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True to label

There must have been at least one great temptation to the dramatic gesture for counsel for the respondent in the case of *Wineworths Group Ltd v Comite Interprofessionel du Vin de Champagne* [1992] 2 NZLR 327. Counsel could have held up a bottle of Bollinger and a bottle of Moet et Chandon and said that this was champagne; and then held up a bottle of Henkell Trocken and a bottle of Lindauer and said that this was not. The arguments advanced in the Court of Appeal were no doubt, however, more technical and more sedate. Certainly the Judges took the issue in the case seriously.

The law is based on the common-sense view that words have meaning, whatever some philosophers and modern literary critics might say to the contrary. The law relating to brand names, to passing off and to copyright are all illustrations of the fact that intellectual property is indeed property, that it is concerned with reality and not just notions.

In the *Wineworths* case the point at issue was the use of the word "champagne". Did this refer to the sparkling wine produced in the district of Champagne in France from grapes grown in that district, or could an Australian sparkling wine use the word "champagne" as a simple generic description?

In the High Court, [1991] 2 NZLR 432, Jeffries J granted a permanent injunction to the plaintiffs, a French semi-official body and a representative group of companies incorporated under the law of France. The injunction restrained the defendant Wineworths Group Ltd from passing off Australian sparkling wine as and for wine produced in the Champagne region by applying the name "Champagne" to it. Wineworths had been selling a sparkling white wine produced by Penfolds as Seaview brand "Australian Champagne" or "Brut Champagne" or simply "Champagne".

It was apparently acknowledged that the proceedings were brought to test the law here by comparison with the position in Australia. As stated by Gault J at p 335 there does not seem to be any doubt that the Seaview brand sparkling wine would meet the definition of "Champagne" as set out in the Australian Food Standards Code. The code states:

> (5) (a) Champagne is a sparkling wine produced by fermentation in a bottle not exceeding 5 L in capacity and aged on its lees [the sediment which results from the secondary fermentation process] for not less than 6 months.
>
> (b) There shall not be written in the label on or attached to a package containing sparkling wine the word "champagne" unless the sparkling wine is one produced by fermentation in a bottle not exceeding 5 L capacity and aged on its lees for not less than 6 months.

There is no such provision in New Zealand. The Court of Appeal agreed with Jeffries J that on the evidence there was an obvious inference that the use of the word "Champagne" on wine, in relation to which the word is neither an apt description nor has acquired distinctiveness, in the words of Gault J, amounts to a misrepresentation and will deceive. The Court dismissed the appeal and allowed a cross-appeal, so that the permanent injunction against passing off remained and the appellant was held to be in breach of s 9 Fair Trading Act 1986.

There was an incidental issue considered in the judgments which has quite significant implications in terms of international trade. As commercial world trade activities become more and more intertwined the issue of the effect of what is permissible or prohibited in one country becomes more urgent in relation to trade with another. If no champagne was sold here then obviously the French interests would hardly have taken proceedings. But more importantly there is the question touched on by Cooke P regarding trade between Australia and New Zealand, more particularly in relation to CER. At p 331 the President stated:

> This Court has been and is sympathetic to progress in integrating the general market in the two countries as far as reasonably practicable, and has been willing therefore to develop the law to protect the legitimate interests of Australian traders; see the *Budget* case and *Vicom New Zealand Ltd v Vicomm Systems Ltd* [1987] 2 NZLR 600, 605. The protection of illegitimate interests is a different matter. It seems to me that the very small importations of "Australian champagne"

between 1958 and 1986 and the subsequent major incursions about to be described have alike been in violation of the common law goodwill rights in this country of the producers of true Champagne.

International brand names, advertising campaigns, and copyright interests are now commonplace. In the Australian case of *Anheuser-Busch Inc v Castlebrae Pty Ltd* (1992) 21 1 PR 54, Davies J had to consider the use of a drawing (and naming) of a dog. He held that the Australian version was so close to an imitation as to amount to breach of copyright and passing off. The American brewery company had created as part of an advertising campaign a dog resembling an English bull terrier with the name "Spuds McKenzie". The Australian company registered trade marks in Australia for depiction of a dog which had a substantial similarity and the name "Spuds McSpud".

Among the matters the Judge took into account was the increase in travel and an increasingly international media. In the United States it is possible in some States to register copyright and that had been done by Anheuser-Busch. Again this was taken into account by the Judge as evidence of the ownership of copyright. There is undoubtedly going to be more and more litigation in the field of international intellectual property. Trade marks, brand names and copyright are for instance all relevant to franchising and the continual growth of international advertising must mean that this area of the law will grow even more significant.

P J Downey

Judicial Appointments

Mr Peter Blanchard

On 25 June 1992 the Attorney-General announced that Mr Peter Blanchard of Auckland had been appointed a Judge of the High Court of New Zealand.

The new Judge was born in 1942 and graduated Master of Laws from the University of Auckland in 1968. He had been educated at King's College. He subsequently did a postgraduate degree at Harvard where he obtained his LLM in 1969.

Mr Blanchard was originally with the firm then known as Grierson Jackson & Partners from 1968. In 1983 that firm merged to create the firm which is now Simpson Grierson Butler White. Mr Blanchard is a senior partner of that firm. He has specialised in Commercial Law and Land Law.

Mr Blanchard was formerly a member of the New Zealand Council of Law Reporting. He has also been a member of the New Zealand Law Society's Legislation Committee. He has taken an active interest in law reform and has recently been a member of the Law Commission.

The new Judge has been very involved in the commercial world. He has been on the Board of a number of companies. These include Fletcher Challenge Limited, New Zealand Oil & Gas Limited, Mineral Resources (NZ) Limited, United Resources Investment Holdings Limited and other companies in Australia and New Zealand that are listed on the Stock Exchange.

Mr Blanchard is well known as the author of *A Handbook on Agreements for Sale and Purchase of Land*. He has also written a book *Company Receiverships in New Zealand and Australia*. He wrote three of the commentaries in *The New Zealand Commentary on Halsbury's Laws of England*. The topics that he wrote on were "Corporations", "Receivers", and "Sale of Land".

The new Judge is to be based in Auckland.

The Judge has an interest in both music and literature. He has described himself as an infrequent sedate jogger. The Judge is married with two children aged 20 and 17.

Professor Grant Hammond

On 26 June 1992 Professor Grant Hammond of Auckland was named a Judge of the High Court of New Zealand by the Attorney-General.

Professor Hammond was born at Waipawa in 1944. He graduated from the University of Auckland with a Bachelor of Laws Degree with Honours (1969) and a Master of Jurisprudence (1970). He obtained a Masters Degree from the University of Illinois in 1979.

Before that he had practised in Auckland and in Hamilton. He was a partner in Wiseman and Hammond and then subsequently in Tompkins Wake & Co in Hamilton where he was a litigation partner.

Professor Hammond sat on several committees of the Hamilton District Law Society and was a member of the Legislation Committee of the New Zealand Law Society.

Professor Hammond has spent a substantial period in North America, both in the United States and in Canada. He was a Law Professor at the University of Illinois and subsequently at Dalhousie University and the University of Alberta.

In Canada the new Judge took an active interest in professional matters outside the University. He was a member of the Alberta Provincial Council of the Canadian Bar Association, and was a member of the National Council of the Canadian Bar Association in the years 1986-88. In that same period he was Alberta Commissioner to the Uniform Law Conference of Canada and permanent head of the Alberta Law Reform Commission.

Professor Hammond returned to Auckland in 1989. He has, until his appointment, been Dean of the Law School at the University of Auckland. It was during his time as Dean that the new Law School building was obtained and fitted out. The speeches at the formal opening of the Law School were published at [1992] NZLJ 193.

Professor Hammond has been married twice; and he has one son and one daughter. His lists his recreations as hiking, fly fishing, golf, photography and music.

The appointment of Professor Grant Hammond has been announced now but he will take up his appointment in November. The new Judge will be based in Hamilton.

District Court Judge Jaine

Judge Jaine has been appointed a temporary Judge of the High Court for a period commencing on 29 June 1992. The period of his temporary appointment ends on 27 November 1992.

The Judge was formerly a senior partner in a Masterton legal firm and was appointed to the District Court bench in 1978. He presently sits in Wellington. He will sit in the High Court in Wellington during the duration of his appointment. This is the third such temporary appointment. Appointments were made for limited terms last year when District Court Judge Rabone sat in the High Court at Wellington, and District Court Judge Jamieson sat in the High Court at Hamilton. □

Recent Admissions

Barristers and Solicitors

Eastwood P T	Wellington	10 June 1992
McEvoy D P	Wellington	22 May 1992
McNamara P M S	Wellington	22 May 1992
Monk J P	Wellington	22 May 1992
Morison G B	Wellington	22 May 1992
Moroney C M	Wellington	22 May 1992
Peacock S J	Wellington	22 May 1992
Richards C H	Wellington	22 May 1992
Rush S E	Wellington	22 May 1992
Sawyer G E	Wellington	22 May 1992
Scoular R S	Wellington	22 May 1992
Sherwood F J	Wellington	22 May 1992
Singh S	Wellington	22 May 1992
Sophocles M J	Wellington	22 May 1992
Stevens A M	Wellington	22 May 1992
Sugrue V M	Wellington	22 May 1992
Thompson L K	Wellington	22 May 1992
Tokeley K E	Wellington	22 May 1992
Treleaven C G	Wellington	22 May 1992
Trueman D A	Wellington	22 May 1992
Vaughan M A	Wellington	22 May 1992
Youngs A J	Wellington	22 May 1992

Case and Comment

Rent — Priority as between mortgagee and debentureholder

Southpac Custodians Limited v Bank of New Zealand et al [1992] BCL 515 and *State Bank of South Australia v Kearns Corporation Limited (In Receivership)* [1991] BCL 1218.

