/12/88.

This list is not complete.

For the most part the applicants in these cases accepted that they could not challenge the policy decision directly. Therefore they concentrated on the procedures. In many of them, there were attempts to allege that the decision makers were biased because they were approaching the question with closed minds as they had already indicated views or had already prepared draft policies. Secondly, the cases sometimes argued that because the policies impacted on the applicant, there was a right to a hearing which had been denied.

These challenges were rejected, by and large. The Judges tended to focus on the task set by the statute to the Crown agencies or the Minister and accept the inevitability of early formation of views or indeed of politicians coming to the question with a view. They also tended to reject propositions that there was any right of consultation by parties likely to be affected by these policy decisions. Some of the cases achieved partial satisfaction by settlements.

It would be fair to say that on an orthodox interpretation of administrative law these cases were doomed. They were desperate attempts by David to halt Goliath in his path. Logically there is another possibility. That is that they might have achieved more if the arguments were less ambitious and more selective. For the purpose of this afternoon's seminar, I wish to fly that kite.

I will develop a theme in this paper that attempts to review policy formulation will be more likely to succeed if they address the administrative model of policy making procedures directly, rather than critique it because the process is not adversarial in character.

The core concepts of natural justice are the two propositions that no person should be a judge in his/her own course, and that each side should have an opportunity to fairly present their case. Of course, these concepts flow from reflection upon the adversarial model of decision making. One of the considerable achievements of administrative law has been to take the spirit of these two basic propositions and apply them to models of administrative decision making processes which are not adversarial. This has been done by developing a general standard of fairness.

There are, however, signs that neither the Bench nor the Bar accepts that administrative models of decision making can possibly produce as good a result as the adversarial model. This can distort perception of the issues. It can lead to arguments as to bias, unfair inquiry, and lack of consultation which distintegrate against the inevitability of the administrative decision-making process.

It is time to define some terms. I understand the adversarial model to be built around the notion of an impartial Judge whose mind is reasonably *tabula rasa* before the hearing starts. The Judge hears the evidence in front of all the parties. The evidence is tested by cross-examination and argument. And the judgment is founded solely upon a consideration of the evidence.

The administrative model of reasoning I understand in the following way. The decision maker has a concern. He/she commissions an analysis of this concern. The facts are gathered by inquiry and analysed into a preliminary response to the concern. That preliminary response is a draft policy. The draft policy is then circulated for comment. After comments are received, the decision maker determines the response to the concern which becomes the new policy.

The adversarial model is at its best evaluating a particular incident and apportioning responsibility among a few parties. It was developed after all out of jury trials. The administrative model is at its best when developing a policy response to complex circumstances involving many people. Once statute has authorised an administrative model of decision making, it is wrong to critique it against the adversarial model.

As an example from the list above, I would take the litigation that has arisen over the restructuring of health services by Area Health Boards. Area Health Boards have been placed under budgetary constraint and as a result have begun curtailing various hospital services. By the Area Health Boards Act 1983, the Boards are given the function of planning for services and towards that end are required to consult with Regional United Councils and provide for community involvement in the planning of such services. Typically, the Boards have proceeded upon administrative models of decision-making when forming policy.

At least two attempts have been made to protect the status quo by maintaining existing services in the face of developing policy decisions to curtail them. *Whare-ora Hospital Inc v Wanganui Area Health Board* and *Gore Borough Council v Southland Area Health Board*. Both these cases were interim applications but the Courts declined to intervene, rejecting a welter of *traditional* arguments including: bias (following upon presenting a draft plan); and that the status quo generated rights to be heard before any adverse decision was made. Following the current jurisprudence, the mode of reasoning in these cases is to examine the statute and look for provisions that make it inevitable that the decision maker will form some preliminary views before consultation and have a discretion as to who is consulted in the course of the process. I think a more direct route may well be simply to recognise that the statute provides or allows an administrative model of policy formation proceeding by way of inquiry and consultation.

Once the administrative model of determination is accepted as a standard process, applicants for judicial review might more fruitfully cast arguments: as to the scope of the inquiry; and for consultation; and selection of investigators, within

the assumptions of the model. I see no reason why the Courts should not develop a jurisprudence of the ideal administrative decision making model and use the principle of fairness to fine tune processes which are otherwise unfair on their particular facts.

In some of the cases argument did get well beyond a crude critique of trying to apply the adversarial model to the administrative process. For example in *Green Island Borough* one of the arguments that was used there was that the Local Government Commission had not carried out a sufficiently full investigation before making its initial proposal. In that particular case (I was involved for the St Kilda Council in the same Local Government Commission proposal) there wasn't anything like the sort of investigations that, for example the Commerce Commission undertakes before it forms its preliminary views. (The Commission operates by the administrative model.) In *Green* the argument accepted that the Local Government Commission was entitled to form a preliminary view before consulting, but argued that that preliminary view must be formed fairly by making an appropriate level of investigation first. The argument failed. But it might have succeeded. There have not been enough of these sort of arguments.

The natural justice problems thrown up by such an approach would be different. The claims for investigation of the facts before preliminary determination and rights of subsequent consultation inevitably have to be addressed within a goal-orientated framework. It is necessary to ask: what is the aim of the procedure, and to fit the applicant's grievance into that context.

There have been some successes in challenging these administrative procedures. The *Universities'* challenge was settled by an agreement to set up a special committee to review certain key issues which the applicants argued had not been appropriately considered by Professor Hawke before he wrote his preliminary paper. Although the *Green Island* case did not succeed before the High Court, the Commission brought down a decision which essentially put the amalgamation of Dunedin City on hold until the government's policy for regional government was further developed. This essentially reflected the view that it was too hasty to complete the subject proposal at that time.

As I have already noted, the common law requirement of fairness has long transcended decisions of a judicial character. It can be and is used as a basis for addressing the quality of the administrative law model of reasoning. The common law has been given a boost by the Bill of Rights Act which was enacted last year which may make it easier for the Courts to justify intervention.

By this Act Parliament gave a primacy to the fundamental presumption that the principle of natural justice applies to administrative decision making. Section 27 provides:

> *Right to Justice*
> (i) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations or interests protected or recognised by law.

Section 6 of the Act provides that all statutes are to be interpreted as being consistent with the Bill of Rights wherever possible. I see s 27 in combination with s 6 as doing more than stating common law. Section 27 is a statutory provision in its own right. Where existing statutes provide some procedural safeguards, it may well be that s 27 will be seen to treat the safeguards provided as particular statements or applications of a more general right.

The use of the time-honoured phrase "natural justice" in s 27 is a clear recognition by Parliament of the appropriate role of the Courts to inform that phrase. Section 27 confirms that role and gives the Courts considerable powers to mandate the process of decision-making. This power is subject to specific provision to the contrary, rather than essentially an inference of a parliamentary intent that the decision-making process should be fair.

According to the White Paper on the Bill of Rights (1985) the phrase "in respect of" is designed to achieve a construction that the provision will not normally apply where the decision is a general one, affecting persons as a class or indirectly. But given the ability to read the section in the plural and the indeterminate character of the phrase "interests protected or recognised by law", there is scope to apply the section to policy formation processes eg what about the principles of natural justice being applied to a review of the merits of keeping open a long-term residential institution for disabled people?

Justiciability

The cases demonstrate that the right to be heard (consulted) and issues of bias (predetermination) cannot be divorced from issues of justiciability. This is not so much a reflection of common law policy, but a recognition that to some extent the nature of the task determines the criteria against which the procedure followed is to be evaluated.

The more unfettered a decision-making power is, the less conducive it is to judicial review. A recent editorial in *Capital Letter* by Dr Graham Taylor discusses justiciability ("More Oil on Waihapa" *Capital Letter* 26 March 1991, v 14, no 10). I quote:

> Justiciability is a concept which has become newly popular and readily accessible in New Zealand as a result of Williams' paper in "Judicial Review of Administrative Action in the 1980s" [one of the papers presented at the Legal Research Foundation's seminar in Auckland in February '86, published by the Oxford University Press in association with the Legal Research Foundation]. Williams sees increasing recognition of the role of justiciability as a result of stripping "outdated technicalities and artificial distinctions" from judicial review, particularly in control of discretionary powers. He, and Richardson J, in the passage in *Petrocorp* approved by the PC, saw the concerns of justiciability as that:
>
> (i) the techniques and procedures of the Courts should be suitable to the issues, and
> (ii) the limits on the democratic acceptability of judicial

review of a power are not exceeded.

Justiciability assessment involves:

(i) construing the provision to determine its outer limits, purposes and relevant considerations, and
(ii) ensuring that the issues before the Court, the way in which the Court is invited to intervene, are within the limits of justiciability . . .

The limits of justiciability can be apprehended in a variety of ways which are essentially ex post facto. For example: time. In the *Gore Hospital* case, Fraser J gave some recognition to the fact that the Health Board was reacting to an *urgent* funding crisis, when not making decisions based on opposing cases, and properly had no express obligation to decide on particular grounds, or after a hearing, or after considering particular parties. In a similar fashion, the Court of Appeal has held that where the Securities Commission had to make a decision urgently, it could not have been the intention of Parliament that its decision be subject to lengthy litigation with the High Court pitting its judgment against that of the Commission. See *Hawkins v Davison* CA215/90; 21/12/90 *Capital Letter* (1991) v 14 2p 7C.

Personally, I do not think that the concept of justiciability clarifies argument as it is a conclusion and can obscure the need for analysis. Though it is valuable in as much as it throws one back on the basics of the subject. These I set out at the commencement of this talk. To repeat, administrative cases turn rather more on a careful examination of the statute and the facts than on the judicial goals of administrative fairness. This is not to suggest that judicial goals of administrative fairness are not important. They are at the heart of administrative law. But rather, properly understood, they are to be appreciated as subordinated to the intention of Parliament and the characteristics of the particular exercise of public administration under scrutiny. In the face of powerful constraints under either of these two factors, the desiderata of impartiality, consultation, and rationality, cannot always prevail. Because these constraints are essentially dependent upon the particular statute or prerogative and the facts, there can be no dogmatic list of the elements of an unreviewable decision.

No talk today would be complete without a mention of the Privy Council decision in *Petrocorp*. The title of this recent judgment is as follows:

D J Butcher — *Appellant*

v

(1) Petrocorp Exploration Limited
(2) Petroleum Exploration (Taranaki) Limited
(3) Payzone Exploration Limited
(4) Southern Petroleum no liability
(5) Nomenco NZ Exploration Company
(6) Bligh Oil & Minerals (NZ)
(7) Carpentaria Exploration Co (NZ) Limited

Respondents

In more than one sense, the title of this case is *David v Goliath.*

The Minister of Energy wore two hats. Firstly, as Minister he was the regulating authority of prospecting and mining licences. The scheme of the Petroleum Act 1937 is that prospecting licences can be freely granted by the Crown. If a prospector discovers petroleum, the prospector becomes entitled to a mining licence over the area discovered. Under the Act, the Minister has the power to grant prospecting licences to the Crown.

The Crown had entered into a joint venture operating agreement (JVOA) between itself and various oil companies. As result of prospecting under the JVOA, deposits of petroleum had been discovered in two places. Mining licences were granted for these areas. Subsequently while enjoying one of its mining licences, the JVOA discovered a much larger field of petroleum which extended beyond the area of the mining licence. The original prospecting licence over that area had expired. The JVOA had no right under the Act to a licence for the whole of the newly discovered field. The Minister, though a member of JVOA, awarded himself on behalf of the Crown a mining licence over the unlicensed area of this newly discovered oil field. He then invited the other joint venturers to enter into negotiations to purchase this interest. The issue was whether or not the Crown was constrained by its participation in the JVOA from acting in such a unlateral fashion to its own advantage by exercise of its statutory power of awarding mining licences. The Privy Council held that the Minister when exercising the discretion to allocate licences was not constrained by the JVOA agreement. In the Privy Council, much of the reasoning was built upon a careful factual analysis of the limits of the licences, and the terms of the JVOA agreement. But even if the JVOA agreement had sought to constrain the Minister's powers as a licensing authority, it was clear that the Privy Council would not have recognised the agreement as constraining the statutory powers. The Judges' finding in support of the Minister held that he was free to decide what was in the national interest beyond judicial scrutiny. That was also the view of Richardson J and Greig J [1991] 1 NZLR 1, 16, 46.

Taking an opposite view in the Court of Appeal, the President argued that the recognition in the statute of the power of the Crown to participate in a commercial way in licensing, must be understood as fettering the otherwise unlimited scope of discretion in granting mining and prospecting licences (p 33). That approach of statutory construction did not prevail in the Privy Council because of the presumption that where statutes grant discretions to be exercised in the national interest, such discretions will not lightly be constrained.

Dr Taylor has suggested the Privy Council decision raises the spectre of unreviewable unfettered discretions being more frequently recognised. See "More Oil" above. To my mind, the case is not raising the spectre of unfettered discretions, but rather illustrating the continued force, at least in London, of the proposition that decisions made in the national interest are by and large unreviewable.

Let us put alongside *Petrocorp,* the case of *Auckland City v*

Minister of Transport [1990] 1 NZLR 264, 293 (per Cooke P for the majority), 303 (per Richardson J in dissent). In this case, a Court of Appeal of five divided on the facts and statutory construction as to review of a Minister's decision to approve transfer of land to a port company. The land in question (112 separate properties) had been leased by the Harbour Board. The Board itself did not therefore occupy the land let alone carry out port related activities on them. On many of the properties, but by no means all, the tenants put the land to port related activities. The scheme of the Port Companies Act 1988 was that port related commercial undertakings of Harbour Boards be transferred to Port Companies. The Minister was given a discretion to approve the transfer of any undertaking of a Harbour Board, whether or not it was a port related undertaking. The Minister approved the transfer of the leased land worth about $100m, denying it to the Auckland City Council. It was argued inter alia that the leased land was not an undertaking, that the Minister did not address each property, and that he had exercised his discretion outside the policies of the Act. Cooke P, McMullin and Bisson JJ allowed an appeal, setting aside declarations that the Minister had exercised his discretion in an uninformed and improper manner. Richardson and Somers JJ dissented. The majority held the land did constitute undertakings, the Minister did not have to consider each property, and had acted within the policies of the Act.

No one could describe the President as being timid on judicial review. On this occasion he and Bisson J were on different sides of the fence from Richardson J as to review of a Minister, compared to *Petrocorp*. In my opinion that supports the proposition that there is no significant shift away from review of Ministers per se. Whether or not a decision or process is reviewable depends far more on the matrix of subject matter, the statute, and the process, than upon judicial favour of a particular philosophy of administrative law.

It is still entirely appropriate in a particular case to recognise that general discretions are in fact fettered by context. This is a reality of statutory construction that has been recognised for a long time. It is not a product of liberal judicial intervention in the 1970s. It is not going to fade away. The reason it will survive is because of the pre-eminence of principles of statutory construction. General words take their meaning and colour from their context. If the statutory purpose is narrow, general words have to be construed within the narrow scope. The purpose may make some considerations inevitably relevant. That is a principle which I think would be accepted in common by the Law Lords of the Privy Council and the New Zealand Court of Appeal. Gone are the days when general phrases per se free the official, agency or Minister from judicial review. □

Mill foretelling the future

In the 3rd edition (1852) of his book *Principles of Political Economy* the great Utilitarian philosopher John Stuart Mill wrote a prophetic section on the eventual conflict between socialism or communism on the one hand, and individualism or democracy on the other. In the light of developments in the USSR in August it makes fascinating reading.

> . . . The question of Socialism is not, as generally stated by Socialists, a question of flying to the sole refuge against the evils which now bear down humanity; but a mere question of comparative advantages, which futurity must determine. We are too ignorant either of what individual agency in its best form, or Socialism in its best form can accomplish, to be qualified to decide which of the two will be the ultimate form of human society.
>
> If a conjecture may be hazarded, the decision will probably depend mainly on one consideration, viz, which of the two systems is consistent with the greatest amount of human liberty and spontaneity. After the means of subsistence are assured, the next in strength of the personal wants of human beings is liberty; and (unlike the physical wants, which as civilization advances become more moderate and more amenable to control) it increases instead of diminishing in intensity as the intelligence and the moral faculties are more developed. The perfection both of social arrangements and of practical morality would be, to secure to all persons complete independence and freedom of action, subject to no restriction but that of not doing injury to others: and the education which taught or the social institutions which required them to exchange the control of their own actions for any amount of comfort or affluence, or to renounce liberty for the sake of equality, would deprive them of one of the most elevated characteristics of human nature. It remains to be discovered how far the preservation of this characteristic would be found compatible with the Communistic organization of society. . . .
>
> But it is not by comparison with the present [1852] bad state of society that the claims of Communism can be estimated; nor is it sufficient that it should promise greater personal and mental freedom than is now enjoyed by those who have not enough of either to deserve the name. The question is, whether there would be any asylum left for individuality of character; whether public opinion would not be a tyrannical yoke; whether the absolute dependence of each on all, and surveillance of each by all, would not grind all down into a tame uniformity of thoughts, feelings, and actions . . ..
>
> No society in which eccentricity is a matter of reproach can be in a wholesome state. It is yet to be ascertained whether the Communistic scheme would be consistent with [favourable to] that multiform development of human nature, those manifold unlikenesses, that diversity of tastes and talents, and variety of intellectual points of view, which not only form a great part of the interest of human life, but by bringing intellects into stimulating collision, and by presenting to each innumerable notions that he would not have conceived of himself, are the mainspring of mental and moral progression.
>
> **John Stuart Mill**

Guarantees of tenant's obligations

By Michael Robertson, Senior Lecturer in Law, University of Otago

Guarantors of the obligations of a tenant are in general terms obliged to accept liability when the tenant fails to perform. There have been a number of cases in New Zealand recently on this matter. This article looks at such issues as the problems in creating a binding guarantee, the effect of termination of the lease, the effect of the assignment of the lease and the effect of assignment of the reversion.

In these harder economic times, the position of those who have guaranteed the satisfactory performance of a tenant's obligations has become more precarious. The 1980s have generated a large number of cases where such guarantors have been asked to make good the consequences of the tenant's default, and, not surprisingly, this has led to a scrutiny of the limits of the guarantor's liability. The results are instructive for practitioners in the area of landlord and tenant, and I shall survey them in this article.

A. Initial problems in creating a binding guarantee

(1) Has a guarantee been obtained or only a letter of comfort?

The English Court of Appeal's decision in *Kleinwort Benson Ltd v Malaysia Mining Corporation Bhd* [1989] 1 All ER 785, has recently been approved of by our Court of Appeal in *Bank of New Zealand v Ginivan* [1991] 1 NZLR 178, but even before this Master Towle had applied it to a landlord and tenant situation in the unreported case of *Genos Developments Ltd v Cornish Jenner & Christie Ltd* (High Court, Auckland, 10 July 1990, CP 556/90). In this case the tenant was a subsidiary, and the landlord had requested a guarantee from its parent company. The parent did not execute the guarantee in the lease, but assured the landlord in a letter that its policy was to ensure that its subsidiaries met their financial obligations. The tenant went into liquidation, and when the landlord asked the parent to make good the arrears, the parent responded that its former policy had changed. Following *Kleinwort*, the Master held that the letter was not a binding guarantee of the tenant's obligations, but only a statement of the parent's present policy. Obviously no landlord seeking a guarantee of a subsidiary/tenant's obligations should be seduced by such a letter in the future.

(2) Writing and registration requirements

In the recent case of *Chan v Cresdon Pty Ltd* (1989) 64 ALJR 111; 89 ALR 522 the High Court of Australia held that a guarantee embodied in a lease which was in registrable form, and which the parties intended to be registered, was not enforceable because registration had not occurred. Even though the unregistered document had given rise to an equitable lease, and even though a common law periodic tenancy had arisen by virtue of the tenant going into possession and paying rent, the Court held that the guarantee only operated with respect to tenant's obligations that stemmed from the legal lease that registration would produce. The *Chan* case was briefly considered in New Zealand by Doogue J in *Cheng v Heise* (High Court, Auckland, 5 October 1990, CP 1370/90). He distinguished it on the basis that the lease before him contained provisions which made it clear that the parties did not intend it to be registered. Consequently, even though the lease was only equitable, the guarantee contained within it was enforceable. Whether a New Zealand Court would follow *Chan* in a case with similar facts is uncertain, but until the matter is decided this is obviously a danger area for landlords.

The writing requirements are covered by s 2 of the Contracts Enforcement Act 1956, and thus a guarantee will be unenforceable unless it or some memorandum or note thereof is in writing and signed by the guarantor or somebody authorised by him. In the absence of such writing, one would have to argue that what had been given was an agreement to indemnify the landlord rather than a guarantee of the tenant's obligations, as contracts of indemnity are not caught by the Act. (*Halsbury's Laws of England*, 4th ed, vol 20, Guarantee and Indemnity, para 306.)

The difference between these two concepts must be kept firmly in mind. Although the terms "surety" and "guarantor" may be used interchangeably, this is not the case with "guarantor" and "indemnifier". (*Halsbury's Laws of England*, supra, paras 104, 108; Sarah Sinclair, "The Difference Between a Guarantee and an Indemnity", (1990) 6 Auckland University Law Review 414.) A contract of guarantee is a contract to perform the promise or discharge the liability of a third person, in case of his default. (*Halsbury's Laws of England*, supra, para 101 fn 5.) The guarantor's liability therefore only arises on the default of the principal debtor, and can be no greater than that of the principal debtor himself. A guarantor thus accepts a less onerous obligation than an indemnifier. An indemnifier contracts to keep another party harmless against loss, and this loss

may arise from causes other than the default of the principal debtor. His obligation is primary, not collateral or secondary to that of another. As well, a guarantor can be released from liability in a wide range of circumstances, but an indemnifier typically remains liable in these circumstances. (*Halsbury's Laws of England*, supra, paras 236-293; Sinclair, supra, pp 424-433.) This is a powerful reason for a landlord to seek an indemnification agreement initially, rather than a guarantee. If a blanket indemnification cannot be obtained, the landlord should seek an express indemnity in the typical situations where a guarantor would be released from liability.