The basic problem

When Bruce Stewart and I presented the New Zealand Law Society Seminar on Mortgagee Sales last year, we set the following problem for consideration by attendees:

> A executes a mortgage in favour of B and a subsequent debenture in favour of C. A has tenanted its property. A has been receiving the rents and B (the mortgagee) demands that A pay the rents to B. Who has priority as to the rents, B or C (the debentureholder)?

This problem derived from a receivership with which I had been involved where both A and C were in receivership. I acted for the receivers of C. My advice was that as B had not entered into possession, C had priority in relation to the rental.

Though it may not be the last word on the subject, *Southpac Custodians Limited v Bank of New Zealand et al* [1992] BCL 515 suggests that this advice was correct. However, that case, and *State Bank of South Australia v Kearns Corporation Limited (In Receivership)* [1991] BCL 1218 also raise other interesting issues.

The Southpac *and* State Bank of South Australia *cases*

In *Southpac*, L executed a mortgage in favour of LSN. LSN assigned its interest in the mortgage to *Southpac*. L then executed a first debenture in favour of the BNZ and a second mortgage in favour of the BNZ. In due course, the BNZ appointed receivers of L.

LSN issued a Default Notice under s 92 of the Property Law Act 1952 to L and prior to the expiry of that notice, advised the receivers of L that LSN now wished to collect the rents. It relied on s 106 of the Land Transfer Act 1952 which provides that a mortgagee, upon default in payment of the principal sum, interest, annuity or rent charge secured by the mortgage, may enter into possession of the mortgaged land by receiving the rents and profits. LSN chose not to serve a notice on the tenants requiring the tenants to pay the rental direct to LSN. (This was apparently because LSN believed that the receivers had issued some form of notice to this effect to the tenants.) After the expiry of the Default Notice, LSN served a letter ("the Letter") on the solicitors for the receivers and L advising that LSN was taking possession by collecting rents and that either the receivers should arrange for the rents to be paid direct to LSN by the receivers' office or LSN would approach the tenants direct and direct them to make payments of rent direct to LSN. The receivers indicated that they were prepared to pay rents received from the time of that notice into a separate account while LSN made application into the court for a declaration as to entitlement of rents received from the date of service of the Letter.

Master Williams QC held that LSN had not entered into possession but granted an order for possession and that LSN was entitled to rents as from the date of the order.

With respect, it is submitted that Master Williams QC was correct. It is submitted that s 106 of the Land Transfer Act is an enabling provision which does not override the common law. A mortgagee does not enter into possession simply by receiving rents. The question is whether the mortgagee has taken control over the property so as to virtually substitute itself for the landlord. Merely requiring the mortgagor or its agent to pay over the rental once collected will not be sufficient. A mortgagee will normally have to serve notice on the tenants direct to demonstrate that it has entered into possession. In this respect, most of the relevant authorities are cited in the judgment.

Unless the mortgagee has taken a charge over the rental, priority issues can only arise once the mortgagee has entered into possession. Until that time, the mortgagor is entitled to retain possession and to receive and deal with the rents and profits to be derived from the land. Thus, the mortgagor may create a charge over the rents and profits. It follows that a subsequent debentureholder who has taken a fixed or floating charge (which has crystallised) over the rental will be entitled to the rental in priority to the mortgagee. (In this case, the debenture purported to create a fixed charge over book debts. Whether the debenture provisions were effective to create a fixed charge was not an issue because counsel for Southpac had conceded that the debenture created a fixed charge over rental.)

However, the position would be reversed once the mortgagee has entered into possession. This is because the equitable assignment of the right to rental in favour of the subsequent debentureholder will have been subject to equities. The debentureholder can have no greater right to the rental than had the mortgagor. The debentureholder will be deemed to have notice, by virtue of the registration of the mortgage in the Land Transfer Office, that the mortgagee has a prior, but inchoate, statutory right to take possession which encompasses the right to then receive rental. (It should be noted, as Master Williams QC pointed out, that in the absence of an express contractual entitlement to possession, a mortgagee who wishes to take possession must rely on the

statutory right given pursuant to s 106 of the Land Transfer Act. Thus, registration of a mortgage will carry with it this statutory right.)

It is submitted that one difficulty with the judgment of Master Williams QC is that he considered that the prior mortgage in favour of LSN created a charge over the rental. With respect, it is submitted that this conclusion, which, no doubt, will have derived from the way in which the case was argued, was incorrect and unnecessary.

Master Williams QC referred to s 100 of the Land Transfer Act which states that a mortgage under the Land Transfer Act shall have effect as security but shall not operate as a transfer of the estate or interest charged and s 2 of the Land Transfer Act which defines "estate or interest" as meaning every estate in land, also any mortgage or charge on land under the Land Transfer Act. The Master concluded that when L mortgaged all its "estate and interest in the land" to LSN, which estate and interest included the right to receive the rents from the tenants, it created a charge in favour of LSN in the rents receivable for the property.

However, it does not follow that the mortgagor has charged the right to receive rentals simply because the mortgagor has mortgaged the mortgagor's "estate and interest" in the land. As we have seen, in Land Transfer Act terms, this only means that the mortgagor has mortgaged all the mortgagor's "estate" in the land. Whether the mortgagor charges assets other than realty surely depends on the intention of the parties.

In this regard, the question is whether it should be implied that the mortgagor, simply by executing a mortgage in the usual form, has agreed to give a charge over future rental. It is submitted that the answer is no. It might be appropriate to imply such an intention if a charge were necessary to give the mortgagee the right, or a prior right, to receive the rental (which Master Williams QC thought was necessary). However, it is submitted that it is not necessary. As has been seen, the mortgagee's prior statutory right to take possession and receive rental is an equity which will bind the subsequent debentureholder.

At first sight, it might be thought that some analogy can be drawn between rent and goodwill. There are old authorities for the view that a mortgage over land carries with it a charge over business goodwill where the mortgagor has carried on a business on the mortgaged property. (See the cases cited in the New Zealand Law Society Seminar Booklet on Mortgagee Sales, June – July 1991, at p 44.) However, it would appear that the rationale for the goodwill cases is that the goodwill is an accretion to the mortgaged property. Rent is not an accretion in this sense; the mortgagee cannot sell the rent (unlike the goodwill of the business) when selling the mortgaged property.

It is submitted that, not only is it incorrect and unnecessary to attribute, virtually as a matter of course, an intention to the parties to create a charge over rental, but also it is to the prior mortgagee's advantage not to come to this conclusion. This can be demonstrated by further considering the proposition that a Land Transfer mortgage, as a matter of course, creates a charge over future rental and in that regard, it is useful to refer to the *State Bank of South Australia* case (supra).

In that case, Roper J considered that a receivership clause in a mortgage (a provision enabling the mortgagee to appoint a receiver, as agent of the mortgagor, to receive rents and profits) created a floating charge over the rental income.

This case also concerned a priority dispute as between a prior mortgagee and a subsequent debentureholder. The debentureholder appointed a receiver and manager in the usual way and, subsequently, the prior mortgagee appointed a receiver of income pursuant to the mortgage. Both the mortgagee and the debentureholder claimed the rental income from the property. Roper J considered that the mortgagee had priority – the mortgage was prior in time to the debenture and was registered in the Land Transfer Office so that the debentureholder had notice of the mortgage.

With respect, it is submitted that there are a number of difficulties with the decision of Roper J. For one thing, it is submitted that the receivership clause in the mortgage did not create a floating charge over rental. Again, the basic question must be one of intention (unless, as sometimes happens, such as with reservation of title clauses, the substantive effect of the parties' drafting overrides their intention, or at least, what they thought they intended). It is submitted that the parties do not intend to create a charge over rental when a receivership clause is included in a mortgage. Rather, the intention is to enable the mortgagee to impose some element of control without any corresponding liability. The intention is to enable a third party (the receiver), as agent of the mortgagor, to take control of the mortgagor's income from the property and apply it in accordance with the mortgagor's obligations to third parties (whether the mortgagee or otherwise).

Even if it were to be assumed that a floating charge over rental had been created by the mortgage the question would have to be asked whether that charge had been registered in terms of s 102 of the Companies Act 1955. The obvious consequences of non-registration is that the charge would be void against creditors and liquidators in terms of s 103 of that Act. Registration of the mortgage under the Land Transfer Act would be insufficient because the charge is over rental, not realty. It would be sufficient if a copy of the mortgage had been registered in the Companies Office. Registration of particulars would not be sufficient if the particulars only indicated a charge over land.

If the comments just made in relation to floating charges are correct, it can be seen that it is more advantageous for the mortgagee to conclude that the mortgagee's (prior) right to rental derives from the statutory right to possession. Further, it is submitted that this is the way in which the matter should be analysed because it must be doubted whether, in the normal course of events, the parties to a mortgage intend to create a charge over rental.

It should be noted that Roper J did not accept that the charging clause in the mortgage, whereby the mortgagor mortgaged "all his estate and interest in the land", created a charge over the rental. The *Southpac* and *State Bank of South Australia* cases are therefore in

conflict on this point though it is conceded that Roper J only made a passing comment to this effect and it is unknown to what extent the point was argued in Court.

Before moving on, it may be of interest to consider briefly another point raised in the *State Bank of South Australia* case. Even if the receivership clause in the mortgage created a floating charge, it might have been thought that the appointment under the subsequent debenture of a receiver and manager as agent of the company would not cause the prior floating charge to crystallise so that the subsequent floating charge, being the first to crystallise, would have had priority. In the absence of express provisions, a floating charge normally will crystallise if the company is wound up or ceases to carry on business. It might be argued that the appointment of such a receiver would not cause the company to cease to carry on business.

However, there is quite a body of authority (which may not be entirely satisfactory) for the view that the appointment of a receiver, even as receiver and manager and as agent of the company, is a crystallising event. (See, for example, Gough, *Company Charges*, Butterworths (1978), at p 87.) The rationale appears to be that, even though the receiver has the power to carry on the business of the company and has been appointed as the agent of the company, the directors, in whom the management powers are normally vested, are prevented by the appointment of the receiver from carrying on the business of the company in the ordinary course of events.

On the other hand, it should perhaps be noted in passing that there is authority for the view that the crystallisation of a subsequent floating charge will not cause a prior floating charge to crystallise: *Re Woodroffes (Musical Instruments) Limited* [1985] 2 All ER 908. Accordingly, if a mortgage creates a floating charge over rental and there is no clause providing for automatic crystallisation on the crystallisation of a later floating charge, a floating charge created by a subsequent debenture which crystallises first will have priority. In such circumstances, it would be unnecessary to consider the effect of the later appointment of a receiver by the subsequent debentureholder because the priorities will have already been determined.

It may be that *Re Woodroffes (Musical Instruments) Limited* requires further scrutiny because it is surely arguable that the crystallisation of a subsequent floating charge must prevent the company from carrying on business in the usual way. If that argument is correct, the crystallisation of a subsequent floating charge would, at the same time and as a matter of general law, crystallise the floating charge under the prior mortgage so that the prior mortgage would have priority.

Further matters for consideration

Originally, it was intended to finish this note at this point because the issues directly raised by the cases have been canvassed. However, it may be of interest to offer some tentative conclusions as to what would have been the priorities in the *Southpac* case if the debenture had been first in time, on the assumption that the right to receive rental under a mortgage derives from the right to possession and not a charge. In considering this point, it is assumed that the mortgagee's statutory right to take possession, being a legal right, places the mortgagee in the same position as the holder of a subsequent legal charge. In that situation, the general rule is that, absent notice, the subsequent legal chargeholder has priority of the prior equitable chargeholder.

Consider first the situation where there is no automatic crystallisation provision in the debenture or, if there is, it is not linked to a restrictive clause (a prohibition against creating further charges in priority to or pari passu with the floating charge) or to the mortgagor defaulting under the subsequent mortgage or to the mortgagee taking possession. In these circumstances, if the mortgagee takes possession prior to the floating charge crystallising, the mortgagee will prevail. The consequence of the company having granted a floating charge is that the company has been free to deal with the future rental in the ordinary course of business and this includes executing a mortgage over land which carries with it, favour of the mortgagee, a statutory right to take possession and to receive rental.

Consider the position where the mortgagee does not take possession until after the crysallisation of the floating charge. It is submitted that the mortgagee will prevail over the debentureholder unless the mortgagee had notice (actual, constructive or, possibly, inferred) when the mortgage was taken that the debenture contained a restrictive provision or an appropriate automatic crystallisation provision which had been triggered.

The question of in what circumstances the mortgagee will have notice is an important one. It is commonly assumed that registration of a debenture in the Companies Office at most constitutes notice of the existence of the debenture. Indeed, s 102(12) of the Companies Act states that registration does not constitute notice of the debenture's contents except to the extent that the debenture relates to chattels, as that term is defined in the Chattels Transfer Act 1924. Under that Act, chattels includes "book debts" but not, it is thought, future book debts. Accordingly, even if a floating charge over future rental can be described as a charge over future book debts, the provisions of the debenture in relation to future rental would not relate to chattels as defined in the Act. Accordingly, it might be assumed that the subsequent mortgagee will not be deemed to have notice of those provisions simply because the debenture was registered in the Companies Office.

Potential difficulties

However, there are a number of potential difficulties.

For one thing, the mortgagee or its solicitors often will have obtained a copy of the debenture prior to taking the mortgage. In such circumstances, the mortgagee will have actual knowledge of the contents of the debenture. Thus, if there is a restrictive provision in the debenture, the mortgagee will know that the taking of the subsequent mortgage without the consent of the prior debentureholder will be a breach of the debenture and, because it would be equitable fraud if the position were otherwise, the floating charge will have priority

over the subsequent legal right of the mortgagee. (Remember that, on the basis of the arguments presented in this note, we are not concerned with priority questions between charges over land. Were that the case, in the absence of Land Transfer fraud, the mortgagee would prevail by virtue of s 62 of the Land Transfer Act 1952.) This would be even more so if the restrictive clause is tied in with an automatic crystallisation provision in the debenture. While, at the very least, this would suggest that the mortgagee should seek the consent of the debentureholder to the mortgagee having priority to rental on taking possession, more importantly it might suggest that a mortgagee should not obtain a copy of the prior debenture.

One possible difficulty with the suggestion that the mortgagee should not obtain a copy of the debenture is that it has been argued that the mortgagee may be fixed with inferred knowledge (which appears to be a type of actual knowledge) of the contents of the debenture in so far as the debenture contains provisions which can be regarded as being common. (See Farrar "Floating Charges and Priorities" (1974) 38 Conv 315, 319-323; Farrar & Russell *Company Law and Securities Regulation in New Zealand*, Butterworths of New Zealand Limited (1985) at pp 171-173.) Restrictive and automatic crystallisation provisions may fall into that category. If the argument is correct, the prior floating charge may have priority.

The argument might seem to fly in the face of s 102(12) which provides:

> Except as provided in subsection (2) of section 4 of the Chattels Transfer Act 1924, *registration* of any instrument under this Part of the Act *shall not in itself constitute notice* to any person *of the contents of that instrument.* (Emphasis added.)

However, s 102(12) is only concerned with the concept of constructive notice. Registration of a charge shall not in itself constitute notice of the contents of the charge. Farrar's argument is that, where the proposed chargeholder has actual knowledge of the registration of the prior charge, there may be a duty to inquire ie to ascertain whether the prior charge contains restrictive and automatic crystallisation provisions. In the absence of such inquiry, the proposed chargeholder may be fixed with inferred knowledge of the contents of the prior charge to the extent to which it contains common provisions.

As Farrar comments, the concept of inferred knowledge does not appear to have been seized upon in recent times, particularly in the present context. If the law in New Zealand relating to company and other charges is ever reformed, it is hoped that, one way or another, the legislation will not leave it open to doubt as to whether a subsequent chargeholder will have inferred knowledge of common provisions in registered company charges.

In summary, it is submitted that:

1 A mortgage of land should not be taken as automatically creating a charge over rental.

2 In the absence of a charge over rental in favour of the mortgagee, the mortgagor is free to deal with the rental until such time as the mortgagee takes possession. This includes creating a charge over the rental in favour of a third party.

3 A subsequent debentureholder who takes a charge, whether fixed or floating, over rental will take that charge subject to the prior mortgagee's ability ie the prior mortgagee's statutory right to take possession. Accordingly, once the mortgagee takes possession, the mortgagee will have the prior right to receive rental as it accrues.

4 The position would be different where a prior debenture creates a floating charge over rental only if the debenture contains restrictive and/or appropriate automatic crystallisation provisions and the mortgagee has actual, or possibly inferred knowledge of those provisions. In the absence of such knowledge, the mortgagee would have priority on taking possession, whether before or after the crystallisation of the floating charge.

Assignment of rent provisions

Some solicitors include "assignment of rent" clauses in mortgages ie assignments by way of mortgage of future rental. Clearly, the main reason is to enable a mortgagee to receive and apply rental without having to take possession or being deemed to have taken possession.

If *Re Woodroffes (Musical Instruments) Limited* (supra) is good authority, these provisions would not be completely effective because the crystallisation of a subsequent floating charge over the rental would not automatically cause the floating charge in the mortgage to crystallise. Though the subsequent chargee would be deemed to have notice of any restrictive or automatic crystallisation provisions in the mortgage (assuming that the mortgage is registered in the Land Transfer Office), provisions of this kind are not usually included in the assignment of rent clauses. Accordingly, the likelihood is that the subsequent charge will have priority over the earlier charge.

However, the mortgagee, on taking possession, will still have the prior right to the rental which is accruing provided that there is nothing in the "assignment of rent" provisions which is inconsistent with the mortgagee's right to take possession and receive the rental.

Steven Dukeson
Auckland

Criminals unite

Sir: The recent furore from certain quarters in Australia towards this country and its monarchy reminds me of a story concerning a chum of mine arriving at Melbourne's Tullamarine airport.

"Do you have a criminal record, mate?" the customs officer asked this visiting English friend.

"No, I didn't know it was still necessary," came the reply.

From *The Oldie*
3 April 1992

The role of the advocate in society

By The Rt Hon Lord Alexander of Weedon, QC

This paper was given by Lord Alexander as a special guest at the 9th Malaysian Law Conference on October 12, 1991. Lord Alexander was President of the Bar Council in England and is now Chairman of the National Westminster Bank. Lord Alexander attended the Law Conference in Christchurch in 1987 and spoke at the closing ceremony of that conference His address was published in the New Zealand Law Journal *under the title "The law and its concerns" at [1987] NZLJ 316. This article is a survey of the responsibilities and the importance within the legal system of the advocate. Lord Alexander emphasises the dual obligation both to the client and to the Court and analyses the reasons for and consequences of this dual responsibility.*

All of us who are advocates know there is danger of overlooking our most important points. To guard against this, may I say immediately how privileged I am to have this opportunity of speaking to the Malaysian legal profession, and how pleased both Marie and I are to be here today. May I thank you most warmly for the welcome you have given us. It is immensely good to have the opportunity of renewing, even although very briefly, friendships and acquaintances made at law conferences in the Commonwealth.