(3) Can lack of consideration cause a problem?

In *Inverell Properties Ltd v Molyneux Tiles Ltd* (High Court, Wellington, 28 February 1990, CP 995/89) Master Williams QC noted that the guarantee clause in the lease did not reveal any consideration flowing from the landlord. This would cause no problem, he said, as long as the lease qualified as a deed, but in this case the requirements for a deed set out in s 4 of the Property Law Act 1952 had not been complied with. The signatures of the parties to be bound had not been witnessed, nor had the witnesses' places of abode and callings been provided. For this and other reasons he refused summary judgment to the landlord seeking to recover against the tenant's guarantor. However, s 3 of the Contracts Enforcement Act 1956 appears to deal with the problem identified by the Master. It states that although a guarantee has to be in writing, the consideration for the guarantee does not have to appear in that writing for the guarantee to be enforceable. (See *Scott v Broadlands Finance Ltd* [1972] NZLR 268.) Recourse to this provision is not usually necessary because a guarantee of a tenant's obligations will typically state that the consideration provided by the landlord to the guarantor is the granting of the lease to the tenant.

B The effect of termination of the lease

As a general rule, a guarantor is released if the principal debtor ceases to be liable to the creditor! One situation in the landlord and tenant context where this can occur is when an assignee of the original tenant exercises an option to renew the lease. This can be interpreted as the end of the original term and the creation of a completely new lease between the assignee and the landlord. (*W E Wagener Ltd v Photo Engravers Ltd* [1984] 1 NZLR 412 at 425 per Somers J (CA); *Halsbury's Laws of England*, 4th ed, vol 27, Landlord and Tenant, para 389.) Since the original tenant is in this case no longer in privity of contract with the landlord, his liability ceases with respect to the renewal term, and so the liability of his guarantor ceases too.

Guarantors have similarly sought to employ this general rule to escape from liability when the landlord forfeits the lease or when the landlord accepts the tenant's repudiation of the lease. The argument is that the landlord's actions terminate the lease, thus bringing to an end any obligation on the part of the tenant or the tenant's guarantor to pay rent accruing after the date of termination. This argument has some force if the landlord has taken steps which in law amount to a termination of the lease, but without being aware of this fact, and has therefore mistakenly framed his action in terms of rent arrears accruing after the termination, rather than damages for the loss of the bargain which had been constituted by the lease. Unfortunately for guarantors, all recent attempts to erect this defence in New Zealand have failed, because the Courts have refused to find that an inadvertent termination of the lease by the landlord has taken place, even when the landlord has taken serious steps, such as changing the locks.[2]

The fundamental flaw in the guarantor's argument is that termination of the lease by forfeiture or accepted repudiation does not completely release the tenant from liability to the landlord – he is still liable in damages for loss of bargain. The guarantor in the *Mattin* and *Townsend* cases argued that the guarantee he had signed was only expressed to cover the tenant's liability to pay rent and perform other obligations in the lease, and did not extend to damages for loss of bargain. Because of findings on other matters, this argument did not have to be dealt with in those cases, but when the identical argument was raised by a guarantor in *Cheng v Heise*, Doogue J was not receptive:

> . . . it seems to me to be made out by the [landlords] that the [guarantors] do not have a defence based upon the [landlords] having sought damages rather than reimbursement of sums which may be payable under the terms of the leases to the time of the issue of proceedings or until the date of hearing. *I am satisfied that in principle, the [guarantors] have no defence to the claim for damages, whether their liability be as principal debtors or guarantors.* (p 15. My emphasis.)

C The effect of assignment of the lease

(1) Any material variation of the terms of the contract between the principal debtor and the creditor releases the guarantor, unless the guarantor consents to it. (*Holme v Brunskill* (1878) 3 QBD 495; *Dunlop New Zealand Ltd v Dumbleton* [1968] NZLR 1092; *Nelson Fisheries Ltd v Boese* [1975] 2 NZLR 233; *Winstone Ltd v Bourne* [1978] 1 NZLR 94; *Halsbury's Laws of England*, supra, para 253.) Could it be argued that merely by assigning the lease, the contract between the landlord and the tenant has been materially altered, and so the tenant's guarantor must be released? After all, the guarantor agreed to be a surety for the obligations of one person, and now a completely new person is in possession, somebody who might be far less reliable than the original tenant. Obviously the guarantor can protect himself in advance by stating in the guarantee that his liability only lasts as long as the term is vested in the original tenant, as was done in *Johnsey Estates Ltd v Webb* [1990] 19 EG 84. But if this precaution is not taken, is assignment of the lease by itself enough of a material variation to release the guarantor under the common law rules? An affirmative response is given by some commentators,[3] and this argument was also received favourably by Master Williams QC in *Inverell Properties Ltd v Molyneux Tiles*

Ltd, and by Master Towle in *Bai and Ors v Scott and Seed* (High Court, Tauranga, 13 November 1989, CP 92/89), where summary judgment was denied to landlords proceeding against guarantors. However, both of these judgments were expressly disapproved of by Doogue J in *Cheng v Heise:*

> I regret to say that I do not feel able to follow the decisions by the Masters. In my view, where, as in this case, the deed of lease contains specific provisions as to assignment, and the guarantors are shown to have had knowledge at the time of signing the guarantee of the terms of the lease, it cannot be said that there is any material variation to the lease when an assignment is made of it in accordance with its terms, as occurred here. (pp 6-7).

The English case of *Johnson Brothers (Dyers) Ltd v Davison*, (1935) 79 Sol Jo 306 also takes the position that assignment, if it is contemplated in the original lease, does not constitute a material variation which releases the guarantor.

(2) Would alteration of the terms of the original lease by the assignee and the landlord constitute a material variation which would release the original tenant's guarantor from liability?

> A variation of the terms of the lease by an assignee, while it will not affect the liability of the original lessee, may result in the discharge of the liability of a guarantor of the liability of the original lessee in accordance with the ordinary principle of the law of suretyship that an agreement effecting a variation between a creditor and a principal debtor which is not acceded to by a surety will discharge the liability of the surety if there is any possibility of its increasing his liability . . . Of course, in the present case the variation is made not by the principal debtor (the original lessee) but by someone whose acts bind him (the assignee). (*Hill and Redman's Law of Landlord and Tenant*, 18th ed, para 2682, fn 8.)

It seems clear that an agreement by the assignee and the landlord to vary the rent payable will *not* release the original tenant's guarantor, and will continue to bind both the original tenant and his guarantor, if it was made pursuant to a rent review procedure set out in the original lease.[4] But if the material alteration is not anticipated in the original lease, it is no longer plausible to argue that the guarantor has consented to it, and it is submitted that the guarantor would be released in these circumstances. For example, a binding agreement between the landlord and the assignee to give the assignee more time to perform his obligations should release the original tenant's guarantor,[5] as should a surrender of part of the premises by the assignee.

What is especially interesting about these situations is that even if the tenant's guarantor is released from liability, the liability of the original tenant continues unimpaired. There are two reasons for this. The first is that the original tenant is not a guarantor, and therefore cannot claim to be released by any of the circumstances which would release a guarantor. It is possible to lose sight of this fact because after an assignment of the lease, the original tenant remains liable to the landlord by virtue of privity of contract if the assignee defaults. This makes the tenant appear to be a guarantor of the assignee's obligations, but this is not so.

> The original lessee is a person who, as principal, undertook towards the lessor the obligations of the lease for the whole term; and there is nothing in the process of assignment which replaced this liability by the mere collateral liability of a surety who must pay the rent only if the assignee does not . . . At no time does an original lessee become a mere guarantor to the lessor of the liability of any assignee of the lease. (*Warnford Investments Ltd v Duckworth* [1979] 1 Ch 127 at 138-9, per Megarry V-C.)[6]

The other reason why the original tenant is not released when his assignee and the landlord effect a material variation of the original lease is because he is bound by whatever changes his assignee makes. This is made very clear by Harman J in *Centrovincial Estates Plc v Bulk Storage Ltd* (1983) 46 P & CR 393, relying on the earlier case of *Baynton v Morgan* (1888) 22 QBD 74 (CA). In *Centrovincial* Harman J said at p 396:

> In my judgment the basic answer which any real property lawyer would give to a question about an assignee's power to deal with a tenancy interest is that each assignee is the owner of the whole estate and can deal with it so as to alter it or its terms. The estate as so altered then binds the original tenant, because the assignee has been put into the shoes of the original tenant and can do all such acts as the original tenant could have done.

Thus if the assignee agrees with the landlord to alter parts of the original agreement between the tenant and the landlord not only is the original tenant not released by such changes, he is liable if they are subsequently not complied with.[7]

(3) What is the extent of the guarantor's liability and what are his rights of indemnity after assignment of the lease? The most valuable case in answering these questions is *Selous Street Properties Ltd v Oronel Fabrics Ltd and Others*, (1984) 270 EG 643 (QBD). Because *Selous* also provides a useful summary of many of the points made above, I will describe the case in some detail. The lease in question was made in 1973 between Selous Street Properties Ltd, as landlord, and Oronel Fabrics Ltd, as tenant. The term was 21 years, with rent reviews to take place after 7 years and 14 years. Mr Morgan was the guarantor of the obligations of the tenant, Oronel Fabrics Ltd. This lease was eventually assigned three times.

(a) The first assignment was by Oronel Fabrics Ltd to Highlight Sports Ltd. Highlight Sports Ltd had no guarantor, but covenanted directly with the landlord to comply with the covenants in the original lease. Notwithstanding this, Highlights Sports Ltd made alterations to the premises (adding some toilets) which constituted a breach of a "no alterations" clause in the lease. The landlord eventually

gave Highlight Sports Ltd permission to leave the toilets in place in the meantime, but reserved the right to require them to be removed and the premises restored to their original state at the end of the term.

(b) The second assignment was by Highlight Sports Ltd to Sunbird Ltd. Sunbird Ltd also covenanted directly with the landlord to comply with the terms of the original lease, and as well had a guarantor of its obligations, Mr Karniol.

(c) The final assignment was by Sunbird Ltd to Cavatina Ltd, and Sunbird Ltd and Mr Karniol were the joint guarantors of the obligations of Cavatina Ltd. In 1980, when the first rent review came due, Cavatina Ltd was the assignee in possession, but the increase in the rent generated by the review procedure was not paid. Selous Street Properties Ltd then sued all of the other parties except Highlight Ltd, claiming that each of them was, for different reasons, liable to pay the increase in rent.

Sunbird Ltd, Cavatina Ltd, and Mr Karniol argued that the rent review procedure had not been properly followed, and that they were therefore not liable to pay the increased rent. Hutchison J rejected all of their many and ingenious arguments. Cavatina Ltd was therefore liable to pay the extra rent as it was the assignee in possession and so in privity of estate with the landlord. Sunbird Ltd was similarly liable, although on different grounds. Because it had entered into a direct covenant with the landlord, when it was the assignee in possession, to comply with the terms of the lease, this contractual liability continued even after privity of estate between Sunbird Ltd and the landlord ceased. As well, Sunbird Ltd was liable on its guarantee of Cavatina Ltd's obligations. Mr Karniol was liable because he was a guarantor of the obligations of both companies. The fate of Mr Karniol exhibits a number of important points about the liability of guarantors following an assignment. As we would expect after our earlier discussion, neither an assignment by the lessee whose obligations were guaranteed (Sunbird Ltd), nor the operation of a rent review once the lease had been taken over by the new assignee (Cavatina Ltd) was sufficient to release the guarantor. A novel element introduced in *Selous* was that the new assignee also had a guarantor, but the case illustrates that the taking of subsequent guarantors by the landlord does not automatically release earlier guarantors.[8]

Oronel Fabrics Ltd and Mr Morgan made no representations regarding the propriety of the rent review, and so *prima facie* were also liable, the former because it remained in privity of contract with the landlord, and the latter because he guaranteed the performance of Oronel Fabric Ltd's obligations. However, a number of defences were raised. Oronel Fabrics Ltd argued that the rent review procedure it had agreed to in the lease had been modified by the agreement between Highlight Ltd and the landlord regarding the toilets. It was claimed that the presence of these toilets increased the rental value of the premises, and so an element had been added to the rent review calculations that Oronel had not agreed to initially. Consequently it was not bound by the results of the rent review. The difficulty facing Oronel Fabrics Ltd, as we saw earlier, was that *Baynton v Morgan* and *Centrovincial Estates Plc v Bulk Storage Ltd* held that the original tenant is bound by modifications made to the lease by an assignee of the lease. Hutchison J endorsed these cases, rejected all attempts to distinguish them, and held that Oronel Fabrics Ltd was bound by the results of the rent review procedure, even if modifications to the lease did result in a higher new rent than would otherwise have been the case (which he did not accept had been proven here).

A very important feature of this case is that Hutchison J accepted that Mr Morgan, as a guarantor, was able to take advantage of the rules for the release of sureties, and so could potentially escape liability even if Oronel Fabrics Ltd remained liable to the landlord. Mr Morgan argued that he was released because there had been a material variation of the contract between the landlord and the original tenant. The agreement between the landlord and the first assignee (Highlight Ltd) to allow the toilets to remain materially varied the original lease, and it bound the original tenant. The guarantor of the original tenant had not consented to this variation, and was therefore released. Hutchison J accepted that this argument would have been entitled to succeed, except for the fact that the particular guarantee signed by Mr Morgan was so drafted as to block release in this fashion. The guarantee contained a provision that the granting of extra time by the landlord for the tenant to fulfil his obligations would not release the guarantor. Such provisions are commonly inserted in guarantees to override the effect of the common law rules on the release of guarantors, as was mentioned earlier. (See fn 5.) Hutchison J interpreted the contract to allow the toilets to remain, while reserving the right to demand their removal at the end of the term, as a granting of extra time to comply by the landlord, and so the guarantor was not released thereby. Notwithstanding this result, the explicit acceptance by the Court of the principle that a guarantor can be released while the tenant whose obligations he guaranteed continues to be liable to the landlord is significant.

The final section of the judgment concerned claims of indemnity by Oronel Fabrics Ltd and Mr Morgan, (the original tenant and his guarantor), against Sunbird Ltd, Cavatina Ltd, and Mr Karniol (the subsequent assignees and their guarantors). Oronel Fabrics Ltd's claim to be indemnified by Cavatina Ltd, the assignee in possession, was held to be sustained by the case of *Moule v Garrett* (1870) LR 5 Exch. 132, aff'd (1872) LR 7 Exch 101. It was decided in that case that if any assignee breaches the lease, and the original tenant has to pay money to the landlord as a consequence, this original tenant is entitled to be indemnified by that assignee, even if there is no privity of contract or express indemnification agreement existing between them.[9]

But *Moule v Garrett* was a case involving an original tenant and an assignee. One of the important issues raised in *Selous* was whether the *guarantors* of assignees are also obliged to indemnify the original tenant if he is obliged to pay the landlord because of some default of the assignee. In dealing with the claim of Oronel Fabrics Ltd to be indemnified by Sunbird Ltd and Mr Karniol, the guarantors of Cavatina Ltd, Hutchison J broke new ground

by holding that *Moule v Garrett* was just a particular instance of a broader principle. This principle could be found in the judgment of Cockburn C J affirming the decision of the Court below in *Moule*, but was stated more clearly in *Duncan, Fox & Co v North and South Wales Bank* [1880] 6 AC 1 and in *Re Downer Enterprises Ltd* [1974] 2 All ER 1074. In the *Downer* case Pennycuick V-C said at p 1082:

> The general principle here, I think, is not in doubt, namely that if A and B are liable to a creditor for the same debt in such circumstances that the ultimate liability falls on A, and if B in fact pays the debt to the creditor, then B is entitled to be reimbursed by A, and likewise is entitled to take over by subrogation any securities or rights which the creditor may have against A . . .

Pennycuick V-C goes on to stress that this indemnity right is not dependent upon any relationship of guarantee between A and B, or upon the existence of any contract at all between them, but "applies in any case where there is primary and secondary liability for the same debt."

In the landlord and tenant context, both the *Moule* and *Downer* cases make it quite clear that although the assignee and the original tenant are both directly liable to the landlord, the assignee is the one who is ultimately or primarily liable, because he has the benefit of the estate, and so it is on him that the indemnification obligation falls and not the other way around. In *Selous* Hutchison J held that as between the original tenant and the assignee's guarantor, the guarantor was the one with the ultimate duty to pay, and so Sunbird Ltd and Mr Karniol were liable to indemnify Oronel Fabrics Ltd on the basis of the broad principle in *Downer*. Hutchison J's application of the broad principle in *Downer* to the liability of an assignee's guarantor to the original tenant was subsequently approved of and followed by McNeill J in *Becton Dickinson UK Ltd v Zwebner* [1988] 3 WLR 1376. The important thing to note about this result is that it makes the assignee's guarantor liable to pay money on the default of the assignee to someone *other than the party who was given the guarantee*. The principle in *Downer* does not depend on the existence of a contract of any kind between the indemnifier and the indemnified. Instead it appears to be an instance of the law of quasi-contract, as was suggested by McNeill J in *Zwebner* at p 1385.

Hutchison J concluded the *Selous* case by finding that Mr Morgan, as guarantor for Oronel Fabrics Ltd, was entitled to exactly the same indemnification rights as Oronel against Sunbird Ltd, Cavatina Ltd, and Mr Karniol. Although the matter was not raised in the case, clearly a tenant's guarantor would have a right to indemnification against the tenant on the same basis.

D The effect of assignment of the reversion

If a party has contracted with a landlord to guarantee the obligations of the tenant, then when the landlord assigns the reversion, he can expressly assign as well the benefit of this contract of guarantee. As long as the statutory provisions dealing with assignments of choses in action are complied with (Property Law Act 1952, s 130), the landlord's assignee can enforce the guarantee just as the landlord could. The problem arises when the reversion is assigned, but the landlord neglects to assign the benefit of the guarantor's contract at the same time. Attempts to assign the benefit of the guarantor's contract *subsequently* face the difficulty that after the assignment of the reversion, the tenant is no longer liable to the original landlord (Hinde, McMorland and Sim, *Land Law,* para 5.139), and since his principal debtor is no longer liable to this landlord, the guarantor is released from liability to him also. There is thus no longer any ongoing guarantee for the landlord subsequently to pass on to his assignee. The only solution to this problem would be if the benefit of the guarantor's covenant passed to the landlord's assignee *by operation of law* upon the assignment of the reversion, even if there was no express *contractual* assignment of the benefit. After a period of confusion on this issue in the 1980s, it now seems well established that the benefit of a covenant guaranteeing those obligations of a tenant which touch and concern the land will pass automatically to an assignee of the reversion.

(1) The English cases

The English case establishing this was *Kumar v Dunning* [1987] 2 All ER 801 (CA). Prior to *Kumar*, a cluster of cases had held that the benefit of a guarantor's covenant did not pass automatically with the reversion, but had to be assigned by the parties.[10] *Kumar* clearly reversed this, but left a number of questions in its wake. The facts were rather complex. The landlord gave a lease to Old Kentucky Restaurants Ltd, which then subleased part of the premises to Mr Kumar. Mr Kumar later assigned the balance of his sublease to Sundowners Ltd. Sundowners Ltd had two guarantors, Mr Dunning and Mr Powell, and these guarantees were given to both the landlord and the sublandlord, Old Kentucky Restaurants Ltd. Subsequently Old Kentucky Restaurants Ltd assigned its rights as sublandlord to Hedges & Butler Ltd, but it did not at that time assign the benefit of the guarantee covenants that it had with Mr Dunning and Mr Powell. Sundowners Ltd defaulted on the rent, and Hedges & Butler Ltd demanded payment from Mr Kumar, the original subtenant. Mr Kumar paid the rent arrears, but then sought to collect what he had paid from Mr Dunning and Mr Powell.

The case proceeded on the basis that once Mr Kumar had paid Hedges & Butler Ltd the rent arrears owing by Sundowners Ltd, he was subrogated to any rights that Hedges & Butler Ltd had with respect to this debt. If Hedges & Butler Ltd would have been able to collect the rent arrears from Mr Dunning and Mr Powell pursuant to their guarantees, then Mr Kumar could now collect from them. But the benefit of these guarantees had not been expressly assigned to Hedges & Butler Ltd by Old Kentucky Restaurants Ltd, so Mr Kumar could only succeed if the benefit passed by operation of law.

A question that arises at this point is why Mr Kumar is taking such a roundabout and dangerous

route to collect his money. Why does he not make a simple claim to be indemnified by Mr Dunning and Mr Powell based on the principle that we have seen applied in *Selous* and *Zwebner*? As in those cases, he has paid a debt for which another person was primarily liable, and so is entitled to be reimbursed by that person. This argument does not require him to establish that some third person has rights against the guarantors and that he is subrogated to these rights. Instead he has his own direct rights against the guarantors. The answer seems to be that this point was not argued before the Court. *Selous* was not cited, and *Zwebner* was decided after the Court of Appeal's decision in *Kumar. Re Downer Enterprises Ltd* was cited to the Court, but only in support of the right to subrogation, not the right to indemnification which Pennycuick V-C also found to exist.

Returning to *Kumar*, Sir Nicolas Browne-Wilkinson V-C notes that there is no privity of contract between Hedges & Butler Ltd and the guarantors, nor is there privity of estate. The statutory provision that makes the benefit of lessee's covenants run with the reversion has no application because we are not dealing here with lessee's covenants. (In New Zealand the relevant provision is the Property Law Act 1952, s 112.) The relevant law is thus not a particular landlord and tenant doctrine, but is rather the general law on when covenants run with the land. The *benefit* of both positive and negative covenants relating to land will run at common law if the covenants touch and concern the land. Thus the question is, do the covenants of guarantee given by Mr Dunning and Mr Powell touch and concern the land so that the benefit of them runs with the leasehold reversion? The Court held that they did.