Different jurisdictions, common heritage

We come together as lawyers from different jurisdictions because we share a common heritage. One of the most enduring legacies of the former British Empire is a survival of the legal system which we came to share. We live half way across the world from each other. We have different populations, different patterns of trade, and sometimes different priorities as a society. Yet we share many engrained habits of thought and legal values. It is in recognition of this that I have called my talk "The Role of the Advocate in *our Society*.

It is not, I hope, just because of our own professional training that we regard the rule of law as precious in our societies. For we all recognise that there are many other qualities which go to make up a successful and civilised society. Perhaps first comes the spirit of our peoples. Mr Justice Learned Hand, the distinguished United States Judge, taught us:

> Liberties lies in the heart of men and women; when it dies there, no constitution, no law, no court can save it. No constitution, no law, no court can even do much to help it.

We have seen many vivid examples in the past few years of the triumph of the human spirit; a splendid illustration is the successful demand for democracy by peoples in the Eastern European countries, culminating in the remarkable and dramatic resistance which so speedily ended the recent coup in the Soviet Union. This shows that the cry of a people for liberty, and the surge of the human spirit, expresses itself where free to do so in a desire both for democracy and for a system of law. These two freedoms are mutually dependent. Without a democratic society you cannot have an independent legal system and an independent legal profession. But without such a system of law and such a profession to practise the law, you cannot have a true democracy. So democracy and the law are twin pillars of a free society.

Economic progress, too, is a human craving, and never more so than in an age where telecommunications can make society acutely aware of the way in which other people live. Here the law has a most practical role to play. Society needs, and again the recent history of the Soviet Union has demonstrated this, a legal framework as an essential prerequisite for commercial progress and international trade. The ability to conduct trade, within the boundaries of law, and to know that a settled system of law is available to resolve differences, is crucial to economic progress. This economic progress made within your country within recent years, with improved opportunities for employment and higher standards of living, is most good to see. Your system of law, and your professional work, are not just an adjunct grafted on to the commerce of society, but an essential element in its development. "Legal rights do not impede economic progress: they buttress it".

Place of advocate in legal system

It is as part of this system that the advocate has his or her place. Our essential function can be stated simply: to ensure that both sides of a dispute are heard, and that each side can be argued strongly, whatever the nature of the cause, and however popular or unpopular it might be, and without any comeback against the advocate. For we are cogs in the machinery of justice. Vital cogs, but cogs none the less.

The development of the law in recent years has increasingly attached importance to what is sometimes called natural justice, and sometimes more simply called common fairness. This common fairness includes the right of a party whose interests may be affected by the decision of a tribunal or sometimes by that of an administrative authority, to have the opportunity to state his or her case. It is this principle which is being acted out every day when two advocates stand in Court to argue the opposite sides of a case. Prosecutor or accused, plaintiff or defendant, the principle is the same. There is an important issue for the parties, which falls to be decided by judicial process, and the Judge or jury need help by the presentation of both sides of that issue.

Nor is this practice in any way there simply for the sake of formality. There is a very good reason for it. Quite simply it is because it enhances the prospect of justice being done.

Duty to client

With this prelude, may I develop a little what seem to me to be the important features of the advocate's approach. For the fundamental duties of an advocate are clearly laid down and remained unchanged, and they are not just historical but are soundly based. First, may I take the duty to the client. The advocate, whether arguing forcibly or with quiet persuasion, has the strongest of duties to his client. As Lord Brougham, when defending Queen Caroline before the House of Lords, said:

> An advocate by the sacred duty which he owes to his client knows in the discharge of that office but one person in the world — that client and none other . . . he must not regard the alarm, the suffering, the torment, the destruction which he may bring on any other.

This indifference to the harm which is brought on others is sometimes criticised by the public. People do not like to see victims of rape aggressively cross-examined to suggest that they gave consent, or cross-examination of children in assault cases. The barrister can easily be portrayed as callous. I think the modern Bar would unreservedly accept that these are distasteful parts of their duty, which they do not relish and which should be discharged without any greater forensic offensiveness than is absolutely necessary to the case. No unattractive questions should be asked or allegations made unless it is essential to put the cause across. But, unpleasant as it can be, the duty in appropriate cases still remains a clear one.

Duty to Court

This duty to serve the client, however fiercely it must be fulfilled, is tempered by the advocate's duty to the Court. As Lord Diplock said:

> The special characteristic of a barrister's work upon which the greatest stress is laid is that he does owe a duty also to the Court. This is an over-riding duty which he must observe even though to do so in a particular case may appear to be contrary to the interests of this client.

Thus a barrister must never mislead or misguide the Court, and must resist attempts at distortion. This also means, as Lord Birkenhead said in 1921, that previous decided cases:

> . . . which bear one way or another upon matters under debate shall be brought to the attention of the Court by those aware of those authorities . . . irrespective of whether or not the particular decision assists the party who is aware of it. It is an obligation of confidence between the Court and all those who assist in the capacity of Counsel.

These basic duties explain why it is so important that society should respect the independence of the advocate. This independence has been traditionally regarded throughout the common law as fundamental. It enables the advocate to resist all pressures in an unpopular cause, and to present the case without fear or favour. Without this independence, there would be no effective rule of law and the basic duty of the advocate to protect the rights and liberties of the citizen could not be fulfilled.

This does not mean that the profession should be wholly free from controls. It is wholly appropriate, as is the case in many countries, for there to be some statutory framework which lays down the guidelines within which the profession ensures that there are adequate qualifications, rules of practice, and a disciplinary code. But within the framework it is immensely important that the profession, and individual advocates, should be independent. One of the essential reasons for our existence is to uphold the human rights of people, and often these have to be upheld against the state. To do this effectively, the profession must be as independent as possible of the state. This principle does not exist for the convenience of lawyers. It exists for the benefit of society as a whole, and needs to be widely emphasised by the profession and by government if the freedoms important to a democratic society are to be sustained.

Acceptance of any brief

There is another principle, closely allied to the independence of the advocate, which is of great importance to us in the United Kingdom. This is a willingness to represent all comers, whatever the

Barristers and clients

It is a measure of the extraordinary cynicism with which lawyers are nowadays regarded that the editor of a legal review wrote recently in the *Evening Standard* of the Bar's "infamous cab rank rule" which she seemed to think obliged members of the Bar to "accept any case that comes in the door on a first come first served basis, regardless of subject or money". This is, of course, a travesty of the rule. There is no reason why a barrister should not refuse to act if the case lies outside his normal practice, or the client is unwilling to pay his normal fee. The importance of the rule lies in the reason why the barrister may *not* refuse to act, namely, his opinion of the client.

Leonard Hoffman
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8 May 1992

popularity of their case. This rule is clearly linked to the independence of the advocate: for the independence exists to ensure that people are able to be properly represented. This rule of non-discrimination has become known in England as the "cab-rank rule".

The principle, stated simply, is that advocates are bound to accept a brief in any Court in which they practise at a proper professional fee unless special circumstances justify a refusal to accept an individual case. The rule has a long and important history. Thomas Erskine, probably the greatest advocate since Cicero, when defending the human rights campaigner Tom Paine in 1792 said:

> I will for ever at all hazards assert the dignity, independence and integrity of the English Bar without which impartial justice, the most valuable part of the English Constitution can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end.

In the United States, John Adams acted to the same high standard when he undertook to represent the British soldiers after the Boston massacre. This duty ensures that the most unpopular cases, whether hideous rapes or IRA bombing attacks, secure representation for the accused. It also accurately reflects the correct role and place of the advocate in the judicial system. The very function of the advocate, presenting one side of a case for evaluation by the Court, means that it must be filled regardless of the advocate's own view of that case. The advocate is not the decision-taker: that role is for the Judge or jury.

Reasons for representation

Let us stand back for a moment and consider the reasons which underlie this fundamental rule. Why should an advocate act for, say, an alleged rapist or an alleged murderer? Why should an advocate have to plead in mitigation for someone who has confessed to the most unattractive of crimes? This duty is not just high-minded or quixotic. It exists quite simply because no one should lack an advocate. As we saw earlier, it is the role of the advocate to argue a cause. Everyone is entitled to be represented in our Court proceedings. The advocate is not there to usurp the functions of the Judge or jury. For it is only through sound argument that justice can be done. Arguing a cause through has been thought the only safe way of reaching a sound conclusion. It is not only in the formal judicial process that we regard it as a cardinal principle that both parties should be given a hearing. In the increasingly widespread judicial review of administrative action, the obligation to hear both parties has assumed growing importance. This is not merely ritualistic: it is a practical necessity. It reflects good hard reality, that it is unsafe to reach a conclusion on any other basis. Basic fairness demands a hearing.

The importance of hearing both sides was well summarised by Megarry J:

> It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were full of unanswerable charges which, in the event, were completely answered; inexplicable conduct which was fully explained; of fixed and unaltered determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

Indeed, we all recollect the great case of *Ridge v Baldwin* which shaped the development of so much administrative law in this area. You will remember that a senior police officer was dismissed by the Watch Committee for suggested corruption, without a proper hearing. The House of Lords held that natural justice had been breached, and that a hearing must take place. The original decision was ultimately upheld by the very same Committee. I believe, however, that as a result of the hearing, three members of the Committee actually changed their minds. So this is a small example of how causes can only be fairly decided when both sides of the argument have been heard.

The soundness of the principle is well established in your country by the decision in *Kanda v Government of Malaya* [1962] AC 322. The principle is, I believe, now embedded in common law throughout the Commonwealth, although it will always need to be guarded with vigilance by the Judges. But it is this principle which is the fundamental justification for our profession in Court. As advocates, permitted by society to conduct cases in Court, we have considerable responsibilities. Here I am speaking not just of formal responsibilities, but of the way in which we conduct our cases. We must do so in a way which commands the respect of the tribunals before whom we appear, the public whom we serve, and society which observes our work. For the work we do is highly visible, and the way in which we do it is the ultimate safeguard of our profession. We cannot expect society to respect us, or value our work, unless our standards are high. So, without in any sense wishing to teach very able people in the audience styles of advocacy, may I say a few words about what I think are cardinal characteristics. What should our attitudes and our approach be?

Sensitivity to the tribunal

Perhaps the most important key, which must never be forgotten, is that we as the advocates are not the audience. We have throughout to be

asking ourselves the difficult question: "What is our hearer thinking? What is he or she concerned or worried about? What points are impressing them? What points are troubling them?" This sensitivity to the tribunal requires flexibility. Often the most important aspect in a case which is tried by a Judge alone is what is called the Socratic dialogue – or, more prosaically, the questions from the tribunal and the answers of Counsel. These are central to the case. However much we may have thought about them in advance, the answers always have to some extent to be shaped to meet concerns which are implicit or explicit in the way the question is put. With a jury, which cannot question the advocate, it is harder to be sensitive to the points, and tone of presentation, which will impress them. Sensitivity to the tribunal is the most priceless gift which the advocate can be granted. One of the best advocates who ever led me in practice, James Comyn QC, was not as much of a wordsmith as some of his contemporaries, nor as stylish, but he had the priceless gift of antennae which appeared to reach right out to read the minds of the Judges whom he was addressing.

If, in addition to sensitivity, I have to select other qualities which, as well as the cardinal, fundamental virtue of integrity, are the most valuable to an advocate, they would, I think, be these.

Advice and preparation

Good advice is the starting point. Preparation, advice and case management are not glamorous, but are essential parts of the art of advocacy. One of the great talents of the Bar, often unrecognised outside, is discouraging a client from suing. This involves evaluating the case, recognising its strengths and weaknesses and either discouraging clients from suing or encouraging them to settle. Take libel actions. Since we are all sensitive to our reputation, people very quickly reach for their lawyer. They tend to forget that other people may instantly half-forget what is written about them, and that an action in Court may resurrect the libel two years later. They may need education in the uncertainty that attends any jury trial. My personal approach was to encourage them to sue only in the plainest cases, or where the libel so struck at the heart of their reputation as to give them no alternative. The techniques of advocacy are inevitably employed at this stage of the case – in approaching, rather like a game of chess, how you seek to think through the various issues and permutations to give the right advice. In the same way the thoroughness of preparation of evidence, whether factual or expert, is the key. Such advice and case management are fundamental to our success and engage all the skills and instincts of the advocate. For, whilst unpredictability is at the essence of litigation, we can always seek to reduce its occurrence.

There is no substitute for the most intense and careful preparation and planning of the case. We must know what arguments we are to adopt, and in what order we are to present them. We must take, in so far as we can, firm decisions in advance as to which witnesses should be called, and in what order. It is important for an advocate who is to carry conviction to be master of the facts and legal arguments. We should also advise our client carefully which points should be taken, and which by contrast would sacrifice credibility, and we must take trouble to persuade our client to agree with us as to the sensible mode of presentation.

Precedent and principle

So much for the essential preliminaries. I hope they are enough to indicate that the skill of an advocate begins long before a case comes to Court, and that a principal skill is good judgment. The strongly-developed perception of reality, as well as knowledge of precedent, are vital. For precedent and principle must be tested together. One way, which was I think my own, was to look for what appeared to be the purposive, and the sensible result, and then test it against the authorities. If the authorities were against the approach, then how strong were they? If there was an odd case standing out like a jagged rock at first instance, then the answer was to go and have a word with Lord Denning. Indeed, perhaps the greatest quality of Lord Denning, who, along with Lord Reid, did most to keep English law in touch with society in a speedily changing world, was his unremitting search for principle. And principle is not abstract: it evolves, and it inevitably reflects a view of sensible morality.

Another approach, often equally valid, is to see where the authorities lead, and then to stand back and see whether they are consonant with principle. In some ways this may be a sounder approach, since it means that the historical strengths of the law are weighed before the practitioner applies what may well be his own idiosyncratic approach to principle. But the one approach which, in my view, is fatal is to go to the authorities, establish the precedents, and assume without more ado that they supply the answer. At some point they must be tested against the purpose of the law, for they are ultimately the unremitting lode star for the Courts. Areas of education, general knowledge, sensitivity and analysis of argument come together in the choice of arguments to be advanced, and mould that indefinable, sometimes elusive, quality of judgment.

Points of argument

One of the essential qualities of good judgment is selection of the points to be argued. Clearly we must argue the points we are instructed but we have a large say in persuading the client which are the good ones to be put forward. It has recently been a criticism of some within the English profession that they are prepared to put all points before the Court without too much discrimination, in the hope that one or other of the arguments may appeal to the Court. This cannot be good advocacy. It is all very well to think that this approach may lead to a case succeeding on a point which could only appeal to a bad Judge on an off day. But it is our job to weed out those points, both to give credibility to the sound argument and to keep it within sensible bounds.

We risk an adverse judicial reaction which has sometimes recently been voiced at home if we argue points by which we ourselves are wholly and completely unconvinced. As I say, we may sometimes be instructed to do so,

but we should exercise our own power of persuasion with the client to seek to limit the case to those points which are sensibly arguable.

It is critical to be adaptable. Advocacy is about influencing people to your views. People do not exist in the abstract, nor are they computers. They have human emotions, and they are very different, and it is our job as the advocate to seek to respond to their sensitivities. It is highly desirable that our basic style of advocacy should be courteous, quiet, and thoughtful as well as lucid. There are always moments when it is necessary to be more forceful, for example when a witness is holding material back or when a Judge is not doing justice to your point. But the forcefulness gains more weight if it emerges in contrast to what is in general almost a conversational style. In short, we should never declaim or speak to our tribunal in a manner by which we ourselves would be antagonised. Likewise controlled passion can be very effective, but not if the currency is debased by too frequent usage.

Interest of the Court

We should also remember to argue the case in a way which commands the interest of the Court. As Lord Denning has said.

> No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers – or your readers – will turn aside. They will not stop to listen. They will flick over the pages. But if it is presented in a lively and attractive setting, they will sit up and take notice.

Our choice of phrase, our incisiveness, and our very speaking tone are of considerable importance to holding the attention of the Court. We must so vary the style according to the occasion. Sometimes we must be gently persuasive, sometimes coldly lucid, sometimes quietly provocative, or forceful, and perhaps more rarely obstinate or dogmatic. Sometimes we need some of these qualities in combination. To be able to be master of all these styles, and to have the touch to decide which is the one to use at any moment, would make us truly masters of the great art of advocacy. For advocacy is about persuasion. That is no doubt why Sir Owen Dixon, who was Chief Justice of Australia, described the skill of advocacy by simply saying in three words that it was "tact in action".

I have tried to give my view, for what it is worth, on the fundamental qualities which an advocate needs. For it is first and foremost by our role in Court that we fulfil our duty to society. Our profession must be of the highest quality. In saying this, I do not distinguish between an advocate in countries where there is a separate profession of barrister, or an advocate in countries such as Malaysia where there is a fused profession. In whichever society, I belief there is much to be said for the advocate practising as a specialist.

Advocacy is not just a business, or an occasional, part-time activity. It is a calling. As anyone who has engaged in its knows, it is nerve-wracking, often exciting, highly time-consuming, all-absorbing, and demands total dedication, striving and commitment throughout the duration of the case. It is important that there should be a substantial body of advocates for whom their profession is a full-time occupation. It is not always easy to reconcile the demands of advocacy with the relentless pressure upon law firms to enhance their incomes. But it is important that advocacy should not just become part of the pursuit of "billable hours", or chargeable time. The nature of the duty must be to transcend these considerations.

Effective professional body

May I turn to some wider issues in which the advocate is inevitably involved. The first must be our professional body. It is vital for our profession that we should have an effective professional body. Some twelve years ago, our Royal Commission on Legal Services commented on what was meant by a profession. It stated that:

> When a profession is fully developed it may be described as a body of men and women (a) identifiable by reference with some register or record; (b) recognised as having a special skill and learning in some field of activity in which the public needs protection against incompetence, the standards of skill and learning being prescribed by the profession itself; (c) holding themselves out as being willing to serve the public; (d) voluntarily submitting themselves to the standards of ethical conduct beyond those required of the ordinary citizen by law; (e) undertaking to accept personal responsibility to those whom they serve for their actions and to their profession for maintaining public competence.

There is no way in which these attributes can be maintained without a strong and vigorous professional body.

But I do not believe that the role of the professional body ends in maintaining the competence and ethical standards of the profession. It is not enough for us simply to argue our cases and stick to our last. It is important that as a profession, with a special learning, experience and perspective, we contribute to public debate and discussion on issues which affect the development of the law or procedures. For a long time we did not necessarily do this enough within the English legal profession. It was felt that those who wished to take part in wider issues could join great organisations such as JUSTICE, the all-party group which seeks to secure legal reform. It was only six years ago that the Bar Council established a public affairs committee. This committee engages in wide-ranging work, such as proposed changes in criminal procedure and substantive law, and in seeking to support minorities in the pursuit of human rights. It has shown itself prepared to defend Judges against unfair criticisms, and would no doubt be equally prepared to criticise a Judge responsibly should this ever be thought to be appropriate.