> As it seems to me, in principle a covenant by a third party guaranteeing the performance by the tenant of his obligations should touch and concern the reversion as much as do the tenant's covenants themselves. (Per Sir Nicolas Browne-Wilkinson V-C at p 807.)

Covenants by the tenant to pay rent, keep in repair, and insure, for example, all touch and concern the land, so any covenant to guarantee compliance with these will also touch and concern the land. Putting the matter more generally, the Court accepted the test given by Best J in *Vyvyan v Arthur* [1814-23] All ER Rep 349 at 352 for when covenants touch and concern the land, and held that a covenant by a guarantor securing the performance of a tenant's covenants in a lease satisfies it. (pp 809-810.)

A final concern with *Kumar* is that the common law rules for when the benefit of covenants run with the land were developed when the land being conveyed by the covenantee was the fee simple. Would the same rules apply when the covenantee is a landlord and the "land" being conveyed is the reversion of a lease? Would the same rules apply when the covenantee is a sublandlord and the "land" being conveyed is the reversion of a sublease, as was the case in *Kumar*? This question was not raised in *Kumar*, but it was in the next case in the English series, *P & A Swift Investments v Combined English Stores Group Plc* [1988] 3 WLR 313. This was another case involving the assignee of a sublandlord proceeding against the guarantors of a subtenant. As in *Kumar*, the benefit of the guarantor's covenants had not been expressly assigned, but unlike *Kumar*, no one had as yet paid any of the rent in arrears, so no issues of indemnity or subrogation arose. The guarantor raised the argument that a reversion of a lease (and *a fortiori* the reversion of a sublease) could not have been "land" for the purposes of the application of the common law rule, for otherwise the rule would have made the benefit of tenant's covenants that touched and concerned the land run with the reversion, and the Grantees of Reversions Act 1540 would have been unnecessary. The House of Lords appeared to acknowledge that this argument had some force, but brushed it away by responding that

> we are, in any event, concerned with what is the position in 1988 and not in 1539 and there being no direct decision upon the point I am, for my part, not prepared to assume that the common law has not developed in the four centuries which have elapsed since the Act of 1540 nor that "land" for the purposes of the common law rule has not, over this period, come to bear the same meaning as it does in the context of landlord and tenant. (Per Lord Oliver at p 318.)

The House of Lords approved of the decision of the Court of Appeal in *Kumar*, and reiterated that the benefit of a guarantor's covenant ran with a leasehold reversion without the need of any express assignment. Consequently the assignee of the sublandlord acquired the benefits of the guarantees of the subtenant's performance.

Finally, *Coronation Street Industrial Properties Ltd v Ingall Industries Plc* [1989] 1 WLR 304 involved the assignee of a landlord's reversion claiming the benefit of guarantees of the original tenant's obligations. The guarantor's obligation in question here was to take an assignment of the lease in the event of the tenant going into liquidation and the lease being disclaimed. The House of Lords held, consistently with *Kumar* and *Swift*, that this covenant touched and concerned the land and so the benefit of it passed with the reversion.

(2) The New Zealand cases

The first responses to the English cases occurred in the context of summary judgment applications before Masters. In two cases that came before him, Master Williams QC showed a reluctance to accept that *Kumar, Swift,* and *Coronation Street* reflected the law in New Zealand, and so denied summary judgment to the assignees of leasehold reversions who were trying to enforce guarantees the benefits of which had not been expressly assigned to them. (*Hastings Motels Ltd v Chandler* (High Court, Napier, 29 November 1989, CP 142/88); *Cardrona Properties Ltd v Newmans Tours Ltd* (High Court, Wellington, 12 July 1990, CP 206/90).) By contrast, Master Towle held in *Windlesham Investments Ltd v Jones* (High Court, Auckland, 21 June 1990, CP 2278/89) that *Swift* and *Coronation Street* were good law in New Zealand, and gave summary judgment to the assignee of the leasehold reversion against the

tenant's guarantor. These three decisions are well analysed, and the reasoning of Master Williams criticised, by Donald McMorland and Roger Fenton in "Guarantor of Lease — Liability Following Transfer of the Reversion" (1990) 5 BCB 197-201. These authors argue strongly in favour of the English cases being followed in New Zealand, and the cases decided after their article was written have supported their position.

In *Robert Jones Investments Ltd v Mayhew* (High Court, Rotorua, 10 August 1990, CP 18/90) Master Towle again approved of *Swift* and *Coronation Street*, and gave summary judgment to the assignee of a landlord which was seeking to enforce a guarantee of the original tenant's obligations. In *Benjamin and others v Wareham Associates (NZ) Ltd* (High Court, Wellington, 27 September 1990 CP 430/88) McGechan J made the following strong statement:

> I respect the concerns expressed in a summary judgment context recently by the learned Master in *Cardrona Properties Ltd.* . . . However, for my own part, . . . I consider the appropriate course is charted by *Kumar's* case, approved as it has been recently by the House of Lords in *P & A Swift Investments v Combined English Stores Group* . . . and *Coronation Street Industrial Properties Ltd v Ingall Industries.* . . . To allow such a covenant and surety obligation to run with the lessor's reversion accords not only with the strong trend of precedent, but with commercial necessity and commonsense. (pp 20-21.)

This strong statement by McGechan J provides a great deal of comfort to the assignees of reversions, although until further cases confirm it, the safest course may be still to assign the benefit of the guarantor's covenant when assigning the leasehold reversion (and give notice to the guarantor as required by s 130 of the Property Law Act).

E Conclusion

Some aspects of the law relating to the guarantors of tenant's obligations have recently been clarified in New Zealand. The position of guarantors following an assignment of the reversion is a prime example of this. What has not yet been decided is the applicability here of two very important foreign cases, *Chan v Cresdon Pty Ltd* and *Selous Street Properties Ltd v Oronel Fabrics Ltd.* The former makes a guarantee unenforceable until the lease is registered, if the lease was intended to be registered. The latter raises concerns for both landlords and guarantors. It accepts the principle that a guarantor of a tenant's obligations can be released from liability in circumstances which leave the tenant's liability unimpaired. Care therefore must be taken by the landlord in drafting the guarantee to prevent this result inadvertently occurring. *Selous* also accepts the principle that guarantors of assignees of the lease are liable to indemnify the original tenant or his guarantor, even though these people were not parties to the guarantee. This increases the potential liability that a person agreeing to be a guarantor may be exposed to. It is submitted that *Chan* constitutes more of a surprising departure from hitherto accepted law than *Selous*, and therefore may face more difficulty in being accepted in New Zealand. □

---

1 An exception to this general rule occurs in the case of bankruptcy of the debtor. The debtor's bankruptcy relieves him from personal liability, but the liability of the guarantor continues. However, there is a further complication in the landlord and tenant context. If the tenant becomes bankrupt *and* the Official Assignee in Bankruptcy disclaims the lease pursuant to s 75 of the Insolvency Act 1967, *Stacey v Hill* [1901] 1 KB 660 (CA) holds that the guarantor ceases to be liable.

2 See *Mattin and Townsend v Millar* (High Court, Whangarei, 1 August 1988, CP 5/88, Master Gambrill); *Miller(sic) v Mattin and Townsend* (Court of Appeal, 24 July 1990, CA 159/88); *I M Hargis v Marshall* (High Court, Auckland, 1 November 1990, CP 894/90, Master Towle); *Benjamin and others v Wareham Associates (NZ) Ltd* (High Court, Wellington, 27 September 1990, CP 430/88, McGechan J); *Robert Jones Investments Ltd v Instrument Supplies Ltd* (High Court, Hamilton, 9 November 1990, CP 199/89, Doogue J); *Auto Point Motors Ltd v Hollows and Parker* (High Court, Wellington, 4 April 1991, CP 882/90 Heron J).

3 W D Duncan, *Commercial Leases*, The Law Book Company Ltd, 1989, p 208: "It is submitted that a change of the identity of the principal debtor, the lessee, must also presage a material alteration in the nature of the obligation guaranteed. The lessee-assignor might be a person of some substance whereas the lessee-assignee might be a person of straw for whom the guarantor would never have considered support. The guarantee should always specifically contemplate assignment and the guarantor must agree to be bound by the guarantee notwithstanding such assignment."

4 *Selous Street Properties Ltd v Oronel Fabrics Ltd*, (1984) 270 EG 643 (QBD); *Leishman v Mexted and Phillips* (High Court, Wellington, 28 February 1991, CP 794/90, Master Williams QC); Murray Ross, *Drafting and Negotiating Commercial Leases*, 3rd ed, Butterworths, 1989, para 5.9.

5 This was accepted by Hutchison J in *Selous Street Properties*, supra, fn 4. A binding agreement by the creditor to give the principal debtor more time to perform his obligations releases the guarantor: *Halsbury's Laws of England*, supra, vol 20, para 261. Clearly this is a potential trap for a landlord, and so the guarantee should be expressed to apply notwithstanding any time or indulgence granted by the landlord: Ross, supra, fn 4, para 5.7:1.

6 See too *Baynton v Morgan* (1888) 22 QBD 74 (CA); *Allied London Investments Ltd v Hambro Life Assurance Ltd* (1983) 269 EG 41. This calls into doubt the remark by Hinde, McMorland and Sim in para 5.130 of *Land Law* that the original tenant is a surety for the assignee in possession. (They note that the early authority they give for this proposition is only obiter.) A Canadian Judge held that an original tenant became a mere guarantor after an assignment of the lease, and was therefore not liable because the provisions of the Guarantees Acknowledgement Act were not complied with. This decision is criticised by William Rowe in "The Tenant as Guarantor", (1985) 23 *Alberta Law Review* 379.

7 A different result will usually be achieved in residential tenancies, where, if the original tenant assigns with the consent of the landlord, s 44(6) of the Residential Tenancies Act 1986 statutorily terminates any further liability of the original tenant to the landlord.

8 See too *Halsbury's Laws of England*, supra, vol 20, para 289. If it can be established that the parties intended the second guarantee to replace the first, the first guarantor will be released: *K D Bai and Ors v Scott and Seed* (High Court, Tauranga, 13 November 1989, CP 92/89, Master Towle).

9 If the lease is registered, s 98 of the Land Transfer Act 1952 will apply, but it only imposes a statutory indemnification duty on the *immediate* assignee of the tenant, not subsequent assignees as *Moule* will.

10 *Pinemain Ltd v Welbeck International Ltd* (1984) 272 EG 1166; *Re Distributors and Warehousing Ltd* (1986) 278 EG 1363; *Kumar v Dunning* (1986) 279 EG 223; *Coastplace v Hartley* [1987] 2 WLR 1289.

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

By Peter Churchman, a practitioner of Dunedin

In a previous article the writer traced the development of the corporatist system of industrial regulation that existed in New Zealand until the mid 1980s and compared that system with the contractualist one which had developed in the United States of America. This article deals with the reform of New Zealand's system and examines whether New Zealand's new system can truly be described as contractualist.

The reform of the New Zealand system

From the mid 1980s successive New Zealand governments have proved remarkably willing to re-examine the basic assumptions upon which the country's system of industrial regulation rested and legislatively remedy the perceived effects.

This zeal for legislative reform has produced three major pieces of amending legislation each more radical and far-reaching in its proposals than its predecessor.

(a) The Industrial Relations Amendment Act 1984

The Industrial Relations Amendment Act 1984 addressed the perceived shortcomings of the wage fixing system by taking the simple but fundamental step of making arbitration voluntary rather than compulsory. For the brief period of 1932-1936, as a response to the depression, compulsory arbitration had been suspended although compulsory conciliation had remained in place. But other than for this period the 1984 amendment marked the first time in 90 years that unions could not compel employers to submit wage claims for decision by a neutral. The removal of this central feature of the system radically altered the balance of bargaining power against the unions. Although the more powerful unions had been able to engage in second-tier bargaining (ie bargaining for gains in addition to those contained in the award) many of the smaller and weaker unions had depended almost exclusively on the compulsory process to extract an increase in wages from their employer. The Act also moved to eliminate the concept of relativities which had been responsible for the widespread rigidity of the wage structure. The Act did this by at last giving the Court five criteria to guide its arbitrating. These criteria focused on the realities of the market place and directed the Court to consider issues of supply and demand for labour. The Act also attempted to address the criticism that the wage fixing process lacked a forum for addressing union concerns on wider social wage and economic issues by providing for an annual Tripartite Wage Conference to be held before each wage round. However, this attempt at a corporatist approach on the lines of the Scandinavian model was little more than a sop to the unions as the conference was to have no real power. Even the issue of a "guideline" on wage increase required a unanimous vote of all the parties.

Once the central feature of compulsion was removed much of the structure of the old system ceased to be effective or even relevant to the goal of industrial peace through ordered arbitration. This meant that a rethinking of the whole basis of the system of wage bargaining would inevitably be required. This was not immediately appreciated by the legislature whose next attempt at reform still tried to work within what was left of the old arbitration system.

(b) The Labour Relations Act 1987

The 1984 Amendment Act had not dealt with such issues as: the problem of powerful unions exploiting the system by conducting second-tier bargaining above the "floor" created by the award; the predominance of national awards for each different craft or occupational group that resulted in most large industrial plants having many different awards in operation at the one time rendering composite plant bargaining difficult; and the large number of unions which relied primarily on the support of the statute for any bargaining power and would have difficulty conducting any meaningful bargaining unless they rapidly adapted to the new order.

The legislature had to solve these problems if New Zealand was to have a workable system of labour relations. But the implementation of the solution involved some political problems for the Labour Party then in power. The elimination of second- tier bargaining; the substitution of plant agreements for national awards and the weaning of unions from their dependence on the state were all matters which struck directly at the interests of the Labour Party's traditional supporters, the trade union movement. This caused the government to adopt the language of euphemism when describing the purpose of its 1987 reforms. The platitudes in the long title to the Labour Relations Act 1987 are so bland that it is impossible to discern the Act's agenda from them. The Government Policy statement which had preceded the enactment was only slightly more forthcoming. It said that the overall objective of the Act was:

> . . . to encourage the development of effective union and employer organisations which:
>
> (a) can operate independently of legislative support; and
>
> (b) can negotiate awards and agreements which are relevant to the industry or work place in which they apply, and which are adhered to.[1]

The Act implemented the policies as far as unions were concerned by increasing the minimum size to 1000 members (s 6(2)). This meant that 117 or approximately half of all unions as at 31 March 1987 would have to either attract new members or amalgamate. (See Harbridge and McCaw "The First Wage Round under the Labour Relations Act 1987: Changing Relative Power" *New Zealand Journal of Industrial Relations* 149, 153 (1989).)

The Act also broadened the lawful activities of unions and introduced provisions for greater democracy in unions. Previously the annual award negotiations were limited to what were "industrial matters" and this term had been narrowly defined by the Courts. This limitation now disappeared and unions could legitimately seek bargaining on such diverse issues as automation, pensions or medical benefits. The Act also, in a very small way, tried to prepare unions for the day when their nearly century-old rights of exclusive representation would disappear by allowing a limited amount of inter-union competition for members. There were a number of parts of the Act which also made it clear that the government was transferring to the unions the responsibility for enforcing their own collective agreements. Previously government inspectors had been responsible for this function. Most significantly the Act made it clear that workers at last had a recognised legal right to strike and employers a legal right to lock-out. The Act carefully defined the circumstances in which these actions would be lawful (Part X). It also ensured that if the unions abused the newly gained right of lawful strike action, employers would have an adequate remedy readily available by transferring to the Labour Court exclusive jurisdiction to hear tort actions founded on conspiracy, intimidation, inducement of breach of contract or interference by unlawful means with trade, business or employment where such a cause of action resulted from a strike or lock-out (s 242). This innovative step ensured that the civil Court's jurisdiction would not be abused by over use of the ex parte injunction.[2] All such applications now came before a tribunal familiar with the dynamics of industrial relations.

The Act dealt with the problems of second-tier bargaining by making the consequences so unattractive for unions that it ceased to be an option for them. In relation to this part of the Act the government did state its objectives clearly. That object was expressed to be that: "The terms and conditions relating to the employment of groups of workers are fixed by a single set of negotiations". (s 132(a).) The penalty for a union attempting second-tier bargaining was that employers could immediately move to cite that union or group of workers out of the award. The union would then lose all the benefits of the award (including access to the Labour Court for resolution of personal grievances and other rights issues) and could only regain coverage under the award if the employer so agreed. (Labour Relations Act, Part VII.)

The Act also attempted to encourage the making of single agreements covering all the workers at one site. It did this by fostering composite agreements which were agreements between one or more employers and two or more unions. (s 166.)

(c) Effect of the 1987 Act

Although the 1987 Act was a radical one when viewed in the context of New Zealand Labour Relations history, it did not result in the dismantling of the old compulsory arbitration system and its replacement by a system of free collective bargaining. The system that existed was largely the framework of the old arbitration system with the "teeth" of compulsion removed. It is important to note the significant features of the old order which remained; compulsory conciliation (albeit now guided by the five criteria introduced in 1984); compulsory union membership, blanket coverage of awards and mandatory disputes and personal grievance procedure.

As had been the experience in other countries after the passage of reforming labour laws, the New Zealand government found in the 1980s that deeply held attitudes about labour relations were resilient to change by legislative means. Of the objectives of the 1987 Act only those in relation to changing the character of unions could be described as having any immediate success. Although the rules on second-tier bargaining were widely ignored in the 1987/88 wage round[3] the government can claim credit for a significant drop in the number of second-tier agreements after 1987. (See Harbridge & McCaw supra at 157). However, the encouragement of composite awards could not overcome the innate caution of both employers and workers and their uncertainty at the prospect of having to step outside the award system. As a result there were actually fewer composite agreements after the Act than there had been before. (Harbridge and McCaw, at 160.)

The Government's stated policy of achieving agreements "relevant to the industry in which they apply" (see fn 1, below) was demonstrably unfulfilled. Instead of bargaining becoming flexible, decentralised and market-place orientated the national

Deja vu — 170 years on

. . . That it is absolutely necessary, when repealing the Combination Laws, [Cf Labour Relations Act 1987] to enact such a law as may efficiently, and by summary process, punish either workmen or masters, who by threats, intimidation, or acts of violence, should interfere with that perfect freedom which ought to be allowed to each party, of employing his labour or capital in the manner he may deem most advantageous.

[Sixth Report from Select Committee on Artizans and Machinery, 51 (1824) pp 589-90.]

award system remained virtually intact in the 1987/88 wage round. (Harbridge and McCaw at 175.) Indeed, the new-found freedom to bargain on their own terms proved too heady even for many employers. Employers such as the hotel industry and many small employers actually supported the retention of the national award system. (Harbridge and McCaw, at 169.)

(d) The 1990 Amendment

This preference of many of the parties to cling to the wreckage of the old rigid centralised system of bargaining rather than striking out into the uncharted waters of decentralised workplace bargaining led the Labour Government to enact an amendment to the 1987 Act. (Labour Relations Amendment Act 1990.) This amendment abandoned the euphemism that had shrouded the policy objectives of the 1987 Act. The government now openly stated that what it wanted to achieve was:

> A transition from a bargaining system based on occupational negotiations towards one with an appropriate mix of viable bargaining arrangements (with a particular emphasis on industry and enterprise negotiations) . . . (s 7(1), Labour Relations Amendment Act 1990.)

The chosen mechanism to achieve this result was to give an employer who employed more than 50 workers in any one workplace the right to conduct a ballot among the relevant workers. If more than 50% of those balloted agreed to enterprise bargaining then that could commence regardless of whether there was already an award covering the workers or whether the workers union wished to take part in the bargaining. Once negotiated, the enterprise agreement would keep the workers outside the coverage of the award until both parties agreed otherwise. Although the Act encouraged enterprise bargaining it also contained some provisions which signalled that the government had not yet cut adrift the concept of compulsory arbitration. The Act introduced the concept of bargaining in good faith. Although this concept is well known in the United States, it was both unknown and unnecessary under the old New Zealand system where it did not matter how conscientiously the parties participated in the process, because the award would be made anyway. The penalty for failure to bargain in good faith was ultimately a form of "final offer" arbitration with a binding decision being made by the arbitration. (s 11). Despite its heroic efforts to replace compulsory arbitration with decentralised collective bargaining the Labour Government itself finally remained unconvinced that New Zealand employers and unions were mature enough to negotiate without the spectre of coercive state intervention.

Even this attempt at promoting decentralised bargaining suffered from the defect that it contained absolutely no incentive for those weak unions who most needed the support of the national award structure to voluntarily walk away from that structure. Shortly after the passage of this legislation the National Party was swept to power in a landslide general election victory. Within weeks of its election the new government introduced a bill (Employment Contracts Bill 1990) that dramatically changed New Zealand's labour relations laws.

Contractualism unrealised

(a) The Employment Contracts Act

If the Labour Government was coy about articulating its real policy goals in 1987, the National Government of 1990 did not do significantly better. The explanatory note to the Bill stated that it "implement(ed) the Government's policy of promoting an efficient labour market in New Zealand" (p 1). The Long Title of the Act is slightly more forthcoming and tells us that one of the Act's objectives is to "provide for freedom of association". The other stated objectives include several that are obliquely phrased in terms of choice. Both the employer or employee are stated to be given the "choice" of whether to become a party to an individual or a collective contract of employment.

The language used in the Act itself tells us little about the real objectives that are behind it. These objectives are discerned by analysing the legislative techniques that are adopted to promote "an efficient labour market". Over the last few years several OECD countries of the "new right" persuasion, notably Britain, have attempted to achieve "wage flexibility" by adopting policies of decentralising wage bargaining and reducing union rights and coverage.[4] The content of the Act shows that these policies have motivated the new legislation.

The Act's rejection of the old corporatist structure of wage fixing is complete. Gone are: conciliation and arbitration (compulsory or otherwise), union registration, compulsory unionism in any form, blanket extension of awards and the union's right to exclusive representation.