This is a role which for some time has been carried out by the American Bar Association, which contributes widely to debate on issues which affect the law and society. This role on the part of the professional body should be respected by government. In a free society, it is of the utmost importance that a professional body

and its individual members should be able to comment on matters which are of public moment. This is particularly so when issues affecting liberty, or human rights, or minorities are at stake. For it is issues of these kinds which we address tirelessly in our individual practice, and it must be right that we should be permitted to address them through our professional body. This is one of the reasons why freedom of speech exists, and it emphasises why it is important that the Courts should uphold this freedom to the maximum extent.

Problem of legal aid

May I stress, too, an area in which the Malaysian Bar set a high standard. The problem of legal aid for those who cannot afford to defend themselves, or to pursue their rights, is one with which every civilised society has to grapple. The principle is clear: people should have an opportunity of adequate representation. But it is undoubtedly costly, and each of our countries has differing views on the extent to which the state can fund representation through legal aid. The Bar in your country performs an immensely useful role with its own scheme in providing voluntary legal representation in many categories of case where government-funded legal aid is not available. This commitment is in the highest tradition of our profession and of a fair society. As I once heard an American bishop say:

> Society either defends across the board, or it ceases to be an expression of civilisation.

I have spoken of the importance of the professional body in upholding standards. But this does not mean that we must be resistant to sensible change. Indeed, it is very important that in some areas we actively promote change. In our country it tends to be delays and cost which are the chief obstacles to access to justice.

It is often said that only the very rich and the very poor can afford to litigate. Our elaborate, sometimes ritualistic, Court procedures are intended to yield a fair result. There is, however, limited value in having an impeccably fair and thorough system of justice if access to the law is effectively denied to many people. So we continually have to ask ourselves the extent to which procedures can be streamlined without detracting from a fair trial. How can we isolate the principal issues at an early stage of the case? Where can agreement be sought to limit the dispute of fact? What can be properly done in writing, so diminishing the time spent on oral advocacy? What is the role for mediation or alternative dispute resolution? For it is only if the system commands respect with the people whose lives that it affects that the profession of advocate can survive and flourish. In the same way, our profession is only justified if our members are of high quality, if cases are prepared really thoroughly, and if excessively long-winded advocacy is avoided. The more passionately we believe that advocacy is a specialist profession, the more it is the function of all of us to seek to ensure that the standards that we set warrant the specialist status.

Independence and standard of judiciary

But if the profession of advocate is dependent in part on the strength of the professional body, so it is also dependent on the strength of the judiciary. We all know of the great importance to a case of the quality of a Judge who hears the argument and decides it. We also know the confidence we feel in seeking to argue a good point before a Judge we respect. In all our societies, it is immensely important that we seek to secure a high standard of appointment to the Bench, and that as advocates we seek to assist the Court in its lonely and sometimes difficult duty of deciding what is the right result of a case. It is also important that we should be able to have the confidence that Judges are truly independent of government, secure in the holding of their office under the Constitution, and so able to decide cases fairly as between the citizen and the state. For it is important for the advocate to uphold the individual, then how much more crucial it is that the Judge should see it as a sacred duty to do so. Consider these words of Queen Elizabeth I of England to her Judges, which remain every bit as true today as when spoken in 1601.

> Have a care over my people. You have my people – do that which I ought to do. They are my people. Every man oppresseth them and spoileth them without mercy: they cannot revenge their quarrel, nor help themselves. See unto them, see unto them for they are my charge. I charge you even as God has charged me.

The importance of the independence of the judiciary is not always respected, even in countries which otherwise apply the common law system. Yet without such independence, the citizen cannot know the Court will decide a case fairly when it is locked in conflict with the government, and then the judiciary is but an empty husk. Judges must feel able to decide cases against the government where it is right to do so. Otherwise our so-called system of justice becomes a charade, and forfeits the confidence of the community.

Role of the executive

The executive, too, has a role to play. It needs to ensure that the best Judges are appointed, and that they all have the fundamental qualities of integrity and independence of mind. Governments must respect the role of the profession and show self-restraint where decisions go against them. Intelligent governments realise this: they recognise the simple truth that without a respected and robust legal system there can in the long term be no stability or enduring progress in society.

To have full independence, Judges must have security of tenure. In our country, High Court Judges can only be removed by Act of Parliament for misconduct. We sometimes have fierce public criticism of Judges. But it is inherent in the role of Judges that they must risk public criticism. So also it is inherent in their role that they must risk the displeasure of governments. It is important that their position should be proof against removal by those who disagree with their decisions or judicial attitudes. In your country, the safeguard against such pressures exists under the Constitution. I know that the last

years have provoked a controversy as to whether these safeguards have worked well enough, and to the outsider the saga concerning the dismissal of the Lord President, Tun Mohamed Salleh Abas, was a most unhappy one. If constitutional safeguards are to work, it is obviously of the utmost importance that the Judges should be united in their determination to uphold the independence of the judiciary of which they are part. Otherwise your apparently excellent constitutional safeguards are all too fragile.

Judicial review

There is one other aspect of the role of the advocate, and indeed of the judiciary, to which I would draw attention. This is judicial review. We are all aware of the extent to which the promotion of human rights is an important and integral task of lawyers. One of the great developments of the last thirty years has been the extent to which the Courts have been vigilant to protect the citizen against the state through judicial review. They have, as we all know, insisted that the state acted within the powers conferred upon it by legislation, and that wherever appropriate procedures of natural justice or basic fairness were followed, and that decisions should not be manifestly perverse or unreasonable.

The late Lord Diplock described judicial review as the greatest development of the law in his lifetime. It is important that it should not be whittled away, and that Courts should be vigilant to ensure that government is acting within the scope of its powers. There are obviously sensitive areas, such as national security, where the power of the Court to intervene is necessarily more limited than in other cases. But even here, the Courts have a clear duty to be vigilant. However much the executive may be the Judge of the needs of national security, it is important that the Courts should be satisfied that powers are bona fide exercised for genuine purposes of national security.

The power of detention without trial is one which, in a civilised system of law, is an exception to all our normal fair procedures. Whilst the role of the Courts may be limited, it is important that they are prepared where appropriate to discharge it vigorously to ensure that there is no abuse of power. The decision in *Liversidge v Anderson* was an abdication of the judicial role and it was rightly set aside in England years ago. In this area, just as in upholding the freedom of speech of the advocate and the profession as a whole, the task of the Judge in society is of the greatest importance. This in turn means that it is for the advocate not only to argue the point firmly and clearly, but individually and as part of the profession to uphold the independence of the judiciary.

To uphold justice and represent client

Let me come back to the essential role of our profession. We are there to uphold justice, and to represent our client. Any case for a client in Court is a matter of acute anxiety, uncertainty and often anguish. I have myself twice been a litigant: once as Chairman of the Bar Council, and later as Chairman of the Takeover Panel. In each case I was acting in a representative capacity, without the additional concerns which affect a personal litigant, but even so I felt vividly what clients go through. Have I been correctly advised? Will the Judge understand the case? Is the other side leading him astray? Will he appreciate the reality which lies at the heart of the dispute? Will he be bold enough to find against the authority of the state?

When asking all these questions, I realised that to secure the correct answer I was very largely in the hands of my advocate. I needed his skill, common sense, courage, tact and articulacy. He was, in a very real sense, a champion who stood alone for me in answer to a most important challenge. I have rarely felt so dependent upon anyone at any time. In each case I was immensely well served and felt abundant gratitude.

I mention this to stress, from the perspective of those who engage our services, just how important is the work we do for our clients. It is demanding, it may be very exhausting, and sometimes we have our failures. If we strain every sinew to perform to the best of our ability, it is all immensely worthwhile. Not least is this because by doing so we help to keep the flame of freedom alive. We can be quietly proud of our role in society. □

The cab rank rule

The core of David Pannick's new book *Advocates* is an essay on the morals of advocacy. The best section is a passionate and, to my mind, convincing defence of the rule of professional conduct which forbids a barrister to refuse to act for a client on the ground that he does not sympathise with the client's conduct or opinions. A barrister is obliged to accept instructions from any client who wants his services in a case within his expertise and who is willing to pay his ordinary fee. The Bar, with characteristic frivolity about questions of high constitutional importance, calls this the "cab rank rule". As Pannick argues, the cab rank rule is the only way in which the advocate can avoid being associated with the client's conduct or opinions. Once the advocate is free to refuse a brief on the ground that he disapproves of the client, he cannot escape the inference that he must have approved of the clients for whom he has chosen to act. Pannick rightly deplores those advocates who deliberately identify themselves with their clients and personally vouch for the truth and justice of the case they are presenting. If this was required or even permitted, no advocate who valued his reputation would act for clients charged with revolting behaviour or holding unpopular opinions.

Leonard Hoffman
Times Literary Supplement
8 May 1992

Books

Higgins & Fletcher, The Law of Partnership in Australia and New Zealand (6th edition)

By Keith L Fletcher, BA,LLM (VUW), PhD (Qld), Barrister and Solicitor of the High Court of New Zealand and Reader in Law in the University of Queensland.