As originally conceived this new model was contractualist in form similar to the system existing in the United States of America. Although the principle of freedom of contract was not expressly stated to be a policy objective it was implicit in the language of the Bill. However in its final form, the Act actually limits the contractual freedom of the parties to an employment contract. Parliament has been unable to resist the temptation to legislatively interfere with the employment relationship. The Act decrees that the parties to all employment contracts no longer have the right to have their disputes resolved in a forum of their own choosing. Instead, they must submit, in the first instance, to decision by a tribunal not bound by either the principles of law or evidence. It is difficult to reconcile this limitation with the "free market" approach to labour relations reflected in the rest of the Act.

(b) The structure of the Act

The Act's treatment of union representation and bargaining rights is found in Parts I and II. The stated object of Part I is to establish that:

> (a) Employees have the freedom to choose whether or not to associate with other employees for the purpose of advancing the employees' collective employment interests:
>
> (b) No person may, in relation to employment issues, apply any undue influence, directly or indirectly, on any other person by reason of that person's association, or lack

of association, with employees. (Employment Contracts Act 1991.)

Sections 6, 7 and 8 contain the mechanisms for implementing this policy. Section 6 specifies that nothing in any contract or other arrangement shall require any person:

(a) To become or remain a member of any employees' organisation; or

(b) To cease to be a member of any employees' organisation; or

(c) Not to become a member of any employees' organisation.

This section therefore prohibits "closed shop" or "union shop" agreements; limits the content of union rules about membership and in a display of even-handedness prohibits what are known in the United States as "yellow dog" contracts (stipulations by an employer that employment is conditional on the employee not becoming a member of a union). By prohibiting the parties from contractually agreeing on closed shop provisions the Act allows the objective of freedom of association to override the right of freedom of contract. This further distinguishes the New Zealand system of labour regulation from the truly contractualist model found in the United States. Section 7 of the Act expressly prohibits preference arrangements and s 8 says that no person shall "exert undue influence on any other person" in relation to joining or, remaining a member of an employees' organisation or acting on behalf of employees.

Section 59 contains an additional limitation on traditional union representation rights. This section confers on an employee a right, when taking any action (such as bargaining or pursuing a rights dispute or grievance), to choose a representative. Any such representative must, at the hearing, establish their right of representation. This section includes parallel provisions in relation to representation of employers, but because in the past employers have effectively been free to make that choice the impact falls solely on unions.

Part II of the Act contains the provisions regulating bargaining. Section 9 specifies that both employers and employees have the right to bargain over the employment contract on an individual or collective basis. The employer and employee have the freedom to contract at any time subject only to the qualification that if there is an applicable (ie binding) collective contract already in existence the individual contract cannot be inconsistent with it. However, s 20 makes it clear that if an employee chooses not to be represented in the negotiations for a collective contract he is not bound by that contract. This is one of the most important practical differences between the new system and the old regime. It is also an important feature distinguishing the form of contractualism adopted in New Zealand from that followed in the United States.

In America the principles of democratic representation that govern the normal political process play an important part in shaping their particular brand of contractualism. The Wagner Act (National Labor Relations Act, 49 Stat 499 (1935)) vests in the majority of employees in a workplace the right to bargain for wages and conditions of employment on behalf of all members in the bargaining unit. There is no provision for individuals to opt out of the agreement negotiated by the majority and conduct separate negotiations with an employer. The fact that the Employment Contracts Act does not allow a majority to bind dissident individuals is consistent with the interpretation of "freedom of association" that underlies the Act. The freedom to disassociate found in the Employment Contracts Act contrasts sharply with the more traditional view taken of freedom of association in the Wagner Act.

Under the Employment Contracts Act the absence of any right in the majority to bind a minority will have significant practical consequences. One possibility is that two employees working alongside each other doing identical work may be subject to different wages and conditions. That would seem to be a recipe for workplace disharmony. It is more likely that once an employer has concluded an agreement with the dominant employee group, the balance of the employees will be treated in a similar fashion. Those members of the dominant group that have paid for a union or other bargaining agent to represent them will therefore suffer from the "free rider" effect. If this pattern becomes widespread it will be a significant disincentive for employees to join unions. This potential for reducing union membership and influence is something that is unlikely to have gone unnoticed by the framers of the legislation.

(c) Personal grievances

Although s 18 of the Act proclaims freedom to negotiate in broad language (negotiations may be "on any matter") the language of Part III of the Act significantly circumscribes freedom of contract in the area of personal grievances. Section 32 dictates that every employment contract (whether collective or individual) *shall* contain an effective procedure for settling any personal grievance. The First Schedule to the Act contains a specimen "effective procedure". The framers of s 32 seem to be at pains to avoid the impression that the First Schedule itself is the only acceptable procedure by specifying that the required procedure is one "that is not inconsistent with the requirements of this part of this Act". (s32(2)(a).) Despite this window dressing it is inescapable that the legislation is seeking to control the content of all employment contracts. This is basically inconsistent with the adoption of a contractualist model of labour regulation.

In relation to personal grievances the Act perpetuates a practice introduced by s 226 of the 1987 Act.

If the facts giving rise to a personal grievance would also give rise to a complaint under the Human Rights Commission Act 1977 or the Race Relations Act 1971 the employee must choose between either invoking the personal grievance procedure or proceeding under those Acts (s 39, Employment Contracts Act). Other countries, notably the United States, have not chosen to limit employees in this manner.

(d) Enforcement of contracts
The objects section of Part IV of the Act contains the statement that

> It is the responsibility of the parties to employment contracts, and of individuals bound by them, to enforce their rights under them.

This is a continuation of the policy of the 1987 Act which was to wean the unions away from dependence on Labour Department Inspectors for enforcement of their awards. However, unlike the 1987 Act which attempted to assist unions in enforcing collective agreements by granting them rights of entry onto premises and inspection of certain records the new Act contains nothing to assist unions or other employee representatives to effectively exercise these responsibilities.

(e) The role of the Employment Court and Tribunal
The framers of the Act wrestled with the question of the proper forum for the resolution of disputes arising from employment contracts. Even after the introduction of the Bill to Parliament the Minister of Labour expressed uncertainty as to whether the Labour Court and Government Mediation Service would be retained. The Act's provisions in relation to the Employment Tribunal differ radically from the original draft of the Bill which had retained the old mediation service. Ultimately, Parliament opted to retain the Labour Court, renamed the Employment Court.

The Labour Court had been a central and indispensable feature of the old corporatist system. It was the essential mechanism (until the division of judicial and arbitral functions) by which wages were set and it was also the obvious forum for the interpretation of the awards that it had made. With the introduction in 1984 of the five specific criteria to direct the wage fixing deliberations it also became more obviously an instrument of achieving government policy. With the formal legalisation of the rights to strike and lockout in 1987 the Labour Court was the obvious forum for enforcement. If the corporatist system was to survive, the legal rights of strike and lockout had to be carefully controlled. The 1987 Act did this by transferring jurisdiction over the specified tort actions involving strikes and lockouts to the Labour Court and also by making it clear that any action outside the careful definitions in the Act would be unlawful. The parties were clearly not free to use economic weapons to resolve rights issues.

However, with the passing of the old order the theoretical justification for the existence of the Labour Court changed. One of the central features of the contractualist model is the private negotiation of agreements and private resolution of disputes without the involvement of the state. In the United States the parties to a collective agreement work out their own mechanisms for resolving all rights disputes including grievances. The mechanism normally used is private arbitration, which allows these issues to be resolved without the intrusion of public law or government policy. This use of private arbitration is so central to the contractualist model that Lothian stated:

> Indeed the use and propaganda of private arbitration in contemporary labor relations is in many ways the perfect emblem of the contractualist bargaining system. (Lothian "The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared 7 *Cardozo L Rev* 1002, 1056, (1986).)

Under the Act the scheme for resolution of rights disputes is similar to that for resolution of personal grievances. Section 44 requires every employment contract to contain a procedure for settling disputes. A specimen procedure is set out in the second schedule but the Act again repeats the assertion that parties are free to agree on another procedure provided that it "is not inconsistent with the requirements of this part of the Act . . ." (s 34). The procedure contained in the First and Second Schedules involves the referral of a dispute to the Employment Tribunal. This Tribunal has final power of decision in relation to disputes connected with employment contracts. It may make such decisions as in equity and good conscience it thinks fit. There is a discretionary right of removal to the Employment Court (s 94) but otherwise the Employment Tribunal has complete first instance jurisdiction. Section 44 continues the pretence of allowing the parties some element of contractual freedom. It states that the Act does not prevent the parties from agreeing to an appeal system that does not include the Employment Tribunal or Court but the section concludes by saying that no such appeal system can confer jurisdiction on any tribunal or Court other than the Employment Tribunal and Court. The Act therefore mandates what amounts to a system of compulsory dispute resolution which severely restricts the parties' freedom to choose an appropriate forum. While this was entirely appropriate under the old corporatist structure, this type of legislative intervention means that the contractualist ideal remains unachieved.

(f) Treatment of strikes
The framers of the Act have failed to appreciate that in a contractualist system of labour relations it is inappropriate for the legislature to actively control strikes and lockouts. The essence of the contractualist model is the free play of economic forces. Lothian has stated:

> Organised conflict between workers and bosses is a fundamental part of the process of negotiation. Workers are allowed to join together to impose their demands through strikes and other forms of industrial action. The free scope granted industrial action is simply the corollary to the principle of voluntary determination. Unless workers had the power to organise and strike in the course of collective bargaining, collective contract arrangements would reflect the one-sided balance of managerial might rather than the free product of joint determination. (Lothian, supra, at 1007.)

To achieve contractual freedom one would have expected minimal legislative control over the nature of the economic weapons that the parties could use as negotiating

levers. But the doctrine of "freedom of association" dictated otherwise. In obedience to this doctrine the Act closely constrains the right to strike or lockout. The definitions of strike and lockout are drawn largely from the 1987 Act although the right to strike is even more restrictively framed. The 1987 Act gave a right to strike within 60 days of the expiry of a collective agreement — this is now gone. The definition of strike is such that sympathy strikes or secondary boycotts are prohibited.

In other countries which have contractualist systems, such as the United States, one of the principal chips that the union has to bargain with is the offer of a "no-strike" clause in return for the employer meeting its wage and benefit demands. The Act denies that advantage to New Zealand workers.

It also should be noted that the provisions relating to lawful strikes apply only to collective agreements. The strike in its very essence is a collective action. An employee who has entered into an individual contract of employment has no lawful right to strike. If his contract of employment expires and is not renegotiated his employment simply comes to an end. If the American experience is any guide, individual employment contracts are seldom likely to contain a clause requiring that dismissal be only for just cause.[5] Therefore those who sign individual employment contracts may well have little by way of job security.

The ideological basis for New Zealand's new contractualist system

(a) The voice of the "new right"

While the changes are in themselves dramatic what is even more surprising is that the changes went so far in adopting the strategies of the "new right". In the context of New Zealand labour relations the most articulate and forceful proponents of these strategies had been the Business Round Table. This group, along with several others had advocated increased decentralisation and deregulation of the labour market. They had specifically adopted the objectives of: abolition of compulsory unionism; removal of union rights and privileges; the end of national awards and the abolition of the Labour Court and Arbitration Commission.[6]

Other employer groups, even their umbrella organisation, the Employers Federation, while favouring decentralisation and deregulation, were not calling for total abandonment of the previous corporatist system. As Wood has noted (see fn 1 at 169), many employers even favoured the retention of the national award system. Other than on the issue of retention of the Labour Court it can be seen that it is the agenda of the "new right" as expounded by the Business Round Table that has swept all before it.

While there was a clear consensus among those who sought to predict the future course of labour reform in New Zealand that it was likely to include greater efforts at decentralised bargaining and more of an influence of market factors[7] no one was bold enough to predict the sudden and almost complete triumph of the ideology of the "new right" as embodied in the Employment Contracts Act.

The likely practical consequences

(a) Can attitudes really be changed by legislation?

We know that the Labour Relations Act 1987 did not immediately change attitudes developed over many decades. We will never know whether the Act would have done so had it been given a longer time to operate.

Professor Sisson has analysed changing attitudes to collective bargaining in a number of western countries including Britain and the United States and he came to the conclusion that:

> . . . the key features of the structure of collective bargaining, together with the attitudes and habits that go with them are not easily changed except at times of great crisis. (K Sisson *The Management of Collective Bargaining* 181 (1987).)

Although this statement may prove true where the changes are of gradual or incremental nature and the old practices still offer a permissible alternative to the new, it is doubtful whether it applies to the situation of a complete transformation from the corporatist model to the contractualist. Those who persist in advocating old concepts of compulsory unionism, blanket coverage, compulsory arbitration or even national awards will find that their views are irrelevant to the new scheme of labour relations. The game is now a different one with a completely new set of rules and even a new vocabulary. There simply is no place for the concepts that underpinned the old corporatist structure. Unless the players understand how the game has changed and what the new language means, they will be unable to exert any real influence on the outcomes.

In assessing the likely practical consequences of the new Act we must remember that the new bargaining structures which the Act will produce are only one of many factors which determine bargaining outcomes. Economic, political, social and demographic factors are often as important as the legal framework of labour relations. We can expect that as these factors differ throughout the country there will be geographic variations in result. The old system, because it permitted only one, highly regulated system of wage determination produced a sameness of result that led to national uniformity of wages and conditions. Whatever other results occur, this uniformity will disappear.

The government is likely to achieve the particular type of wage flexibility it is seeking. New Zealand, even under the old corporatist system, had a surprising degree of wage flexibility.[8] But this flexibility was in one direction only — upwards above the floor created by the national awards. What the Employment Contracts Act will achieve is downwards flexibility. The "floor" has effectively been removed. This has been done not just by changing the bargaining structure but by amending those laws that regulated employment contracts by specifying matters such as penal or overtime rates of payment and by a general reduction in social welfare benefits. The reduction of benefits is a key aspect in attaining flexibility. If benefits, particularly the unemployment and domestic purposes benefits, had remained at the previous levels they would have been a disincentive for workers to work for the newly "flexible" wages. They would have

encouraged potential employees to become or remain beneficiaries. This would have distorted the market and reduced the effectiveness of economic forces as the principal determinant of wages and conditions.

(b) The macro-economic impact

It is much easier to assess the likely political consequences of the new Act than it is to predict the wider economic consequences. The Conservative government in Britain can claim some success in the political objective of eliminating unions as a political force in Britain. The de-unionisation process is now well under way.[9]

(c) Decentralisation

One area where some empirical research has been done is on the effect of the decentralisation of wage bargaining. It is beyond doubt that the reforms contained in the Employment Contracts Act will result in the considerable decentralisation of wage bargaining. We have an indication of some of the likely consequences.

In 1987 Calmfors and Driffell[10] studied seventeen western economies including the United States, Britain, Australia and New Zealand. They concluded that countries with highly centralised wage bargaining systems (such as Austria and Nordic countries) and countries with highly decentralised systems (such as Japan Switzerland and the United States) are likely to have better macro-economic performance than those countries with an intermediate degree on centralisation. They ranked New Zealand and Australia 9th and 10th out of the 17 where 1 represented the most centralised bargaining structure and 17 the least. Although their reference to the features of the Australian and New Zealand systems was both brief and of doubtful accuracy, other more careful and thorough observers[11] would confirm their ranking of New Zealand in the uncomfortable "intermediate" category. The value of decentralising wage bargaining in New Zealand has long been recognised and was one of the principal objectives of the 1987 Labour Relations Act and particularly the 1990 amendment to that Act. The acceleration of that process under the Employment Contracts Act will almost certainly move New Zealand out of the poor performing middle ground and toward the perimeters of decentralisation where Calmfors and Driffell found better macro-economic performance.

(d) De-unionisation

The economic consequences of de-unionisation are more difficult to gauge. American evidence suggests there is a clear wage differential between a unionised and non-unionised workforce. That would indicate that costs of production with a de-unionised labour force will be cheaper. In a recent review of the economic consequences of unionisation, Flannagan concludes that the 10-15% wage premium of unionised workers over non-unionised workers first noted in 1963 remains similar today. ("The Economics of Unions and Collective Bargaining" 29 *Industrial Relations* 300, 301 (1990).) Other contemporary American observers put the figure even higher at 15-20%.

However Flannagan points out the variation for different occupational categories, racial groups and geographic area. It cannot automatically be assumed that the percentage variation in New Zealand would be similar to that in the United States.

The other principal area in which de-unionisation is likely to have an impact is that of productivity. The Minister of Labour Mr Birch is reported as having stated that the principal objective of the Act is increased productivity. (*Otago Daily Times*, p 3, February 25 1991.) Because of the significant de-unionisation that the Act is likely to produce Mr Birch may well be disappointed. There is considerable empirical evidence that unionisation significantly increases rates of productivity.[12] Flannagan's recent survey of the research in this area produces a conclusion that in the United States, in the manufacturing and construction areas the productivity differential of unionised labour is approximately 20%. (Flannagan, supra, at 303 and the studies referred to there.)

However, the increased productivity of unionised workers does not result solely from factors such as higher morale and better working conditions. Because unionised labour costs more than non-unionised labour, employers are encouraged to substitute machines. The higher productivity of unionised workers is often associated, not just with higher wage costs, but with higher costs of mechanisation. Therefore, although the new legislation is unlikely to increase productivity, it may well result in some employers reducing their overall costs.

It is interesting to note that Flannagan's study also records a correlation between high productivity and the presence of effective personal grievances clauses in collective agreements. The government's insistence that all contracts of employment contain clauses providing for the resolution of personal grievances may therefore have a positive result despite its inconsistency with the concept of freedom of contract.

One of the few pieces of empirical research done by New Zealanders on the effect that unionisation as opposed to the regulation of the labour relations by market forces has on specific employment outcomes, is that published by Novitz and Jaber shortly before the introduction of the Employment Contracts Act. ("Pay Equity, the 'Free' Market and State Intervention" *New Zealand Journal of Industrial Relations* 251, 251-62 (1990).) They studied the area of pay equity and examined the theory put forward by the "new right" that a deregulated labour market would be to the benefit of women workers. Their study refutes that suggestion and concludes that state intervention in the labour market and the unionisation of women workers are associated with reductions in the relative earnings gap between men and women.

We can therefore see that beyond the likely favourable consequence of decentralising bargaining, any other positive economic consequences from the new system are far from certain.

(e) Economic forces as labour market regulator

The doctrine of freedom of contract, as driven by neo-classical economic thought, has as its basis the concept that the employee's freedom of contract comes from the market itself. Just as an investor in the financial market is free to

withdraw his investment if he does not like the return generated by the market, so a worker is free to withdraw the "investment" of his labour if he does not like the return provided by the labour market. Like many economic theories this theory assumes the model of a perfect market. The perfect market requires that all the players have access to all the relevant information; there are a multitude of alternatives available to the worker to provide competition and real choice; there are no penal transactional costs on the withdrawal of the labour investment; the "investment" of labour does not create a dependency between employer and employee; that the employee's investment of labour is portable; that true substitutes for the original investment exist, and that all parties make rational decisions influenced only by economic factors.[13] While the absence of a perfect market does not invalidate the theory, it can give us an indication of whether the theory will work in practice. It is therefore useful to consider whether perfect market conditions can be said to exist in the New Zealand labour market.

In New Zealand few potential employees have all the relevant information about the various options they theoretically have available to them. The low population density and scattered population distribution mean that often a town is dominated by one significant employer or industry — freezing works, paper mill, dairy factory or manufacturing plant.

Frequently an employee who comes to the conclusion that the return on his "investment" of labour is unrealistically low will be faced with prohibitive costs of relocating to another town and the attendant social dislocation involved.

Often if an employee has invested many years of her working life in a particular job and acquired specific job skills she may have become unemployable by any other employer and thus dependent on that employer. Adequate substitute investments are usually available in the financial market but alternatives such as self employment may just not be viable for the disenchanted employee. Neither are employment decisions made solely on consideration of economic factors. Given the social, political and geographic characteristics of New Zealand society it is arguable that the labour market is far from the perfect model and that, irrespective of the legislative framework, economic forces will not become the sole determinant of the terms of the contract of employment. Arguably, in New Zealand, the contract of employment does have some special characteristics that distinguish it from say a contract for the supply of widgets. Just as Professor Aaron categorised the nature of freedom of contract enjoyed by American workers in the late 19th and early 20th century[14] it appears likely that real freedom of contract will still prove illusory for New Zealand employees.

Conclusion

Systems of labour regulation, be they corporatist or contractualist in nature, may serve many different ends.[15] Those may include the attaining of industrial peace; a balancing of bargaining power, the reinforcing of power inequalities; industrial democracy; preservation of workers' personal dignity and freedom from arbitrary treatment; economic efficiency and productivity; and political control of different segments of society. Not all of these objectives are compatible with each other and the choice of which are to be included on the agenda for labour law reform inevitably reflects the political philosophies of the framers of legislation.

While the Employment Contracts Act clearly rejects the corporatist approach in favour of a contractualist one, its conception of the appropriate contractualist model is heavily qualified by the political values incorporated into the Act's policy of "freedom of association". If the contractualist system operating in the United States represents the epitome of the contractualist model as claimed[16] then the New Zealand system falls short of the ideal. Implicit in the Wagner Act is the view that if the employment relationship is to be truly contractual in nature the bargaining process should be conducted on a free and equal basis. Also implicit in the Wagner Act's choice of collective bargaining as the vehicle to achieve bargaining parity is an appreciation of the limitations of the individual contract of employment.

The Employment Contracts Act emphatically rejects the collectivist approach. The only freedom of contract protected by the Act is the "freedom" of the raw economic forces of the market. In basing its system of labour regulation so comprehensively on neo-classical economic doctrine the National government has set a bold but uncertain course. One thing is sure, when workers who are willing and able to work cannot produce by their own labour sufficient to allow them to live with dignity then powerful destabilising political forces are unleashed. In this context it is very significant that although the Employment Contracts Act repeals many of the laws which limited the terms of the employment contract it has retained the laws mandating a minimum adult wage. Therefore despite the formal rhetoric of market forces as the determinant of the terms of the employment contract, there is still a "floor" below which wages cannot fall. Whether or not the government chooses to maintain or adjust this floor is likely to depend not on economic theory but on the social and political consequences of the present reforms.

As originally envisaged the Employment Contracts Act would have given New Zealand a truly contractualist system of labour relations. But by the time the Act was passed economic theory had already given way to political pragmatism. The new system is contractualist in concept but contractual freedom is qualified and some elements of the old corporatist system have been retained. One consequence of this is that if the new Act does not achieve the goals of its framers, we will not know whether this is because the economic theories upon which it is based are unsound or because we did not go far enough in embracing them.

The New Zealand system of labour relations now much more closely resembles that of the United States than it has at any time in the last 100 years. But the contractualist systems adopted by the two countries differ in the important respect that the American system is based on collective contracts and the New Zealand system on individual ones. This difference results more from political considerations than

economic or legal ones. The Americans have chosen to value and foster "industrial democracy". In order to achieve this they have legislatively adjusted the inherently unequal bargaining power of employer and employee. The New Zealand legislation has put a premium on "freedom of association". This concept, as interpreted in the Employment Contracts Act, denies any inequality in the bargaining power of employer and employee. Contractual freedom comes instead from the law of supply and demand and other market forces.

Although the Employment Contracts Act has not yet implemented neo-classical economic theory in its full rigour, it is doubtful whether the pendulum of labour market reform will swing any further to the right. The political and social consequences of complete dominance by the market are unlikely to be acceptable to the government.[17] Instead what we are likely to see is the modification of the new contractualist model by ad hoc governmental intervention to control the excesses of the market.

It can therefore fairly be claimed that exactly 100 years after the Industrial Conciliation and Arbitration Act was introduced into Parliament[18] New Zealand is once again in the vanguard of labour reform although this time it is headed in a very different direction. □

---

1 Government Policy statement on Labour Relations, September 1986 p 3 as quoted in Wood "The Labour Relations Act and changes to the structure of bargaining" *New Zealand Journal of Industrial Relations* 167, 168 (1988).

2 In the 1980s more and more employers and the occasional Union had attempted to utilise the ex parte injunction as a weapon in the arsenal of economic warfare. Once the injunction was issued the substantive proceedings were almost never prosecuted to completion and few of the cases were ever reported. One typical example is *The New Zealand Meat Producers Board v The New Zealand Meat Processors etc Union of Workers* (unreported) High Court, Invercargill Registry, A52/82, 30 September, 1984.

3 See Harbridge "Whatever Happened to Second Tier Settlements? A Survey of Settlements under the Labour Relations Act 1987" *New Zealand Journal of Industrial Relations*, 143, 143-156 (1988).

4 See Boston, "The State, Wage-fixing and Labour Market Reform: Some International perspectives" *New Zealand Journal of Industrial Relations* 121, 129 (1988).

5 Individual contracts in the United States seldom contain such a clause see Leslie, "Labor Bargaining Units", *Va L Rev* 353, 356 (1984). In this context it is doubtful if the decision of the Labour Court in *New Zealand Food Processing Etc Union v ICI (New Zealand) Limited* (1990) 3NZELC 97,386 would now be followed. In a contractualist system where individual employees have a much greater opportunity to control the content of their employment contract than was previously the case, they are more likely to be held to the express terms of their contract.

6 Boston fn 4 at 138 and see: New Zealand Business Round Table *New Zealand Labour Market Reform: a Submission in Response to the Green Paper* (1986), and P Brook *Freedom at Work: The Case for Reforming Labour Law in New Zealand*: (1990) OUP.

7 Nolan "Regulation of Industrial Disputes in Australia, New Zealand and the United States" 7 *Otago L Rev* (1990); Wood, fn 1.

8 See Boston, fn 4 at 131-132 and the International Studies ranking New Zealand's wage flexibility referred to there. This flexibility resulted primarily from second tier bargaining.

9 See Wedderburn "Labour Law Research in Britain" in *Labour Law: Research in Twelve Countries* (Edlund, ed.) 202 (1986). The former Conservative Prime Minister Margaret Thatcher had publicly stated that her ambition was to get rid of Socialism as a "second force" in British politics and to achieve a political outcome where the "choice" was between two parties which both believed in "economic freedom" (*Financial Times*, November 19 1988, as quoted in Wedderburn "Freedom of Association and Philosophies of Labour Law" *Industrial Law Journal* 1, 15 (1989)). The realisation of this goal proved beyond the power even of the determined Mrs Thatcher while she was in office. It is also important to note that no New Zealand politician has been so publicly forthright about any political agenda behind the new reforms as the British Conservative Party was.

10 L Calmfors and J Driffell "Centralization of Wage Bargaining and Macro-Economic Performance" *Economic Policy* no 6 (April 1988).

11 See for example Nolan, fn 7.

12 See for example R Freeman and J Medoff *What Unions Do* 162-80; (1984) S Allen *Unionization and Productivity in Office Building and School Construction* National Bureau of Economic Research Working Paper No 1139 (1983) at 4.7 as referred to in Fried infra, fn 15 at 1034; and Flannagan supra, at 303 and the studies referred to there.

13 For a comparison of the labour market with the capital markets see Fischel "Labor Markets and Labor Law Compared with Capital Markets and Corporate Law" 51 *U Chi L Rev* 1061 (1984).

14 B Aaron "Labor Relations Law" in *The American Assembly: Challenges to Collective Bargaining* 118 (Ulman, ed) (1967)

15 See Fried "Individual and Collective Rights in Work Relations; Reflections on the Current State of Labor Law and its Prospects" 51 *U Chi L Rev* 1012, 1020-1022 (1984).

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

17 See Nolan supra, fn 7 at 282 and Grills, "Labour Market Flexibility: Wage Relativities under the Labour Relations Act 1987 *New Zealand Journal of Industrial Relations* 157, 158 (1988).

18 The I C & A Act, although passed in 1894, was in fact introduced into Parliament in 1891. Its passage was held up for three years by opposition in what was then the upper house of New Zealand's Parliament.

Environmental Law (II): An international conference overview

By Bridget Nichols, a Wellington practitioner

This is the second of two articles on the NELA/LAWASIA conference on environmental law held in Bangkok, Thailand from 4 to 7 August 1991. In the first article Bridget Nichols noted the emphasis at the conference on involving people at all levels in environmental issues. In this article she reports on the conference topics, among others, of educating Judges, the question of locus standi, *the call for an ecocentric ethic, and the need to act globally.*

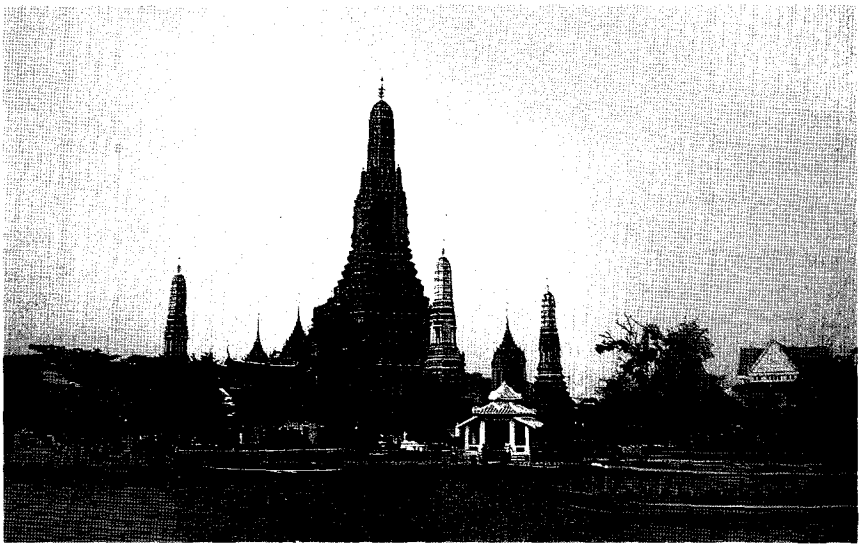
Back to the Conference . . .

7 Educate the judges

One might think that this is perhaps a somewhat impertinent suggestion but it was a theme of the Conference and a sentiment endorsed by their Honours present. Gurdial Singh Nijar of Malaysia indicated that public interest environmental law needs a judiciary that recognises its role and is empathetic to the needs of the wider citizenry.

Mr Justice Wilcox of Australia, in his plenary address, suggested that a conference of Judges be called within the LAWASIA region to discuss the need for creativity in this developing area of law. With respect, he was of the opinion that many Judges still think in terms of private litigation, and that there is a generational problem in that Judges grew up at a time when the environment was not an issue. He fears that Judges may be failing to follow the debate sufficiently conscientiously.

Justice Bhagwati explained to the Conference that he had had to evolve a new style, a new jurisprudence to meet the needs of the people and of the environment and that the issue of conscience had emerged. Even though the Indian Constitution did not make provision, the Court found that the right to life includes the right to live with human dignity and in a clean and healthy environment. The Court held this to be a fundamental right that it would enforce despite the absence of legislative enactment. The Court has also been innovative by permitting simple letters of complaint sent to it to be treated as writ petitions upon which relief can be granted.



Bangkok scene

Justice Bhagwati describes this as the creation of an epistolary jurisdiction which goes some way to assisting the poor to have recourse to justice without legal representation.

Judge Wilcox may have been swayed not only by the oratory and creativity of Justice Bhagwati but also by the presentation by Terri Mottershead, a lecturer in law at the University of Hong Kong of her paper entitled "Common Law Liability for Environmental Damage, the developing law". This was a comprehensive paper which covered in some detail the problems with the Common Law in this area of developing law. Mottershead commented that the Common Law had lacked flexibility primarily because Courts have declined to "create" laws preferring to leave that role to the legislature to retain the strict separation of powers. However, she is of the view that the Common Law has been the most innovative, and rightly so, where the Judges have recognised that decisions can be made on the grounds of public policy, decisions which are justified on the basis that they reflect the community's requirements.

> Flexibility of Common Law, the ability to accept and make decisions in rapidly changing environmental conditions, will be lost where decisions are not made on policy grounds. What is suggested is not irresponsibility, but careful, informed but realistic judgments, since judgments may be crucial now and cannot wait for legislative invention or reform.

In similar vein Kevin Lindgren, a Sydney barrister discussed the need for "public policy" decisions in the realm of the enforcement of contracts relating to pollution and environmentally harmful products and processes. In his paper, after

discussing the authorities and analysing numerous hypothetical examples, he concluded that the Courts have shown a reluctance to hold contracts unenforceable merely on the ground that performance has involved illegality or on the public interest principle that a person should not profit from his or her own wrongdoing. Should the Courts continue to demonstrate judicial reserve in this area then the legislature, he contended, must be asked to address the question. Perhaps this submission also instigated Mr Justice Wilcox's call for a judicial conference.

Finally, Mr Justice Wilcox may have had in mind the challenge delivered by Mr Brian Preston to extend the law of negligence to protect the planet. (See "A new philosophy – an ecocentric ethic" below)

8 The fight for *locus standi*

An area which is of crucial importance to the development of public interest and environmental law and one which needs to be addressed by Judges throughout the world where the legislature has not intervened, is that of *locus standi.* Terri Mottershead, in her paper, set out the rules of *locus standi* which serve to restrict the ambit of the type of plaintiff, recorded the findings of the Australian Law Reform Commission on the subject and applauded the New South Wales Environmental Planning and Assessment Act 1979 and the Heritage Act 1977 which adopted "any person" standing provisions.

Gurdial Singh Nijar also emphasised the importance of this area of law in the Malaysian context. In *Government of Malaysia v Lim Kit Siang* (1988) 2 MLJ 12 the majority of the Court restricted the standing to sue in public law litigation to those with a genuine private interest to be furthered and protected. He explained that the lack of standing to sue and, therefore, the inability to have access to justice, has very serious repercussions in a Third World context as the litigants most affected by development or administrative or governmental inquiries are usually the urban and rural poor.

It has to be acknowledged that India has led the way in relaxing the *locus standi* rules in the Third World. The Indian Supreme Court in *Fertilizer Corporation Kangkar Union v Union of India* AIR 1981 SC 344, 353, recognising a notable lack of restraints upon the exercise of state power in public enterprise activities relaxed the *locus standi* rules to redress the balance. Similarly, in *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473 the Indian Supreme Court allowed the plaintiff, a voluntary group, to advance the interest of workmen whose rights were being violated. Bhagwati J said:

> . . . having regard to the peculiar socio-economic conditions prevailing in the country where there is considerable poverty, illiteracy and ignorance obstructing and impeding accessibility to the judicial process, it would result in closing doors of justice to the poor and deprived sections of the community if the traditional rules of standing . . . were to be blindly adhered to and it is, therefore, necessary to evolve a new strategy by relaxing this traditional rule of standing in order that justice may become easily available to the lowly and the lost.

The Court referred to public interest litigation as intended to

> promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed or unredressed.

Mas Achmed Santosa works with WALHI, the Indonesian Environmental Forum which is a legal public interest group and which has had some considerable success in Indonesia. The landmark case for this group is referred to as the *Indorayon* case and it related to the presence of a pulp and viscose rayon factory in North Sumatra. The factory required a certain type of tree as raw material for its process and a grant of 150,000 hectares was made to it by the government. The deforestation of the area was marked and decreased the water levels, adversely affected the rice production and sedimented the river. Further, an artificial lagoon was filled with industrial waste which then burst its banks discharging the pollutant into a river. The noxious smell alone was present forty miles down river and the river turned black. Fishing and farming became impossible throughout the area. The local inhabitants complained to the government and media but to no avail. WALHI then stepped in and filed a lawsuit against the relevant Ministers responsible for the issue of the original licences as well as against the company seeking damages and restoration of the damaged environment. After an eight-month proceeding in 1989 the plaintiffs' case failed but WALHI's standing in the Court was recognised and accepted, although it had no proprietary or economic interest itself – which interests had traditionally been required by the law.

Santosa believes that the development of the law of standing in other countries inspired the Judges to recognise WALHI's standing to sue, but in addition the Court was able to justify its decision on the point on two innovative and praiseworthy articles in the Indonesian Environment Management Act (No 4 of 1982); Article 6 provides that it is the right and obligation of every person to participate in the management of the environment and Article 19 provides that it is the right of environmental Non-Governmental Organisations to perform a supporting role in the management of the environment.

9 A new philosophy — an ecocentric ethic

Reference has already been made to De Silva's paper on the "new development paradigm". However, another fascinating paper was delivered by Brian J Preston, a Sydney barrister, advocating a new philosophy and once again, challenging us to rethink our traditional perspectives.

Preston contended that an anthropocentric ethic views the environment, which necessarily includes wildlife, as existing for the use and enjoyment of humankind. He described the relationship of man towards wildlife through the ages with particular reference to the concept of property. He believes that today wildlife, as in the past,

is still viewed as property capable of being seized and put to the use and/or enjoyment of human beings. Preston submits that this position allowed the development of the international trade in endangered wildlife and wildlife products, which became a problem of such magnitude that the international community sponsored the Convention on International Trade in Endangered Species of World Fauna and Flora (CITES) to which at least 87 nations have become signatories. Laudable though this Convention is, it none the less perpetuates the notion that wildlife is inherently capable of being the subject of trade, ie it accepts that wildlife is an article of trade or commerce or property. Preston suggests that the only way to stamp out such trade is to eradicate the underlying assumption that wildlife is property to be appropriated to the use and benefit of humankind.

Preston advances a new alternative ethic of ecocentrism. This approach defines the environment as a system which includes all living beings, including human beings and the air, water and land which is their habitat and which recognises that all living beings have intrinsic value, ie that they are valuable for their own sake. Preston suggests another way in which we can assist the process of changing society's moral view of wildlife is by altering the legal regime governing humankind's relationship with wildlife eg by imposing duties or responsibilities on human beings in this area. He says that if one accepts the intrinsic value of all living beings and systems, then there is a responsibility or a duty on man not to damage or destroy them. An absolute obligation cannot be maintained as it is irrefutable that life exists by destroying other life, but a practical compromise is possible by imposing a prima facie duty on humankind not to damage or destroy any living being or system, ie by raising a rebuttable presumption. Discussion is then centred on what test should be used to determine whether such a presumption has been rebutted in a particular case. Preston suggests the test should be whether the damage or destruction is necessary or unavoidable and by applying a standard of reasonableness. Such a test would eliminate the wasteful utilisation of resources.

Finally, Preston argues that a positive duty should also be imposed that people must live and act in the service of a habitable planet and/or that people must have a general duty to take reasonable care to avoid acts or omissions which they can reasonably foresee would be likely to injure living beings or systems. Clearly this is an extension of the common law of negligence.

In conclusion, Preston suggests that by keeping in mind these overriding duties on humankind with respect to living things and systems the legislative, executive and judicial branches of government can adapt and apply both statute and common law to implement an ecocentric ethic. He accepts that, at present, an ecocentric ethic is merely an idea but it is worth thinking about if we are serious about our concern for the whole environment.

10 Act globally — but equitably

In his keynote address Justice Bhagwati first spoke of the need for global thinking, co-operation and action and the need for international environmental law because this need reflects the global character of environmental problems today. He adverted to the fact that national environmental laws are necessarily territorial in scope and cannot be applied across transnational boundaries. "Global commons" is the new terminology being applied to space, atmosphere, climate and the seas of the planet. The urgent need is to reach consensus not only on how to ameliorate the growing environmental crises of air, ground and water pollution, acid rain, damage to the ozone shield, the greenhouse effect and the loss of biological diversity and non-renewable resources, but on how to husband the remaining world resources before it is too late.

Justice Bhagwati says that one only has to refer to the recent disasters of Basel, Bhopal and Chernobyl to recognise that new international norms have to be developed for fixing responsibility on the offending polluters and new international mechanisms have to be developed to enforce such responsibility for alleviating the plight of their victims. He drew attention to the weakness of international environmental law at this time especially in its punitive and deterrent aspects and suggested the need for criminalisation to take place in this area. He referred to the Bhopal tragedy which he considers highlights the following weaknesses in the law at the this time.:

(a) The difficulty of securing legal representation for victims to pursue their legal remedies
(b) The lack of legal provision for interim relief for victims
(c) The problem of jurisdiction where an industrial unit is set up as a subsidiary of a multinational corporation which problem could be resolved by extending the doctrine of "piercing the corporate veil" in such cases.
(d) The confusion and problems relating to forum, discovery, choice of law and recognition and enforcement of foreign orders and judgments
(e) The basis of liability being founded in negligence or nuisance demonstrating a need to extend the doctrine of absolute/strict liability.

Justice Bhagwati then continued on to express with some concern what he terms "environmental colonialism": which, he says, seems to be based less on science and more on the political motive of blaming the Third World and absolving major consumers like the USA of responsibility for inequality in the use of the world's resources. He voiced the fear of many developing countries that data recently published by the World Resources Institute (1990) will be used to put brakes on their development by limiting their ability to produce energy or undertake agriculture and livestock projects which allegedly produce carbon dioxide or methane gases:

> Clearly a global environmental discipline is sought to be thrust on the hapless developing countries by the rich nations in the name of global protection of the environment with no effort made to understand Third World perspectives. How can we

> visualise any kind of global management in a world so highly divided between the rich and the poor, the powerful and the powerless, which does not have a basic element of economic equity and justice?

He continued on to say that an equitable and just approach must calculate each country's share of responsibility for the accumulation of the devastating gases and that permissible limits of emission should be set for each nation possibly on a population basis. He further suggested that countries discharging excess gases should be fined and that such fines should form a global climate protection fund. Justice Bhagwati also contended that it is essential that the developed countries which are exporting hazardous products, processes and technologies to the developing countries which have potential for environmental damage or harm should provide the necessary information to the people in the developing countries.

The role of transnational environmental law to protect the environment was also the subject of an informative and extensive paper by Professor James Crawford, Challis Professor of International Law and Dean of the Faculty of Law, University of Sydney. He said that over the past fifteen years there has been a considerable degree of environmental activity at the transnational level in the Asia Pacific region especially the ASEAN Environment Programme, the South Asia Co-operative Environment Programme and the South Pacific Regional Environment Programme. The Professor proceeded to summarise the most important of the regional environmental treaties that have been concluded over the last few years and, although acknowledging that these treaties represent a significant body of regional or subregional law, he is concerned that they contain only "framework provisions" or provisions of a promotional character – a regional "soft law". However, the treaties, together with the activities of the regional environmental organisations are playing an important role in the progressive development of regional customary law.

Transnational environmental law and sustainable development were further examined by Professor Ben Boer of Macquarie University, Australia. He too commented on the spectacular growth in the transnational law relating to the environment and mentioned a figure of 300 multilateral agreements and some 900 bilateral agreements concluded in the environmental area. However, there is now demand for at least three new conventions touching the subjects of biodiversity, a framework for the law of the atmosphere and a convention on sustainable development and environment protection. These conventions are being drafted and will be discussed at the United Nations Conference on the Environment in 1992. In conclusion, there is now unanimity that international law is an important mechanism in the quest for sustainable development.

11 Bangkok — pollution personified?

Bangkok is indeed a bustling, exciting, chaotic city, the street markets and stalls, the succulent fruits, the wonderful tempting aromas wafting on the warm night air, the taste experiences. Some might figuratively describe it as "colourful" – but one certainly would not describe it that way literally – for, sad to say, it is a grey city. From the moment one leaves the airport for the drive into the city one is brought face to face with the reason for that reality – traffic! Traffic jams and air pollution were frequent topics of conversation for delegates and everyone agreed Bangkok was an ideal forum for debating environmental problems! One realised the wisdom of the police wearing face masks whilst directing traffic but for pedestrians, bike or tuktuk passengers – tuktuks being Bangkok's bouncing, rattling, precariously weaving motorised successor to rickshaws – inhalation of exhaust fumes is inevitable and nauseous.