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Reviewed by P R H Webb, MA, LLM (Cantab), LLD (Auckland), Emeritus Professor of Law, University of Auckland, part author of Webb & Webb, Principles of the Law of Partnership *(5th ed, 1992).*

Dr Fletcher states in his Preface, dated 27 July 1991, that the law of partnership as stated in his work is based on materials available to him in Brisbane at 1 March 1991. He has accordingly been both fortunate and timely enough to celebrate the centenaries of the partnership legislation of South Australia, Queensland, and Tasmania. When one reflects that the New Zealand Partnership Act of 1908 was preceded by the Partnership Act of 1891, he is celebrating the New Zealand centenary as well. It would be pleasant indeed for Dr Fletcher's readers to be able to look forward to a seventh edition marking the centenary of Western Australia's partnership legislation, No XXIII of 1895, especially since the reviewer, as he read the work from cover to cover, increasingly came round to the view that, if a prize could be awarded for the most thoughtfully drafted Partnership Act, it ought to go to the Western Australian one: see, eg, pp 11, 27 – 28, 114 and 154 for examples. Dr Fletcher has managed to juggle – with consummate neatness – with no less than nine Partnership Acts, viz, all the seven Australian Acts, the New Zealand Partnership Act 1908 and the United Kingdom Act of 1890. The reader's way round the work is much facilitated by the comparative Table of Partnership Acts which is contained in the preliminary pages (xxxix et seq).

This work (which the reviewer has not had occasion to write a review of before) appeared first in 1963 under the authorship of the late Professor Patrick Higgins. Dr Fletcher became his partner in this partnership work for the third and fourth editions of 1975 and 1981. The fifth and sixth editions have been the sole responsibility of Dr Fletcher as the surviving partner. Its reputation in New Zealand has gone from strength to strength over the years, as is obvious from the frequency with which it has been cited with approval by the New Zealand Courts.

In three Parts

Dr Fletcher approaches his task in a conventional order. The work is divided into three Parts. Chapter 1, the only one in Part 1, is an introductory one and a good one, too. It contains, inter alia, a useful comparison between partnerships and exempt proprietary/private companies and a section on the interpretation of the Acts. It is evident, from the caustic comment on p 17 in the course of discussing the unlimited personal liability of each partner in a firm, that the author does not exactly see eye to eye with *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).

Part 2

Chapter 2 is the first of the six chapters in Part 2, and is concerned with the Nature of Partnership. The reviewer considers that the treatment of "Carrying on a business" (pp 28-33) was particularly illuminating, especially the explanation of the High Court of Australia decision in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321. The treatment of what, in New Zealand, is s 5(c) of the Partnership Act 1908 (pp 52-61) is also especially helpful, and not least the explanations of *Television Broadcasters Ltd v Ashtons Nominees Pty Ltd (No 1)* (1979) 22 SASR 552 and *Moore v Slater* (1863) 2 W & W (L) 161. (One might mischievously inquire if the learned author ever succeeded in discovering whether the ill-fated submarine figuring on p 54 in *Beckingham v Port Jackson and Manly Steamship Co* (1957) 57 SR (NSW) 403 was a yellow one, as this would make the case even more memorable). All writers on legal matters are subjected to the perennial risk of being overtaken by decisions too late for inclusion in their works, and this fate has overtaken Dr Fletcher in his lucid treatment of the rights of an assignee of a share in a partnership (pp 65-69). *Hadlee v CIR* [1989] 2 NZLR 447 went to the Court of Appeal: see [1991] 3 NZLR 517. This decision will consequently require expanded treatment in this part of the work in the next edition. It will, incidentally, also require mention in Chapter 10 (on Taxation of Partnership Income in Australia) if only to show the different approaches taken in the two countries with regard to taxation of partnerships.

One is apt to think that reported cases on limited partnerships – special partnerships, of course, to the New Zealand reader – are few and far between. This is, no doubt, the case. The New Zealand reader who is concerned with forming a special partnership should, however, ensure that he or she heeds the warning given by Dr Fletcher on pp 73-74. He there refers pointedly to *Re Cotton Crops Pty Ltd* [1986] 2 QD R 328, affd [1988] 1 Qd R 34, as illustrating the "potential for disaster" where the complex registration procedure is not complied with when a special

partnership is to be formed in New Zealand.

Chapter 3 deals very competently with the Contract of Partnership: Formation and Terms. No doubt the Protection of Personal and Property Rights Act 1988 should have been mentioned (and perhaps also *O'Connor v Hart* [1985] 1 NZLR 159 (PC)) for the New Zealand user's benefit in the section on persons of unsound mind (pp 80-82) and, for that matter, in Chapter 7 (on Dissolution) in the section on dissolution by the Court on the ground of mental infirmity (s 38(a) of the 1908 Act). The section on Married Women (pp 82-83) might profitably have referred, even if only briefly, to the possibility of contracting out of the Matrimonial Property Act 1976 pursuant to s 21 of that Act. The text on illegality (pp 86-93) is of considerable interest, though the author has not been able to trace any reported New Zealand case on the Illegal Contracts Act 1970 which is concerned with a partnership. It would appear from the text on partnership contracts concerning land (pp 94-97) that Australian and New Zealand law have, to some extent at any rate, parted company on the matter of the requirement of written evidence, and it will be of interest to see whether the New Zealand Courts will follow any of the seemingly more generous Australian decisions in this context.

It may very well be that not every law library subscribes to the *Financial Times Law Reports*. This would explain the fact that *Walters v Bingham* [1988] FTLR 260 does not figure in the discussions of expulsion (pp 113-115) and of s 30 of the 1908 Act (pp 116-117). *Clark v Leach* (1863) 1 DeGJ & S 409 held that a power to expel a partner contained in a partnership agreement which had expired could not continue to apply when the partners had held over. Browne-Wilkinson V-C, on the other hand, was of the (admittedly obiter) opinion in the *Walters* case that the power to expel was not inconsistent with a partnership at will (see at pp 268-269 of the report). *Lindley & Banks on Partnership* (16th ed, 1990) are far from happy with this opinion: see pp 146-147 and 623. (The new edition of this work arrived, according to the author's preface, when he was *in mediis rebus,* but he has nevertheless been able to refer readers to it.)

Commercial Management Ltd v Registrar of Companies [1987] 1 NZLR 744 (CA) might have been mentioned, for the sake of New Zealand readers at least, in that it relates to the competence of the firm as a whole to act in a particular capacity, eg, as a company director or secretary.

Chapter 4 provides an informative and full discussion of partners' fiduciary obligations. That a fiduciary obligation may also arise *before* the partnership business commences is thoroughly brought home by the discussion (pp 121-122) of the recent decisions in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 (High Court of Australia) and *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1. The highly instructive decision of Williamson J in *Gallagher v Schulz* (1988) 2 NZBLC 103,196, however, appears to have escaped the author's usually eagle eyes, which is a matter for regret on the part of both Australian and New Zealand readers. It is a valuable decision in other partnership contexts as well as on that of the fiduciary relationship between those who are already in a partnership relationship.

Chapter 5 has been ably devoted to the not-so-easy topic of Partnership Property and deals, very skilfully, with (inter alia) the recent decision of the High Court of Australia in *Kelly v Kelly* (1990) 64 ALJR 234. It could have been noted in n 66 on p 143 that s 40 of the Law of Property Act 1925 (UK) has now been superseded by the Law of Property (Miscellaneous Provisions) Act 1989, s 2. It would be interesting to know what the author thinks of *Re Estate of JHR Bloomfield, Baldwin and Robinson v CIR* (1978) 2 TRNZ 587. The nature of a partnership interest has, as far as New Zealand is concerned at least, now been described by Cooke P and Richardson J in *Hadlee v CIR* [1991] 3 NZLR 517 (CA), at pp 520 and 528 respectively, by which Dr Fletcher has, as stated above, been overtaken. The discussion of s 26 of the 1908 Act (procedure against partnership property in respect of a partner's separate judgment debt) which is given on pp 146-148 is of particular interest, for there is more illustrative Australian case law than there is in New Zealand.

Chapter 6 is concerned with the relation of partners to persons dealing with them. The treatment is deft. A small point maybe, but would not readers appreciate better the true breadth of the decision in *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103 if they were explicitly informed that the partner's business was basically concerned with letting lock-up garages and repairing cars? Given that the work is, very deservedly, likely to be used by qualified and aspiring solicitors alike, the reviewer would have preferred to see a fuller (and cautionary) discussion of solicitors' undertakings in the otherwise excellent treatment of s 8 of the 1908 Act (pp 149-156) than appears from the brief reference on p 205 to *United Bank of Kuwait v Hammoud* [1988] 1 WLR 1051 (CA).

There is no doubt that the author will be able to have himself a field day when dealing with wrongs in his next edition. From England, there will, for instance, be *Agip (Africa) Ltd v Jackson* [1990] Ch 265, affd [1991] 3 WLR 116 (CA), to mention on constructive trusteeship, even though there is admittedly a minimal discussion of partnership law as such in the judgments. *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10 (HL) will need mention as well. And, from New Zealand, for "starters" the decisions in *Estate Realities Ltd v Wignall (No 2)* [1991] BCL 2257 and *Cricklewood Holdings Ltd v CV Quigley & Sons Nominees Ltd,* both decided in 1991, will both call for comment. The latter is to be reported in the *New Zealand Law Reports. Simms v Craig, Bell & Bond* [1991] BCL 443 (CA) will also require consideration in the context of breach of a law firm's liability to a client for breach of fiduciary duty.

It is clear from pp 161-162 that Australia has a richer selection of cases on ratification than has New Zealand. Perhaps the New Zealand reader ought to be referred to s 77 of the Property Law Act 1952 on the matter of equitable mortgages somewhere in the course of p 164. Dr Fletcher seems to have a happy knack of tracking down interesting unreported (or as yet unreported) judgments. One such is a 1990 case, *Walker v European Electronics Pty*

Ltd (in liq), with which he deals on pp 174-175. It was there held that receivership work fell within the ordinary course of business of a chartered accountancy firm whose business was not defined or described in the partnership agreement. Another such case, *CSR Ltd v Armitage* (1984), appears on p 194, n 238, in the treatment of s 39(1) of the 1908 Act.