Pollution too has all but destroyed the water of the mighty Chao Phya river and its man made klongs. The water is now harmful to the skin and unable to support aquatic life.

A paper written by Anek Srisanit, the President of the Lawyers Association of Thailand, addressed the reasons why water pollution has occurred and is continuing unabated. In brief, it is yet another example of rhetoric failing to be supported by action. Anek comments that despite private sector awareness of the serious degradation of the waterways, highlighted by a "magic eye" campaign to clean up the river there

Bangkok pollution

. . . With more than 2.3 million cars, trucks and motorcycles on its streets – a count that rises by 1,100 every day – the city [Bangkok] of 5.5 million is strangling on its own economic success. The air is so filthy from exhaust fumes that at some busy intersections the traffic police need oxygen masks, and most others routinely wear surgical masks. Despite such precautions, the city's hospitals say 40 percent of the police force is currently under treatment for respiratory problems. Officials say the typical motorist spends the equivalent of 44 days a year staring at the rear bumper just ahead. Cars crawl through the streets at an average speed of 5 kilometers per hour, when they can move at all. A French diplomat recently left his office at lunchtime for a dentist's appointment. He got back home at 8 p.m. that night. The round trip of roughly 10 kilometers had taken him six hours.

No matter how bad the congestion gets, though, few Thais and even fewer foreigners are willing to get out of their cars and walk. If the weather isn't debilitatingly humid, it's usually pouring rain. Most of the city's sidewalks are narrow and crumbling, and every crosswalk is a game of pedestrian roulette: when Bangkok drivers see their chance to move, nothing stops them.

from *The Bulletin and Newsweek*
1 October 1991

seems to be complacency, if not outright neglect on the part of the Government to tackle the problem urgently.

Anek provided a survey of Thai law on the subject of pollution. He pointed out that the Penal Code does impose criminal liability for polluters but, in practice, prosecutions are so seldom that it is almost as if the law did not exist. Tortious liability under Thailand's Civil and Commercial Code is possible but causation always proves a stumbling block for compensation claimants. Specific enactments were also analysed and served to show that the laws are outdated, their implementation and enforcement almost impossible and the sanctions so grossly inadequate as to be a joke. Anek supports not only the introduction of new legislation but the imposition of a tax on household tap water users and the establishment of a central body to co-ordinate water usage, management and quality.

"Pollution" was, of course, on the agenda and occupied the last day of the Conference. A paper entitled "Future directions in pollution control laws" by John A Taberner, a Sydney solicitor provided a good overview of New South Wales and United States pollution prevention and control legislation as well as advancing propositions for new mechanisms. A further critical overview of Australian environmental offences was made by Mark Brennan and Stephen Garret in their joint paper which served to demonstrate the lamentable lack of uniformity in state legislation and the need for the Australian Federal Government to address the issue. This paper, in line with those of Justice Bhagwati and Anek Srisanit, favoured adopting the Canadian and United States models to impose criminal sanctions to act as deterrents to damaging conduct as financial penalities alone seem inadequate. The United States experience was fully and ably presented by Michelle B Corash, a solicitor in San Francisco. There followed a fascinating discussion on the subject of "toxic torts" with particular reference to extending the tort principle to permit the suing for damages for long term and latent conditions in cases where persons have been exposed to toxic chemicals or radiation but have yet to manifest injuries or illness.

12 Accountancy terms transposed

The Conference was first awakened to this trend by Justice Bhagwati in his keynote address when he referred to Lester Brown's pronouncement that economic deficits may dominate our headlines but "ecological deficits" will dominate our future. Justice Bhagwati amplified and commentated on this statement:

> Accounting systems signal when a country begins to run up an economic deficit but they do not indicate when the sustainable yield threshold of a biological resource such as a forest has been crossed. Ecological deficits, such as loss of tree cover or of topsoil, often go unnoticed until they produce negative economic effects.

Justice Bhagwati then went on to show the inter-dependency between the two by saying that ecological deficits actively diminish the resource base on which the productivity of an economy hinges so that the combination of excessive economic and ecological deficits will affect development and impede progress to prosperity.

Coming to the final session of the Conference, delegates were presented with another new environmental buzz word and one taken from the accountancy world – the environmental audit. In short, an environmental audit is a multidisciplinary project to identify existing and potential liability and reduce the probability of unlawful conduct and consequential loss. It is a process of risk management and risk allocation and is now a necessary procedure for prudent vendors, purchasers and financiers alike, whether in the realm of industrial, commercial, agricultural or even residential land. Property and banking lawyers among the delegates listened attentively to the practical session on the possible liability of financiers in respect of environmental degradation and the need to incorporate in all financial documentation environmental undertakings, covenants, warranties and indemnities on the part of the borrower to provide some level of protection. American case law in point was discussed and it seems that an environmental audit is one way that a company can be deemed to have satisfied the "due diligence" test to avoid contravention of environmental laws.

The problems arising from contaminated land generally were traversed by the presenters of three further papers with particular reference being made to the various options open to the parties involved.

13 Last but not least — New Zealand leads the way

Regrettably, Mr Michael Holm, a barrister from New Zealand (but presently practising in Sydney) was only invited to make a commentary in response to previous papers and accordingly, an in depth analysis of the Resource Management Act was not presented to the Conference. However, perhaps it is early days to do so. None the less, in the brief time available Holm commented on the changes that have taken place over the last ten years and touched on many of the themes of the Conference which I have described in this article to relate them to the New Zealand situation.

First he commented that although the Conference had been discussing the problems of *locus standi*, in New Zealand this had not been a problem and individuals and public interest groups have had access to the Courts in environmental matters. In addition, he pointed out that New Zealand was indeed fortunate in having a liberal Official Information Act which overcame many of the difficulties of secrecy that litigants in other jurisdictions were facing. He expressed the view that Non-Governmental Organisations have had a major impact on environmental law reform and that the Resource Management Act is proof of their influence and input during the three years since its birth.

Holm described the Resource Management Act as a landmark of environmental law in Western legal jurisdictions and a model for other countries to emulate. He explained the Act's integrated approach and summarised its major novel attributes and concepts. He drew attention to the fact that the Act accepts the intrinsic value of resources and has adopted as part of the substantive domestic law of the country the philosophy of the "sustainable use of resources".

continued on p 369

The "affirmative" negative pledge

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

This article follows on from the one published at [1991] NZLJ 312 by Mr Stone. In this article he looks at the situation that arises where a debtor gives a charge over property to a third party in priority to the negative pledge lender. It looks at the action taken by the lender to protect himself, herself or itself on the basis that in the event of any such charge being given in breach of the agreement then the debtor will be deemed to have been given a prior charge to the negative pledge lender. This is what is meant by an affirmative negative pledge clause. It is concluded that while there might be some technical benefits in restricted cases the third party charge is unlikely to be voidable where it has been given for valuable consideration.

A number of attempts have been made by negative pledge lenders to guard against losing their priority to third parties who have received charges in breach of the negative pledge. These attempts involve a provision in the negative pledge deed that either no charge may be given by the debtor unless a prior charge is given to the negative pledge lender, or that on granting a charge in breach of the pledge clause, the debtor will be deemed to have given a prior charge to the negative pledge lender. Such clauses will be referred to hereinafter as affirmative negative pledge clauses. In this article the writer will discuss the principal issues arising from use of such clauses.

1 Is an agreement to give a security effective?

The negative pledge lender who chooses to use an affirmative charging clause aims to remain unsecured until the debtor breaches its clause, but at the time of the breach, wishes to become secured *in scintilla temporis* before the third party chargee. The problem arises as to how to construct an instrument which does not purport to give a charge until a contingency but (the breach of the negative pledge clause), on the happening of the contingency immediately grants a charge to the lender.

Goode, (*Legal Problems in Credit & Security* at p 20) states that in his opinion

> An agreement for automatic attachment of a security interest to an asset upon the debtor subsequently charging this to a third party gives the first creditor nothing at all beyond a mere contractual right.

The learned writer explains that at the time of the agreement, the right, unlike a security interest in future property of the type in *Holroyd v Marshall* (1862) 10 HL Cas 191, does not amount to an "inchoate security" capable of retrospective attachment at some time in the future.

Further, and more important to the issue at hand, Goode submits that the provision for automatic attachment does not have the effect of granting a security interest at the time of the contingency as it "lacks the essential requirement for value". (supra, p 20.) Because the loan moneys are advanced at the time of the agreement, they represent "no more than an advance by an unsecured creditor". (supra, p 21.) No consideration is given at the time or after the security comes into existence.

Goode justifies this argument by pointing out that because an agreement to give a security on a contingency is a mere contract (a point which is not disputed), in order for a security to arise at the time of the contingency, specific performance must become available! But specific performance will only be ordered if consideration is executed. Unless a fresh advance is made at the time of the contingency, no security will attach as specific performance would not have been ordered. The provision will thus be ineffective in aiding the negative pledge lender. (Goode, supra, at p 36.)

Gabriel (*Legal Aspects of Syndicated Loans*, Vol II, (1986), at pp 85-90) expressly disagrees with Goode. He initially discusses the application of the equitable maxim that "equity treats as done what ought to be done" saying that, while the doctrine prima facie causes an agreement to give an interest in property to confer an immediate equitable proprietary interest, such an interest is only granted in favour of one who has "a right to pray that the thing should be done". In other words, the doctrine will not turn the conditional into the absolute, the optional into the obligatory, or make for parties contracts different from those they have made for themselves". (See *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52, 65.) Gabriel further submits that value to support the charge which is deemed to arise on a breach of an affirmative negative pledge is provided by the loan. He states that all that is required for a charge is a mutual intention that the lender have a present right to have certain property made available for payment of the debt, "even though the present

legal right which is contemplated can only be enforced at some future date . . .". (Gabriel at pp 86, 87 citing Atkin LJ in *National Provincial and Union Bank of England v Charnely* [1924] 1 KB 431, 449-450.) The breach of the negative pledge clause turns the contingent right into a present right. The present right will either be an unconditional agreement to grant a similar security which would be specifically enforceable and effective to confer an equitable interest in the property, or an actual grant of a similar security.

It is submitted that Gabriel's view is correct.[2] The case of the affirmative negative pledge does not involve a mere contract of loan and a later decision to give the security. (See *Wigans v English & Scottish Law Life Assurance Association* [1909] 1 Ch 291.) In such cases the antecedent debt does not constitute sufficient consideration for the subsequent security as the security was not at all contemplated at the time value passed. However the cases which immediately confer a present right to a security are also not relevant. The affirmative negative pledge falls somewhere in the middle. As Gabriel states, the loan agreement, for which consideration is provided, contains a number of conditions. One of those conditions is a condition precedent to the giving of the security, that is the breach of the negative pledge clause. But the consideration by way of the loan advanced bargained for all these eventualities. If a breach occurred, the loan would be accelerated; if the London Inter-bank Offered Rate increased so would the interest rate on the loan; or if a charge was given, the lender would immediately gain a present right to a charge. Unlike Goode, Gabriel takes account of the fact that the value given by way of the loan advance is no less consideration for the charge contemplated to arise on a breach than it is for the right to accelerate the loan which is also contemplated to arise only on a breach. And as Gabriel points out, *In Re Jackson & Bassford* [1906] 2 CH 467 and *In Re Gregory Love* [1916] 1 Ch 203 cited by Goode to support his view, can both be explained on this basis.

In Re Jackson & Bassford [1906] 2 CH 467 is a case concerning a fraudulent preference and is not directly on point. Nevertheless Buckley J did recognise that in the absence of the fraudulent preference, the promise by the company to give the guarantor a charge when demanded would have been enforceable. He stated (supra at 479)

> It seems to me that in the present case the promise — which was certainly made and I agree, for value — was a promise to which effect could not legally be given by calling for performance at a time, when in the absence of the promise, the security would have been a fraudulent preference.

This dictum seems to suggest that if the security had not been a fraudulent preference, effect could legally be given to the promise. Gabriel notes (at p 88) this authority would therefore be "contrary to the view of Professor Goode."

In Re Gregory Love, Francis v Gregory Love & Co [1916] 1 Ch 203, 211, a case that also appears to support Gabriel's view, Sargant J commented on an agreement that gave a right to call for a charge on two contingencies, saying:

> The agreement contains no present charge, but merely a right to the plaintiff's testator to have a charge of a certain kind on the occurrence of either of two events. And an enforcement of the agreement would result in the plaintiff getting a floating charge — not as at the date of the agreement, but as at the date when the first of the two events happened . . .[3]

Another writer[4] has criticised Goode's conclusions on the basis of *Williams v Burlington Investments* (1977) 121 SJ 424 (HL), where a promise to give a legal charge on demand to vendors of land was made in the sale agreement. The writer states that "as the *Burlington* case demonstrates, attachment may occur if the security promised is in fact delivered and that such security will rank in priority in circumstances where the subsequent chargee had notice of the contractual obligation".

It is submitted that *Williams v Burlington* (1977) 121 SJ 424 (HL), must be read in light of the statutory regime existing at the time. The facts of the case stated that although the sale agreement had been registered under the Land Charges Act 1925 (UK), the purchasers had given a legal charge to their financiers which had been registered under the Companies Act 1948 (UK) before the vendor called for his legal charge. The House of Lords held that the vendor's charge had priority. But Lord Russell of Killowen recognised that the sale contract did not even constitute an equitable charge which would have required registration under the Companies Act 1948, let alone a legal charge. He said (at 424)

> It [the sale agreement] was not so expressed as to create a present equitable right to a security; it was merely an agreement that in some future circumstances a security should in future be created . . . When the financiers acquired their legal charge, they did so subject to the landowner's right to call in due course for a legal charge by reason of the registration of the 1971 contract under the Land Charges Act 1975, of which indeed they had actual notice.

It would therefore appear that the reason for the decision was their Lordship's view that under the Land Charges Act 1925 priority dates from the time of the contract, whether or not this time coincides with the time of the charge.

A further argument was put to the Court that when the legal charge was demanded, an equitable charge arose that was void for non-registration under the Companies Act 1948. Lord Russell rejected this submission saying that

> When [the vendor's] legal charge was executed it was not because such an equitable charge compelled it but because the . . . contract required it. (at 424)

Gabriel notes (at 289) however that, had the priority not been determined by statute, then it may have been the case that the legal charge could only be compelled by a request for a charge whereupon an equitable charge would have come into existence and been void for non-registration under the Companies Act. The current writer further notes that even if this is not

the case, in the absence of such a statutory regime for priorities, priority in such cases will be determined not at the time of the contract, but at the time of the charge. However with regard to the issue of consideration, it is submitted that clearly an agreement to give a security on breach of a negative pledge clause will be effective to confer a security not at the date of the agreement, but on the happening of the contingency.

2 The American cases

While the use of affirmative negative pledge deeds appears to be very limited in England (Goode, p 22), a number of American cases have emerged which have used the device in relation to corporate debentures. Unlike in the Commonwealth, where the word "debenture" (literally, "a written acknowledgment of a debt") usually refers to a debenture containing a fixed or floating charge, in other words a secured loan agreement, the term has been used in America to denote unsecured loan arrangements which contain restrictive clauses, that is a negative pledge with a provision for security to be given on a breach.

The first type of case involves clauses which provide for automatic attachment of a security interest in favour of a lender if a security interest is given to a third party. In *Connecticut Co v New York, New Haven & Hartford Railroad* 94 Conn 13; 107 Atl 646 (1919) the Court, far from holding that a charge arose on a breach of the agreement, held that even when no breach had occurred, the agreement gave rise to a present equitable interest by way of an equitable lien. (ie, a charge.) The case involved the transfer of the covenantor's property to its subsidiaries in exchange for shares. The subsidiaries thereupon mortgaged the property claiming they were free to do so as they were not bound by the covenants. (G Gilmore, *Security Interests in Personal Property*, Vol II, (1965) at p 1102, fn 5 notes that "the device . . . became a standard method of evading a restrictive covenant.") As Gilmore states (at p 1002):

> The *New Haven* litigation may have made affirmative covenants . . . seem a little too much like the real thing.

And the decision was criticised in a note in the *Harvard Law Review* where it was recognised that "an equitable lien like the equitable ownership of land in land contracts is considered a consequence of the right of specific performance." (1919-20) 33 *Harv Law Rev* 456.) The note writer went on to say that "until the performance of this condition precedent, the specification by mortgage of the property, the bondholder is not entitled to specific performance" and thus "it would be impossible to say what property was subject to a lien". But Jacob ((1938) 52 *Harv Law* 77) criticises this view saying that the proposition that there can be no equitable property interest unless it rests upon a present right to specific performance "is not true". Jacobs goes on to say (supra at 98, 99) that while the lenders did not contemplate present security, they did contemplate security on property and not just on the success or failure of a business venture (ie the shares in the subsidiaries). Because this intention can only be effected by preserving the lien after the transfer, the decision was correct. The Court was correct to treat the covenantor's acts as outside the ordinary business of the company and so impose a lien.

While it is submitted that Jacob is correct in his claim that equitable proprietary interests can exist without a right to specific performance,[5] his view of the *New Haven* decision, just as the decision itself, is only justifiable on policy grounds. Certainly, if the restrictive clause contained restraints on acting outside the ordinary course of business, the clause may have been effective in conferring a charge on the lender, though this itself is by no means clear.[6] But this clause did not contain such a restriction (it clearly only extended to mortgages) and at any rate, the Court decided that the "equitable lien" existed at the time the debentures were issued and not merely at the time of the transfer of the property to the subsidiary. It is unlikely that the case will be followed in Commonwealth jurisdictions.

In *Chase National Bank v Sweezy* 281 NY Supp 287 (Superior Court 1931), an issue of debentures contained a negative pledge clause which stated that the issuer could not pledge any property unless the debentures were equally and rateably secured. The Seaboard Bank, which also happened to be trustee for the debenture-holders, made extensive loans to the issuer taking in return large blocks of security and guarantees. The plaintiffs were the guarantors who having repaid the loan were subrogated to the rights of the Seaboard Bank.

Rejecting counsel's argument that the debenture-holders had only a damages action derived from their purely personal covenant, Judge Callahan held (at 491) that

> . . . the debenture-holders could have secured injunctive relief against the proposed violation of the covenants by the company [and that] . . . the fact that the contingency [had] already occurred should not defeat their rights.

Gilmore notes that despite some ambiguity, the decision was based on the Court's interpretation of the restrictive clause and the fact that both the Seaboard and Chase Banks had knowledge of the breach, rather than on the Seaboard Bank's conflict of interest through being both trustee for the debenture-holders and chargee.

In *Kaplin v Chase National Bank* 281 NY Supp 825 (Superior Court 1934), the covenants provided for equal and rateable security on a breach, but excepted pledges to secure notes for securities for not more than one year. Once again, the trustee for the debenture-holders was the chargee (once again, this was the Chase National Bank) but the company rolled over the notes (ie, substituted old notes for new ones) before the year ended and so despite the loan remaining outstanding, were prima facie within the exception.

However, Justice Steur held that "the intent . . . was . . . to avoid the provisions of the indenture . . . by stamping the notes paid and indulging in the other mummeries of banking practise" and that neither "financial prestidigitation" nor "the ingenuity of counsel" would suffice to get the bank out of the covenant and into the exception. (Gilmore at p 1004.)

The debenture-holders were given the right to share rateably in the

security with the pledgee.

It is submitted that while the Court was prepared to forgive the poor legal drafting engaged in by the debenture-holders (or presumably the lawyers for the trustee who was Chase National Bank) other Courts may be slow to do so. As will be discussed below, one of the greatest problems in using affirmative negative pledges is the lack of certainty of intention able to be evinced from the instruments.

In *Kelly v Central Hanover Bank & Trust Company* 11 F Supp 497 (SDNY-1935) the debentures contained an affirmative negative pledge clause with exceptions for pledges and mortgages to secure loans contracted in the usual course of business for periods of not more than one year, and for purchase-money securities ["the negative pledge clause"]. Additionally, the issuer was not to incur indebtedness if it would cause total indebtedness to exceed 50% of total assets ("the 50% clause"). A number of pledges were given to the defendant banks and subsequently a debentureholder brought an action.

Judge Mack, in the District Court of New York, held that the negative pledge clause had not been breached as the pledge fell within the exception. As to the 50% clause, the learned Judge stated (at 506, 507)

> Even assuming a violation of this covenant and full knowledge thereof on the part of the defendant, I can find no ground upon which either plaintiff or cross-plaintiff [the trustee in bankruptcy] is entitled to recover.

He went on to discuss "four nominally separate" theories of liability namely equitable liens, equitable servitudes, constructive trusts and equitable rights of reparation. As to equitable liens (charges), the Judge noted that no case has held that a negative covenant has created such a lien, stating that the *New Haven case* (94 Conn 13; 107 Atl 646 (1919)) applies, "if at all, only to the negative pledge covenant" and not to the 50% clause. Equitable servitudes were also inapplicable. The Judge stated (11 F Supp 497, 508) that

> While the scope of this equitable doctrine remains as yet undefined, it is clear that the vast gap between the situation presented in *Tulk v Moxhay* (1848) 41 ER 1143 and that presented in this case at Bar has not yet been abridged, if indeed it ever will be.

Furthermore, there is no dominant tenement here to which the benefit of the servitude may attach and while the Judge noted that a "limited class of cases" have recognised equitable servitudes on chattels,[7] none of these had concerned negotiable instruments or stock certificates as were involved here.

Trust theories were irrelevant as there was "no res to which a trust might have attached" (11 F Supp 497, 509) nor any trustee. And since the common law remedy of damages was adequate at the time of the original loans because the company was "abundantly solvent," (supra at 510) no intervention by way of an equitable right of reparation could be made.

It is submitted that Judge Mack decided this case correctly, although his reasoning was in part incorrect. The fact that at the time the 50% clause was given, the remedy at law as adequate for a breach of the clause is only relevant if the Court is seeking to impose equitable proprietary remedies as remedial devices to alter the rights of the parties and achieve the result that it thinks is fair. But the result Judge Mack arrived at could have been reasoned on the much sounder basis that there was simply no intention by the other party to give the debentureholder an equitable proprietary interest at the time of the loan. Furthermore, even if there was an intention to give such an interest on breach of the negative pledge clause (this writer submits that there probably was) the 50% clause was a separate covenant, quite independent of the express promise to "equally and rateably" secure the debenture-holders on breach of the negative pledge clause. Thus a breach of the 50% clause would not have the effect of securing the plaintiffs.

But the "implied disapproval" (Gilmore at p 1006) of *New Haven* by Judge Mack was admirable and timely for the US Courts, that case obviously having been decided on broad ideas of fairness and justice rather than traditional equitable principles.

Unfortunately however, the Second Circuit Court reversed Judge Mack's decision on appeal. (85 F 2d 61 (2nd Circuit Court 1936)). In a brief judgment, the Court directed the lower Court to

> . . . pass upon the questions presented (a) whether the loans were made in the ordinary course of business and (b) whether the banks had knowledge of the restrictive covenants (at 63).

Clearly the Court disapproved of Judge Mack's decision and, as Gilmore notes, the Judge "was then pursued by the law reviews. (Gilmore at p 1007, see for example: (1936) 36 *Col Law Rev* 319 but cf 49 *Harv Law Rev* 620.)

However, it is submitted that the Second Circuit Court's decision provides little solace for negative pledge lenders in the Commonwealth. Commonwealth Courts are likely to read affirmative negative pledge covenants in a way that traditional principles demand. Although it may be possible to provide for a charge to vest on breach of the covenant, where the covenant is not breached, or a totally independent promise not governed by the promise to charge is breached (as in *Kelly v Central Hanover Bank & Trust Company* 11 F Supp 497) the agreement will have merely personal effect.

3 The problem of certainty

A number of problems exist in drafting a clause under which the lender becomes secured on breach of the negative pledge. The draftsperson must ensure that the document does not confer an immediate charge on the lender, but is effective to confer a charge at the time of the breach. This involves a sufficient consideration of identifiability of the assets to be subject to the charge. Goode (at p 20) submits that without an act of appropriation by the debtor after the contingency has occurred, the agreement will be ineffective to create a charge, though if the agreement provides for a prior, or even an equal and rateable security on the same asset(s) charged in breach of the clause, this problem

would seem to be avoided. Even so, it would appear that if the lender specifies in a schedule to the agreement a list of fixed assets on which the charge is to attach, the problem of identifiability would disappear. (See for example, *Williams v Burlington Investments* (1977) 121 SJ 44.) Furthermore, this writer submits that there should be no reason why the agreement could not be effective in appropriating the assets to the charge. Where the agreement provides that upon the contingency, a floating charge is deemed to attach to all stock-in-trade and book debts owned by the debtor at the time, and the terms of the floating charge are clearly set out in the original agreement, there would appear to be no objections on the grounds of identifiability. All floating charges over circulating assets provide for identifiability in a similar way in determining the assets attached on crystallisation. The only difference is that in the case of a floating charge, a security interest arises on the execution of the agreement and before crystallisation rather than on the happening of a contingency.

It is submitted that it is irrelevant whether, on the happening of the contingency, the charging provision provides for an agreement to give a charge or a deemed giving of a charge to come into effect. Because equity treats as done what ought to be done, the specifically enforceable right to have a charge given (in the former case) which arises on the happening of the contingency is itself effective to create a charge in equity. (P Gabriel, *Legal Aspects of Syndicated Loans* 1986, p 87.)

But Gabriel argues (supra, at p 90) that where the clause provides that the borrower shall not create a security in favour of a third party *unless* the benefit of such security is extended equally and rateably to the lender, the giving of the security to the third party is not a precondition to the grant of the security to the lender and so a breach merely gives rise to a personal right of damages against the borrower. He submits that the clause does not have the effect of causing a promise to grant a security (which would be specifically enforceable and so constitute a charge) to come to life.

It is submitted that this is correct. If the borrower goes ahead and breaches the clause by granting a security, he has merely breached his contractual promise to secure the lender equally and rateably. In order to avoid this problem, the clause should be worded so as to deem an agreement to give a security, or a security itself to come to life *in scintilla temporis* before the breach.

The final problem with regard to certainty is that at first reading, it is difficult to see how a charge could rank in priority or even equally with a charge given in breach of the deed as it must by definition only come into existence *after* the contingency (the giving of the first charge) has happened. The equitable rule that priority is determined by time would prevail.

However it is submitted that this problem will be handled by the Courts in the same way as they handle automatic crystallisation clauses contained in floating charge debentures. The negative pledge lender's charge will be deemed to come into existence *in scintilla temporis* before the breach of the negative pledge deed. (See *In Re Manurewa Transport* [1971] NZLR 909.)

4 Registration

In New Zealand, the Companies Act 1955 stipulates that certain types of charges given by companies are void as against the liquidator and other creditors[8] unless they are registered at the Office of the Registrar of Companies within 30 days of execution. While it is submitted that affirmative negative pledge deeds will not be registrable under this Act as they do not create a charge until a breach occurs, once a breach occurs, registration would probably be required if the charge was of a type within s 102(2) of the Act, as at that time, the negative pledge deed would amount to an "instrument by which the charge is created or evidenced" and so be within s 102(1) of the Act.

In practice, this fact creates an almost insurmountable barrier to the use of affirmative negative pledge clauses. The fact that the original agreement cannot be registered means that the third party chargee is unlikely to have notice of the agreement and so will be unaffected by it.[9] Furthermore, the negative pledge lender is unlikely to know if the negative pledge deed has been breached and by the time he finds out, the 30 day registration period may be over and so his charge will be void.

Possible solutions to this problem include providing for a deemed transfer of certain assets, or a common law lien to come into existence over assets owned by the borrower but held by the negative pledge lender, as these are not registrable as "charges" under the Companies Act 1955. Further, the lender could closely monitor the borrower's file at the Office of the Registrar of Companies to see if he has given any charges though admittedly, this is impractical;[10] time-consuming and could be defeated by a prudent creditor who delays registration of his charge until the 29th day of the registration period.

Interestingly, while s 395 of the Companies Act 1985 (UK) has a similar effect on this type of negative pledge deed, s 5(1) of the Australian Companies Code defines a charge as including ". . . an agreement to give or execute a charge or mortgage whether on demand or otherwise" and so presumably would allow registration of affirmative negative pledges on execution of the agreements. Thus in that jurisdiction, the registration problem would not arise. Furthermore, registration would operate as statutory constructive notice to all the world.

It is submitted that given the Law Commission's recommendation that the law in relation to company charges be incorporated in a comprehensive Personal Property Securities Act, it is timely for New Zealand law to be changed to include within the definition of "charge", an agreement to give or execute a charge. This would provide greater protection to a negative pledge lender who chose to guard against its debtor's breach of the pledge clause by the use of automatic charging provisions.

The deed would contain a conditional agreement to give a charge and so would be registrable when executed. Charges subsequently executed by the debtor which were within an allowable percentage of secured debt[11] (ie if the debtor gave a charge beyond the allowable percentage of secured debt). The lender, however, would gain priority over any third party

who took a charge from the debtor in breach of the pledge deed, as a charge would automatically attach in favour of the lender *in scintilla temporis* before the breach.

5 Voidable preferences and securities

Because it is unlikely that a borrower under a negative pledge would need to breach the deed when solvent, most charges deemed to be created under such deeds would be created near insolvency. While s 309 of the Companies Act 1955 will not apply as the charge would not have been given with a view to prefer the negative pledge lender, s 311 is likely to apply to make the charge voidable if the breach occurs within one year of winding up and the debtor is insolvent at the time of the breach. However the fact that s 311 only applies to securities "executed or given by the company" within one year of insolvency may save the negative pledge lender from despair. It is arguable that if the negative pledge deed was drawn up two years before winding up and the breach occurred, say, ten months before winding up, the charge would neither be "executed" nor "given" within the required time period, but merely come into existence or be "deemed to be given" at that time. However it is submitted that "given" would include "deemed to be given" and so catch the negative pledge lender, as otherwise all creditors who provide for charges to be deemed to be created whenever certain financial ratios are breached, would escape this section of the Act. This would go against the pari passu policy behind the insolvency code.

Unfortunately for the negative pledge lender, the third party creditor's charge is unlikely to be avoidable under s 311 of the Act as it will invariably have been given for valuable consideration. Section 311(3) exempts such securities from the clawback provision in s 311(1). However s 309 may make the third party creditor's charge voidable if it was given by the debtor within two years of insolvency and with a view to preferring that creditor over other creditors. □

---

1 Goode at p 34 exempts the case of what he calls an "inchoate security," where a security given over future property is nevertheless a "present security" at the time of the agreement – see *Holroyd v Marshall* (1862) 10 HL Cas 191,220. Priority is determined at the date of the agreement.

2 Watts, [1989] *Lloyd's Maritime & Commercial Law Quarterly* at p 9, also appears to favour this view.

3 The case actually decided that the floating charge was void because of the voluntary winding up of the company in the same month as the debenture was given. See [1916] 1 Ch 203, 210.

4 See Stumbles, *The Legal Problems of Secured Financing*, Seminar Paper on Negative Pledges and Subordination, IBC Conference (1987 – Sydney, Australia) at p 9.

5 Clearly a floating charge over an asset is considered a presently existing security even although specific performance of the charge will not be ordered until a contingency occurs to crystallise the charge. Similarly a trust, by definition, confers an equitable proprietary interest in the trust property on the beneficiary, despite there being no legally binding contract of which specific performance can be ordered.

6 Jacob at p 99 cites *In Re Borax* [1901] Ch 326, but that case decided that transactions must be "quite extraordinary" to be outside the ordinary course of business. This tends to suggest that all intra vires transactions will be within the ordinary course of business. However in *Julius Harper v SW Hagedorn* (1990) 13 TCL 45/10, the Court of Appeal overturned the High Court's finding that the sale of a company's main asset was unusual but not outside the ordinary course of business (see [1989] 2 NZLR 471). Given the uncertainty surrounding this point, it would appear that use of a clause restricting all acts "outside the ordinary course of ordinary business" (as in *Fire Nymph Products v The Heating Centre* (1988) 14 ACLR 274) is the safest way to prevent transfers of the entire undertaking of the company.

7 See the principle in *De Mattos v Gibson* (1858) 45 ER 108.

8 This right has been held to only accrue to secured creditors. See *In Re Ehrmann Bros* [1906] 2 Ch 697.

9 Statutory constructive notice of a mere contractual covenant would be ineffective to defeat the third party's rights anyway under traditional rules of priority and also under the tort of inducing breach of contract, which requires actual notice. But cf: *Elders Pastoral v Bank of New Zealand* [1989] 2 NZLR 180 (CA).

10 Due to long delays in registration procedures at the Office of the Registrar of Companies.

11 This percentage would be set out in the negative pledge deed.

12 The object of giving the charge would have been quite the opposite.

---

continued from p 363

Holm also remarked that it is easier for New Zealand politicians – or for any politicians, to talk about global warming and holes in the ozone layer than tackle environmental issues closer to home! He reiterated that public interest lawyers in Asia have a long and difficult road ahead and are deserving of support of all practising lawyers. He believes that large healthy law firms are necessary to keep public interest work alive. Finally he said that he did not agree with United States lawyer, John Bonine's comments that corporate clients are the root of all evil in the environmental context as companies in New Zealand are, in his experience, willing to take advice in this area and act responsibly. Rather, he considered that it is the small operators who are proving irresponsible and who slip through the net and escape control and regulation and it is this area which needs action.

14 Conclusion

Pessimism is a natural attribute when considering the environment. However, lawyers and others must recall that there have been changes in political structures in the past two years that would have been unbelievable and not dreamed of a few years ago. The Bangkok Conference was about change. The health of future generations and the environment depends on the capacity and willingness of the world to encourage change in the environmental sphere.

When describing the Reclining Buddha in Bangkok's Wat Po – this being an enormous Buddha covered in gold leaf lying majestically on its side, it is said that the position shows he has abandoned the materialistic way of life to reach enlightenment. The Bangkok Conference exhorted lawyers not necessarily to abandon the materialistic way of life but at least to temper it and challenged them to reach enlightenment about the need to conserve the world's environment and to utilise our skills in a pro bono way to that end. The Conference represented a positive step towards that enlightenment. □

Trick or Treaty

By Pita Rikys, Lecturer in Law, Auckland Institute of Technology, and Chairman of the Legislation Committee of the New Zealand Maori Council

This is a response to the article by Mr Guy Chapman [1991] NZLJ 228. The article takes a different approach to the response published last month from Dr Paul McHugh at [1991] NZLJ 316. It is Mr Rikys' contention that Mr Chapman is wrong in his approach and that the New Zealand inheritance of English law is valid only to the extent it is not inconsistent with indigenous conditions. Secondly he claims that it is contrary to the most primitive concepts of fairness and justice if rules preserved in the nation's founding document are not automatically justiciable in the Courts.

Mr Rikys is reported as one of those whose interpretation of the Treaty requires all New Zealanders, who themselves or their ancestors arrived here after 1847, to apply now to Maori authorities for permission to stay in New Zealand as they are aliens.

The article on the Treaty of Waitangi in the July *Law Journal* [1991] NZLJ 228, replete as it is with dogmatic statement and position-taking deserves a response and elucidation from a different perspective. What follows therefore is from the perspective of a Maori, with some knowledge of the jurisprudential and constitutional contexts of the debate.

It is clear from the article's opening paragraphs that Chapman sets himself up as defender of the (white) democratic majority's right to rule. The idea of that right being qualified in any way, eg by Treaty obligations . . . is clearly anathema to him, but in taking that stance he fails to explain why such constraints *must* necessarily be contrary to those interests. In reality there are a number of arguments based on concepts of fairness, equity, justice and the need for culturally balanced decision making, that bring us to a contrary conclusion.

The real imperatives glaring out from between the lines, are economic ones, protection of the economic power-base of the same majority. Even in the economic context there are arguments in favour of re-distributing the economic resources of our society (fisheries are only one example) to enable Maori to contribute more effectively, *in the interests of the whole.* The fact that we deal with historical injustices at the same time is really a bonus. Finding ways of reducing the negative costs in our economy and society (eg the cost of a prison system) and making more efficient and effective use of our resources – particularly our human resources, is a highest priority. The Treaty debate when viewed from a balanced, informed and unemotional perspective has a major role and contribution to make in these areas.

The opening paragraph states that Parliament is "highly accountable" – a statement I suspect most thinking New Zealanders would take issue with. Certainly, Governments are accountable at the polls every three years but our recent experiences have shown that in the interim they are prepared to ignore the loudest expressions of public disapproval in the myopic pursuit of (Treasury's) economic goals regardless of social cost. Our "generally effective and honest" system has a long tradition of electing minority Governments and a penchant for abuse of both the functions of the executive and the legislative process itself.

What is abundantly clear is that the democratic system has not been "effective" in protecting the interests of or meeting the needs of the indigenous people. It should also be remembered, lest we conveniently forget, that in first setting the franchise, essentially the same interest group Chapman seeks to protect by discrediting the Treaty, had no qualms about abandoning democracy or later, in manipulating it (eg with the establishment of the four Maori seats) to meet their own ends.

At some stage, even within a whole society, it is in the interests of all, that justice be seen to be done.

The real questions then are, if the system is "highly accountable" – *to whom* is it so accountable. And if the system is "generally effective and honest" *for whom* does it function in such a laudable manner. Certainly not the indigenous people.

Later on the same page in the article (228) the author baldly states . . .

> nor has it ever been generally conceded in our . . . democracy, that one or more groups amongst us should be recognised by all others as having special or antecedent rights or privileges.

Aside from the obvious point that the people of the various Maori First Nations clearly thought so (and still do) at a time when they constituted the majority in the fledgling democracy, the Treaty aimed largely at establishing that very position. Furthermore, the statement appears more than a little inconsistent with the following quotation from (now) Sir Geoffrey Palmer, a notable constitutional lawyer with some experience of government, at [1987] NZLJ 314 –

> as the Royal Commission on the Electoral System said in its report, the Treaty marked the beginning of constitutional Government in New Zealand. Under its terms, the Crown formally recognised the existing rights of the Maori and undertook to protect them. It is in this sense that *Maori people have a special constitutional status* whatever recognition

governments and the legal system may have accorded them at various times in our history (emphasis mine).

The author then attacks the 1990 Commission's treaty promotion as "myth-making". How the cost of it, at $2.3m is relevant, is difficult to grasp. Both the Human Rights Commissioner and Race Relations Conciliator have called for public education programmes on the Treaty, without response from Government. For their part, more and more Maori are becoming aware of the "mushroom syndrome" as a Crown strategy. In addition the more aware and liberal sections of our society have undertaken their own "consciousness raising" although it is worth noting that the vast majority of available material is still based on *tauiwi* perceptions.

Government's reluctance in this respect is curious, given their predilection for opinion-shaping; and this tends to suggest that the answer to "why not" is rhetorical, and self-evident.

To describe the 1990 Commission programme as propaganda (by innuendo) does it a disservice both in terms of quality of content and intent. It seems to me that the intended outcome could not be described as much more than "warm fuzzies". Perhaps at the end of the day that is a sufficient result from roughly 10% of the Commission's total budget.

At this point the author gets into the serious work of attempting to discount and marginalise the Treaty. We are told that such a "modest little document" creating rights 150 years after execution was "unacceptable" and "utterly unworkable". This, in the same manner presumably that the Magna Carta, another modest little document of much earlier vintage, could not possibly create rights.

We are not given any reasons to support these statements beyond the incantations themselves, other than the curious conclusion that to admit otherwise, somehow threatens an espoused ideal of "multi-cultural democracy". The multi-cultural red herring has been so over-used in cultural politics that it has almost become a cliche.

The statements are, to us an often unappreciated word, *purest twaddle*. Implicit within them however are concepts of assimilation which have been intellectually discredited for so long that it is a source of some amazement to see them being reinterred, like some vampire, from the grave. Perhaps someone should pass around the garlic.

Maori prior to 1840 had a long history of treaty making between *First Nations (iwi)*; enforced by the mana of the participants. The Treaty did not create rights; it preserved, guaranteed and protected them, as consideration (in contractual parlance), for the right to colonise. It was signed by the ceding parties almost exclusively in their own language. Subsequent historical evidence makes it very clear that their intention in so doing was unequivocal; namely to facilitate the advantages of controlled settlement and to preserve their *tino rangatiratanga* (very chieftainship) an indivisible part of which was their mana, their *sovereignty*, reiterates and reinforces this point.

When interpretative canons such as contra proferentum are applied, the vagueness and uncertainty debate over the meaning of the text evaporates.

It is equally clear that from the British Crown's perspective there were no options . . . a contract or covenant had to be made with the indigenous people to secure the right to colonise. They could not afford to conquer and from General Cameron's subsequent experiences had they done so, the likelihood was that they would have been thoroughly thrashed.

As an aside, one could argue that from a constitutional viewpoint — as the consideration for the covenant has never been paid, the contract is at least voidable; see Professor F M Brookfield — "The Constitution in 1985: The Search for Legitimacy" (19 September 1985).

Similarly, however much one tries to deny reality by arguing that Maori in 1840 were not in European terms, a sovereign people, "a body politic" — the reality is that they collectively exercised all of the functions implicit within those concepts.

To suggest that Britain initiated the Treaty for humanitarian reasons and because of a sort of political safety-first, while true in part — really misses the point. Even if they had wanted to, they could not "nakedly assert authority" over Aotearoa in 1840, because they couldn't enforce it, if they did. The 2,000 or so settlers clearly existed under the mana of 120,000 — 150,000 *tangata whenua*.

Thus it is such arguments of "asserted" sovereignty as Chapman espouses, based as they are on specious logic — that are the real mythology in this debate.

It is equally clear, from a Maori perspective that the Treaty did not "cede sovereignty" but something significantly different and more qualified in nature — *"Kawanatanga"*.

The Treaty, not "as a vehicle for special pleading", but as a contract between sovereign peoples, is, has been and will continue to be the "focus of deep and growing resentment" until such time as the contract is honoured and the goods paid for.

Moana Jackson writing in the *Listener* 19 November 1988 defines the steps necessary to facilitate payment. He writes that

> many people redefine the Treaty not in terms of rights but of property interests. This realpolitik evades the critical issue: the equitable distribution of property can only be achieved if the rights and status of the participating parties are clearly defined. This is not the case in Treaty negotiations because one party assumes that it can determine the interests of the other.
>
> That stance is consistent with the claim that Maori ceded sovereignty under article one of the English version of the Treaty. The fact that the corresponding article of the Maori version does not say this is ignored. So too are the written and oral traditions which show that Maori did not cede their mana . . . and that *rangatiratanga* ensured the retention of their authority.
>
> These differing perceptions cannot be dismissed . . . or ignored through the unquestioned acceptance of a Pakeha interpretation. They are the basis of unsatisfied grievance and the well-spring of continuing injustice. Until the Treaty debate moves from the present Pakeha parameters the injustice will continue and the harmonious co-

existence envisaged by the Treaty will be unattainable.

Maori find it morbidly amusing that the much vaunted British justice system, based, we are told, on precepts such as equity, fairness, natural justice and Christian morality cannot deliver any of these values in the context of the rights of indigenous people.

Thus the "founding document of our nation" (National Government policy statement 1991) remains a dishonoured and broken covenant which will continue to sour relations between our peoples until such time as the democratic majority via the Crown, can act with honour and integrity.

Attempts to capture and marginalise the Treaty debate from positions of limited and/or monocultural perceptions, confuse and delay the moral and consciousness-raising processes necessary to achieve this objective. Debaters in this category tend to be mean-spirited defenders of vested interest groups, entrenched positions and positions of privilege our society can no longer afford.

What the Treaty offers us in positive terms, is an unfulfilled promise for our nation and *all of its peoples*. A promise of a functionally bi-cultural society. Within that promise are two treasure houses of knowledge. One, our present society acknowledges, promotes, values and nurtures throughout its institutions. The other, is largely ignored or at best paid lip-service to. As a people, we are infinitely poorer as a result.

As to the attempt at legalistic marginalisation some detailed comments are required.

The Treaty may well have been an "inexpertly drawn document" but the bona fides of both parties have never been questioned. An objective study of later events, makes it abundantly clear that the intentions of the ceding party, the Maori, *as expressed in their language in the document they signed*, are crystal clear and remain unwavering to this day. Certainly until at least 1847 (see *R v Symonds*, NZPCC 387) the Treaty was recognised and honoured.

As power shifted to settler governments, so the urgent need arose to put the natives in their rightful place. This need was as much a product of colonisation as anything else and certainly was not unique to Aotearoa.

Thus the pronouncements of Prendergast C J in *Wi Parata v The Bishop of Wellington* in 1877, come as no surprise, emanating as they do from settler need, and the First Nation Peoples of Aotearoa are quickly reduced by judicial process to "primitive barbarians" (p 77 of the judgment). There are parallel statements from other colonies eg *R v Syliboy* (1929) 1 DLR 307, which exemplify the same dichotomy. Compare statements about "savages" and a "handful of Indians" in one, with earlier recognition which can be found in the words of Marshall CJ in *Worcester v Georgia* (1832) 31 US (6 Pet) 350 at 358.

Both Joe Williams and Eddie Durie traverse this ground thoroughly in papers presented to the Indigenous Rights Session of the 1990 Commonwealth Law Conference.

Thus Prendergast's statements about the lack of a body politic to cede sovereignty need to be seen in their context, both judicial and political to be seen as statements of cultural and judicial arrogance, promoted, it has been suggested by more than a degree of class or racial self-interest ascribed to a shift in legal climate in the colony.

Again as a statement of reality it is clear and obvious nonsense. The leaders of the First Nations of Aotearoa had no doubt in their minds as to who exercised mana in their *rohe* (lands and territories).

The evolution of Treaty jurisprudence from 1975 on, and clarification via academic research, suggests that the Prendergast decision should now be regarded as *per incuriam* — see F M Brookfield, *The New Zealand Constitution — Waitangi — Maori & Pakeha perspectives* (1989, Oxford pp 10-11).

The next weapon in the arsenal of the legalistic marginaliser is the incorporation doctrine. Here the author wants to have his legal cake and eat it too by arguing for a diminished Treaty concept "an amateurish document" in one breath and resurrecting it to full Treaty status in the next, so that the incorporation doctrine can be applied to deny it domestic justiciability. Such jurisprudential gymnastics are more than a little transparent.

The incorporation doctrine itself — in essence that a Treaty can have no formal standing at law until incorporated by statute, is the linchpin for majority Treaty control and rule as long as the white majority dominate the legislative process.

There are two major flaws in this argument. The first is that the doctrine is an inviolate part of our constitutional law. But as Dr J B Elkind from the Law Faculty, Auckland University points out on this issue, writing in the *NZ Herald* 23 May 1989, the doctrine, while part of English Constitutional law, is not universal. West Germany is cited as a state that automatically incorporates its treaties into domestic law.

One of the fundamental conditions of our inheritance of English law as reflected in the various English Laws Acts for example, is the adoption of those laws *unless inconsistent with indigenous conditions.*

Automatic incorporation of treaty commitments between First Nations clearly created such an inconsistency and the doctrine should have no application here as a result.

The second flaw reinforces the first. While purporting to have a society, and legal system based on equity, fairness and Christian ethics, how can we countenance a doctrine that rules rights preserved in our nation's founding document are not automatically justiciable in our Courts? This would seem to be contrary to the most primitive concepts of fairness and justice. This leads into question the very value structure of our society.

When the article discusses judicial and Tribunal "myth making" sudden accord is unexpectedly found with the Maori position.

Many Maori see judicial interpretation of the Treaty as unilateral redefinition by an agency of the Crown. Similarly many reject the "principles" concept on the basis that their *tupuna* did not sign principles of the Treaty of Waitangi but rather Te Tiriti-o-Waitangi. Others see the total exercise as little more than damage control by the Crown. Notwithstanding this

continued on p 373

Chapman is wrong

By Joe Williams, an Auckland practitioner

This article is a further reply to the article by Mr Guy Chapman on the Treaty of Waitangi, published at [1991] NZLJ 228. Mr Williams argues that the Treaty conferred rights or benefits on both Maoris and settlers. He argues that the Treaty is not a nullity in legal terms. Furthermore, he says, the honour of the Crown is at issue, and the Treaty is now firmly embedded in our legal system.

Mr Chapman's article ("The Treaty of Waitangi – fertile ground for judicial (and academic) myth-making" [1991] NZLJ 228) is so full of serious errors of law and interpretation that the record must be put straight lest his attempts at myth breaking generate, in publication and repetition, some erroneous myths of their own.

The Treaty and discrimination

Chapman argues that to treat the Treaty seriously is to sanction the (obviously racist in his view) preferment of one group within society over others. That is presumably because (again in his view) all of the benefits under the Treaty accrue to the Maori. That argument is historically and legally incorrect. The British Crown acquired on behalf of its burgeoning and impoverished working and lower middle classes the right to secure land in New Zealand to settle and make a new life. The Treaty of Waitangi was the instrument by which that right was acquired.

The practical benefits which have accrued to Pakeha New Zealanders (immigrants and their descendants) have been immense. They were given access to millions of hectares of land available at ridiculously low cost. They were accorded the opportunity to establish a system of responsible Government among themselves free from the straitjacket of British class chauvinism. Further the Crown was, by securing the right of pre-emption in Article 2 of the Treaty, able to fund early colonisation without undue strain on the Imperial Treasury. It is said that the proof of the pudding is in the eating, and the fact that 85% of New Zealand's population is now non-Maori is ample evidence that the Treaty should be seen by non-Maori New Zealanders as benefiting them directly.

The rights particularly secured to Maori by virtue of the Treaty were rights in property (exclusive possession of lands' forests, fisheries and other properties) and powers of internal Government (*tino rangatiratanga*). These rights did not accrue to Maori because they were Maori. The Treaty guarantees simply recognised the obvious status quo. No one, and least of all Captain Hobson, would have suggested on 6 February 1840 that the Maori did not *in fact* own New Zealand. Nor would anyone have suggested that the tribes were not *in fact* self-governing. Any attempt at the time of the Treaty's signing to take land without purchase or supplant tribal government without consent would have led to war with little doubt as to the victors. Article 2 of the Treaty did no more than recognise the status quo and protect it against non-consensual change.

The Treaty, in other words, did not create any rights, it simply recognised them. It is true that all of those rights were held by Maori but that is only because before pakeha contact all land was owned and all Governmental power exercised by tribes consisting exclusively of Maori. To suggest that the protection of those rights improperly prefers one group within the community over others is about as insightful as arguing that free antenatal care in New Zealand is unfair because men can't get it.

---

continued from p 372

understandable cynicism, others say any forum is better than no forum and any rights, however pusillanimous, better than none. As a result, a very unequal struggle (in resources terms) is joined and fought out in Tribunal and Court.

As the Tribunal's powers are strictly limited and its role primarily recommendatory, the Maori struggle for justice continues to largely fall on the barren and stony ground of democratic fairness and bona fide.

A report from the Commissioner of the Environment on implementation of Tribunal recommendations to 1988 underlines this point.

In terms of access to real justice, when stripped of cosmetic rhetoric, many Maori see the Tribunal as little more that a stream vent, tied to a facility for tribal research and a publicity platform of sorts.

At the end of the day the only path to change, open to Maori, short of armed insurrection, is dependent upon increasing levels of knowledge, awareness, goodwill and understanding from the majority. In acquiring these things the majority should not feel threatened or even insecure, for surely a balanced and fair society is in the *common good.*

As to whether Guy Chapman is right and various eminent Judges, professors, constitutional lawyers and others wrong, is a matter for readers to decide for themselves on both the evidence presented and I hope, further inquiry.

From this Maori's perspective he is clearly "myth-taken".

Kia ora koutou katoa.

□

The Treaty and cession

Whether the Treaty was a treaty of cession is a perennial argument apt to ambush the unaware. The school of thought to which Mr Chapman subscribes would have it that sovereignty in New Zealand was *created* by the British, not *given* by the Maori. The explanation proffered is that the Maori had no governmental institutions capable of exercising it. The proposition is unsustainable. Every society in the world has institutions of government and rules by which the society is ordered. Maori society was no exception. Maori government was, in traditional times, tribally based, small scale, and within its own terms very efficient. What Mr Chapman and his deceased protagonist, Prendergast CJ, really mean is that the Maori did not have government *in the way that the British had Government* – that is a central government with a legislature, executive and judiciary. No one would argue with that, but it is difficult to understand why that should be a basis for saying that the tribes were not, each of them, independent and sovereign. Europe does not yet possess a single structure of government but no one suggests as a result that a multilateral treaty entered into by its constituent states is a nullity. That being so it is ethnocentrism in the extreme to suggest that each of the 539 chiefs who signed the Treaty of Waitangi could not bind his or her tribe to that multilateral international agreement.

The British Parliament (see the Murderers Abroad Act 1817 57 George III Chap 53 preamble), the Colonial Office (Lord Normanby's instructions), the Anglo-American Arbitral Awards Tribunal (*Re William Webster Claim*), the Privy Council (*Hoani Te Heu Heu Tukino v The Aotea District Maori Land Board* [1941] AC 308) and Her Majesty Queen Victoria herself (Treaty of Waitangi) *all* agreed that the chiefs who signed the Treaty had the capacity to do it. It is a little late in the day for Mr Chapman to suggest otherwise. The *Wi Parata* obiter in that regard has not stood the test of time as Chapman suggests. It was wrong even in its own time.

Chapman continues that the Treaty was only one step in a much longer process in which law making power was formally acquired. That must of course be right. It was however the essential step. For there were already people living on the land owning it and governing it (albeit separately and tribally) in accordance with established customs and usages. What possible basis can there be in British Colonial law for the argument that the British Crown could legitimately ignore that reality and proclaim law making power for itself without first acquiring the consent of those already there? The obiter of Chief Justice Marshall eight years prior to the signing of the Treaty of Waitangi, is particularly apposite in this regard:

> The extravagant and absurd idea that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. (*Worcester v Georgia* (1832) 31 US 6 Pet. 315 at 350).

Orthodox acquisition theory has it that sovereignty can be acquired by cession, conquest, or settlement of terra nullius. New Zealand was certainly not terra nullius and the history books reveal no war of conquest between Britain and the inhabitants of New Zealand on or before February 1840. That leaves acquisition by Treaty of cession as the only legitimate basis for acquisition of law making power in New Zealand.

Prendergast CJ in the *Wi Parata* decision cited by Chapman made reference to s 3 of the Native Rights Act 1865 in these terms:

> The Act speaks further as to the ancient customs and usages of the Maori people, as if some such body of law did in reality exist. *But a phrase in a statute cannot call what is non-existent into being.*" (at p 79) (emphasis added).

If His Honour, so roundly praised by Chapman, was correct in saying that a statute cannot make real what is apparently fictitious, a fortiori Governor Gipps on 14 January 1840 could not, by proclamation, create British sovereignty in respect of New Zealand if the British had not in fact acquired it. The fact of the matter is Governor Gipps knew that and worded his proclamation of 14 January accordingly – that is British sovereignty applied only to any territory which "is or may be acquired" by the Crown in New Zealand. In other words it fully contemplated that acquisition of sovereignty required something more than the proclamation itself in order to be effective. Without that extra element, the effectiveness of British sovereignty in New Zealand could rightly have been questioned. It follows that Chapman is wrong in his conclusion that the Treaty is a simple nullity as, with respect, was the former Chief Justice. The Treaty was an essential ingredient in fact and *in law* in the process by which the Crown acquired sovereignty in New Zealand.

The rather more important question is that which logically follows from the conclusion that the Treaty is not a nullity. If it truly was the legal vessel by which the Crown acquired law making power (sovereignty/*kawanatanga*), can it not be said that the Crown acquired no more than that for which it bargained – that is it could not exercise its newly acquired right in a manner inconsistent with the obligations owed by it under Article 2 of the Treaty. That the rights of *rangatiratanga* and exclusive possession were and remain a burden upon the powers vested in the Crown. Parliament appears to have accepted this proposition by enacting provisions (such as s 9 State Owned Enterprises Act) which prohibit executive action in breach of the Treaty.

Principles of the Treaty

Parliament saw fit in 1975 to enact legislation creating a body (the Waitangi Tribunal) whose job it would be to discern the "principles of the Treaty". The reference to "principles" rather than "terms" reflected a perception at the time that conflicts between the English and Maori texts were such that reference to the actual terms of the Treaty would have been unworkable. Since then thinking has changed somewhat and the Waitangi Tribunal in particular has taken the view that the two texts supplement each other rather than conflict. Since 1975 references to Treaty

principles have proliferated in legislation and in policy. Most Maori commentators have argued against the use of the principles of the Treaty for fear that they would be used as a mechanism for dilution of the Treaty's plain terms. The problem is neatly stated in the Muriwhenua Fisheries Report:

> No one seriously contended that "full, exclusive and undisturbed possession" [of fisheries] means other than what it says . . . It was apparent that the only difficulty with the words is the inconvenience they present. The meaning is altogether too clear. "Exclusive" means "Exclusive" . . . (at p 202).

In opposing the adoption of the concept of Treaty principles, Chapman is at one with most of Maoridom and with such well known and confirmed reactionaries as Jane Kelsey and Moana Jackson. Even a cursory analysis of current writing in the area would have encouraged Mr Chapman to support rather than oppose the use of Treaty principles. The fact of the matter is that the cold hard terms of the Treaty are likely to be far less palatable to those of Mr Chapman's ilk than its rather more pliant and dilute principles.

Partnership, fiduciary obligations and judicial activism

The Court of Appeal in the *Maori Council* case took the view unanimously that the central principle of the Treaty was the principle of partnership. The two important elements of that principle were, in that case, the duty of utmost good faith and the presence of responsibilities akin to fiduciary duties. For findings such as these the Court of Appeal is accused of rampant activism. Perhaps when compared with the obiter of Prendergast CJ that, in the context of Maori rights, the Crown "of necessity must be the sole arbiter of its own justice" (at 78), the Court of Appeal is taking a robust approach. But in truth that Court's findings are at best unsurprising. A duty to act in good faith is hardly breaking new ground. Whoever suggested that the Crown was entitled to act in bad faith? The existence of a fiduciary obligation is rather more novel, but only in New Zealand. In the United States, the trust relationship between the Federal Government and Indian "nations" can trace its lineage back to the Cherokee cases of the 1830s (eg, *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1, *Worcester v Georgia* (1832) 31 US (6 Pet) 515) and is generally regarded as the linchpin of modern Federal Indian law (see eg Cohen, *Handbook of Federal Indian Law* (1982 ed) 207 FF).

The Canadian Supreme Court in *Guerin v The Queen* (1985) 13 DLR (4th) 321 held that the Crown owed a fiduciary duty to Indians when dealing with land the subject of aboriginal title on behalf of Indians. The duty was not to be found in any express legislative provision but had its roots in the concept of aboriginal title and the statutory scheme established for the disposal of Indian land (at p 334). The recognition of the existence of a fidudiary relationship between the Canadian Crown and native Canadian tribes has become one of the most important principles of Native law in Canada. Thus, those who take the view that our Court of Appeal has been guilty of unwarranted and highly imaginative judicial activism are quite wrong. Our Court of Appeal is not only following an impeccable line of judicial authority on the question of application of concepts of trust and fiduciary obligation in the context of indigenous rights, it is also the last Court in the three jurisdictions mentioned to have done so.

The honour of the Crown.

The most disturbing aspect of Mr Chapman's dissertation, all "flim, flam and flummery" aside, is its basic argument. That is that the Crown with all of its superior knowledge, resources and expertise, could enter into a Treaty with the indigenous inhabitants of this or any other land, receive substantially all of the benefit to accrue to it by virtue of that Treaty and then, having failed to fulfil its own obligations, later denounce that same Treaty, citing legal principles in support, as a quaint historical anachronism. Such an approach is unlikely to engender harmonious race relations in this country or respect for the rule of law. Maintenance of the honour of the Crown is an enduring doctrine in indigenous rights jurisprudence whatever Mr Chapman's view of the imprecision of that concept.

> The principles to be applied to the interpretation of Indian Treaties have been much canvassed over the years. In approaching the terms of a Treaty, quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned . . . (*Regina v Taylor & Williams* (1981) 62 CCC (2d) 227 at 235 per MacKinnon ACJO (Ont CA)).

In the final analysis matters have simply progressed too far for us ever to return, as Mr Chapman proposed, to the racist doctrines of the latter half of the 19th century. For all of its humble beginnings and its inconsistencies, the Treaty of Waitangi is now firmly embedded in our legal and constitutional firmament. This writer for one is of the unshaken belief that our judiciary has too much integrity to allow it to be dislodged at this late stage.

Fiat justitia ruat coelum! □

Tribunals Division Change of address

The Tribunals Division of the Department of Justice advises that from 29 October 1991, the new Wellington address for the Division will be:

Tribunals Division
District Court Building
49 Ballance Street
WELLINGTON

Postal Address

P O Box 5027
Lambton Quay
WELLINGTON

Telephone Numbers

(04) 472-1709
(04) 471-1263 (Fax)

Books

Narcotic Offences

By Fiori Rinaldi and Peter Gillies
Law Book Company Ltd, Sydney, 1991. 243 pp plus Tables and Appendix.

Reviewed by Don Mathias, of Auckland

The first question that a practitioner in New Zealand will ask about this book is, how relevant is it to issues that may arise in connection with our Misuse of Drugs Act 1975 and its Amendment of 1978? Even cursory appraisal reveals that this is a book about Australian law. It makes extensive use of unreported decisions, which can be obtained from the library of the relevant Supreme Court. In the Table of Cases only two New Zealand decisions are cited: *Humphries* [1982] 1 NZLR 353 and *Seven Seas Publishing Pty Ltd v Sullivan* [1968] NZLR 663. In the Table of Statutes no New Zealand legislation is listed. There is no entry for New Zealand in the Index. Closer perusal discloses that the words "New Zealand" are used only once (p 3). Much space is given to the Appendix of basic legislation (pp 247 – 438), in which extracts from relevant Commonwealth, State and Territorial legislation are set out.

A significant omission from the subjects covered, at least from the point of view of the New Zealander in search of useful cases, is the interception of private communications.

There are twelve chapters, six by each author. The last six were written by Dr Gillies, and as they are concerned with inchoate offences, complicity, search and seizure and various other procedural topics, they naturally contain cross-references to some of his other publications. This presents us with choices: for example, if we want to know about conspiracy in relation to drug offences, do we rely on this book alone, or should we also consider his *The Law of Criminal Conspiracy* (2nd ed, 1990, The Federation Press, Sydney)? Much of the treatment of joinder and severance could happily sit in a more general text because there appears to be little effort to illustrate its application to the context of narcotics offences.

In discussing circumstantial evidence (p 211) it is predicted that the statutes of the *Chamberlain (No 2)* (1984) 51 ALR 225 direction will ultimately be qualified by the High Court; reference must now be made to *Shepherd* (1990) 65 ALJR 132. There will, no doubt, be arguments about whether the High Court has modified, or explained, its earlier decision.

Differences between Australian and New Zealand treatment of unfairly obtained evidence are reflected in the brief reference to abuse of process in this book (p 225) compared with the chapter on that topic in my *Misuse of Drugs* (1988).

The proof-reading has been to a high standard (especially if one accepts that question marks should be upside-down: they all are here). There is some effort to avoid the accusation of sexism: ". . . the trial judge exercise her or his discretion" (p 180), and the awful "her or his" (repeated on pp 186 and 190) becomes "he or she" on pp 192 and 194. A tendency to say "even as" instead of "although" (eg on p 180) recurs. Even people who don't require corrective lenses to read may find the typeface (Schneidler Old Style, 10 on 11.5 point) rather light. But these are matters of fine detail and to highlight them is only to emphasise the overall high quality of the book. New Zealand users, however, will have to be careful about relevance. As far as the substantive law of the offences is concerned, relevance depends on the similarity of the Australian enactment to the New Zealand counterpart, but relevance of the evidential and procedural law is much more difficult to assess. □

Recent Admissions

Barristers and Solicitors

Ball W R	Christchurch	24 May 1991
Bickford-Smith J M	Hamilton	30 July 1991
Carslaw S	Christchurch	24 May 1991
Chatwin S J	Hamilton	24 July 1991
Choo O E	Christchurch	24 May 1991
Dreadon B L	Christchurch	24 May 1991
Gould D C	Hamilton	24 July 1991
Green B R	Christchurch	24 May 1991
Haldane S P A	Christchurch	24 May 1991
Hamilton M C	Napier	21 June 1991
Hayward S L	Napier	24 June 1991
Hoon A Y P	Christchurch	24 May 1991
Huston E C	Christchurch	24 May 1991
Joo A T C	Christchurch	24 May 1991
Leng L P	Christchurch	24 May 1991
Lindsay S M R	Rotorua	25 May 1991
McGuire R D	Christchurch	24 May 1991
Nathan B M	Napier	24 June 1991
Oon P L	Christchurch	24 May 1991
Rajaratnam M	Hamilton	24 July 1991
Robinson B	Napier	29 August 1991
Russ D J C	Christchurch	24 May 1991
Ryan M T	Christchurch	24 May 1991
Scott P G	Christchurch	24 May 1991
See T Y	Christchurch	24 May 1991
Shiun L S	Christchurch	24 May 1991
Smith I R	Nelson	8 July 1991
Spencer H M	Hamilton	24 July 1991
Stewart-Rowe V R	Hamilton	24 July 1991
Vause C M	Napier	7 August 1991
Wilson J K	Napier	24 June 1991
Yum N S	Christchurch	24 May 1991