In the course of discussing s 17 of the 1908 Act (persons liable by holding out) there is a footnote 200 on p 186 which is inspired by *BNZ v Harrison and Groothuis* (a case noted by the reviewer in [1986] NZ Recent Law 27). The footnote reads:

> It is suggested that medical or dental practitioners who work in medical or dental centres as independent principals may run a considerable risk of liability as apparent partners unless patients and others are aware of a clear distinction between the centre as a location and a common name for the separate businesses which are operated at that location.

The reviewer would hazard the guess that many doctors and dentists of the kind described in the footnote would be very considerably taken aback once its implications were explained to them. One does, indeed, sometimes see a hoarding or notice displaying the names, one under the other or in columns, of general practitioners practising in a particular named centre. Furthermore, the "considerable risk" of which Dr Fletcher so rightly writes may well be enhanced by the fact that those doctors' names in much the same way as the partners' names appear on the letterheads of other professional partnerships such as chartered accountancy or law firms.

Chapter 6 nicely covers Dissolution and Winding Up. *Germano v Gresham Fire and Accident Insurance Society* [1924] VLR 592 is offered (pp 226-227) as a timely and practical reminder to partners thinking of dissolving partnership that they should review all contracts with, and obligations to, outsiders with a view to discharging the old firm from its obligations and vesting its rights in the new one.

Part 3

Part 3 of the work consists of Chapters 8-11. They expertly deal respectively with what the author calls "Related Provisions", viz, Bankruptcy, Procedure in Partnership Actions, Taxation of partnership Income in Australia, and the Regulation of Firm Names. page lviii of the Index unhappily refers readers to the Code of Civil Procedure and not to the High Court Rules which have now replaced the Code. The last section of the Procedure chapter (pp 308-309) deals with matrimonial proceedings. The New Zealand reader might wish to be reminded that, by virtue of s 4(3) of the Matrimonial Property Act 1976, application of the Partnership Act 1908 is liable to be displaced. Perhaps the chapter on names could in future mention some of the New Zealand cases on passing off and briefly touch upon the Fair Trading Act 1986?

Some 25 years ago, the reviewer spent some extremely pleasant hours, which he remembers to this day, in the company of Pat Higgins and Mrs Higgins when he paid a short visit to the University of Tasmania. It has accordingly given him much personal pleasure to review and to welcome this edition. It will surely continue to be a scholarly and practical guide to law practitioners, law teachers and students on both sides of the Tasman, especially in these days of CER. Hopefully also, accountancy students who have to acquire a knowledge of partnership law will find the book useful. They are well catered for by useful working examples such as those given on pp 256-259 and 270-271 to illustrate the Rule in *Garner v Murray.* The two precedents for partnership agreements which are set out in Appendix 2 should materially assist both the practitioner and the law student who is required to do a drafting exercise.

The get-up of the work is good, as it always has been. The picture of the stained glass window by Cherry Phillips, entitled *Elements of debate I,* which graces the front cover is guaranteed to seduce every reader who has but half an eye to beauty. Prunella Scales wrote in 1985, in her Introduction to the Hogarth Press Omnibus edition of EF Benson's *Dodo, An Omnibus* that "Dodo remains a wonderful read." Higgins & Fletcher may not raise so many laughs, it is true, but it does nevertheless "remain a wonderful read", and its author has amply proved the point made in the Preface: "While the legislation may be venerable, the law is not a crusty relic." □

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What constitutes "land value" in a stratum estate?

By Michael Chapman-Smith, Property Manager and Consultant of Auckland

Land, the actual ground on which things are built, has been the traditional form of determining ownership of buildings and fixtures. The concept of unit titles has, however, raised a serious conceptual problem with certain very practical implications, particularly in the area of rating. In this article Michael Chapman-Smith looks at some of these problems, including the notional concept of land for rating and other purposes, and even in one Australian case the Judge being led to refer to the concept of "future land" in respect of a contract for a unit title building that had not yet been built. The author of this article suggests that for rating purposes "land value" of a unit should be arbitrarily fixed at 33⅓% of the current market value of any particular unit.

There are historical reasons for the differentiation between the "value of land" and the "value of buildings or improvements". In the 1850s the Provincial Government of New Zealand initiated the requirement that all land be valued for rating purposes. Three systems of rating were introduced, viz: the Annual Value method, which came from England, the Capital Value scheme, and early forms of the Unimproved or Land Value system (Jefferies, 1978). O'Regan (1985) observed that local taxation in New Zealand differed from that in England, or the United States of America, in that in New Zealand the greater part of rates are struck on land value alone, and not on the value of land and buildings together. Before the imposition of the infamous Poll Tax which has recently been repealed, England operated a system of rating based on annual rental values, where the owner of vacant land paid no rates because the general principle was that "where no rent is received, no rates are paid".

It is because of the significance of "land value" for rating purposes that the definition of "land" differs in the Rating Powers Act 1988 from its broader definition in the Land Transfer Act 1952. For example, "land", in the Land Transfer Act 1952, includes mines and minerals, which are excluded from the definition of "land" in the Rating Powers Act 1988. O'Regan (1985, p 23) noted that: "In Wellington as early as 1849 there was an ordinance which provided for rates to be levied on an estimate of the value of land, and the word 'land' was specifically defined as not to include houses or buildings."

Before looking at the actual definitions of "land" or "land value" in various statutes, reference will be made to some of O'Keefe's observations on valuation principles. He noted that, while comparable sales are the substratum of valuation theory and practice, those sales must be comparable (O'Keefe, 1977). To O'Keefe (1975b), it was a logical proposition that a stratum parcel can not have "land value" as presently defined and therefore might be non-rateable! O'Keefe (1973, pp 105-106), who believed there was an antinomy in applying the doctrine in *Tooheys Limited v Valuer-General* [1925] AC 439 to a stratum estate, noted that as

> [o]ne of the cardinal principles of valuation is that unimproved value must be ascertained without reference to the improvements . . .[,] the unimproved cannot exist without the improvements. This anomaly, which had been first discerned in Australia [the *Tooheys* case] still persists in New Zealand . . . . Division into strata or layers means that the strata must be marked out by "improvements" . . . . However, in the case of layer subdivisions, it is the building itself which marks out the layers . . . the "land value" of the strata or layers cannot exist without the "improvements".

Is it possible to disperse O'Keefe's cloud of confusion, or does one support his belief that "land value cannot exist without the improvements" when dealing with a stratum estate in a unit title? Section 2 of the Unit Titles Act 1972 defines a "unit" as

> . . . a part of the land consisting of a space of any shape situated below, on, or above the surface of the land, or partly in one such situation or partly in another or others . . . and that is designed for separate ownership.

"Land" is defined in the same section as having the meaning ascribed to it in the Land Transfer Act 1952.

It does appear that the definition of "land" in the Land Transfer Act 1952 is inconsistent with the use of the word "land" in the definition of a "unit" in s 2 of the Unit Titles Act 1972. This is because a unique certificate of title is issued for each principal unit and yet, by definition, the "land" component of that unit is only "part of the land" as defined in the Land Transfer Act 1952. To this extent, O'Keefe was obviously correct in his assertion that the definitions are a legal paradox because, on the one hand, a precisely-defined stratum estate is "land" and yet at the same time the principal unit, and any associated accessory unit comprising that stratum estate, is defined as being only "part of the land" . . . .

It is suggested that the definitions of "land", "land value" and "improvements" in s 2 of the Valuation of Land Act 1951, coupled with the definitions of "land" and "improvements" in s 2 of the Rating Powers Act 1988, provide only part of the answer as to how to ascertain what is "land" in a stratum estate in freehold under the

Unit Titles Act 1972, and are incomplete in assisting in the assessment of a "land value" for any particular unit. There is no relevant case law in New Zealand. For example, although the Court of Appeal observed in *Elwood v Valuer-General* [1989] 1 NZLR at 554, when commenting on the value of land under units, that: "The system of cross-leasing effectively provides the benefit of a limited method of subdivision", no reported judgment has canvassed the definition of "land" in a multi-unit development. However, several Australian cases have examined the meaning of "land" and the assessment of "land value" in strata titles which are analogous to our unit title.

New Zealand is not alone in having difficulty in defining "land" when used in the artificially created sense of an "air lot". This spuriousness led Kennedy J in *Agaiby v Pantham Nominees Pty Ltd* (1985) 55 LGRA 441 to introduce the concept of "future land" when considering the subject matter of a contract to build a multi-storeyed building to be subdivided into strata titles. An interesting Privy Council decision was that of *Commissioner for Railways, Sydney City Council and Wynyard Holdings Ltd v the Valuer-General* (1973) 26 LGRA 1, in which it was held that there was no legal barrier preventing the Valuer-General from valuing as "land", property which contained a stratum or strata. However, the case did not define how a valuer is to assess a "land value" to a unit or to, say, a horizontal stratum at the base of a stratum estate in freehold under the Unit Titles Act 1972.

That Australian legislators have been grappling with similar problems of definition of "land" can be deduced from reading some of their relevant definitions. For example, s 5 of the Strata Titles Act 1973 (NSW) says that:

> *"Building"* . . . means a building containing a lot [note, not contained within a lot] . . . or part of a lot . . .
> *"Lot"* means one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being designated as one lot or part of one lot on the floor plan forming part of the strata plan, . . . being in each case cubic space the base of *whose vertical boundaries* is as delineated on a sheet of that floor plan and which has *horizontal boundaries* as ascertained under subsection (2) . . . [author's italics].

In case the reader is at all confused, a 1977 amendment inserted the following definition in s 5(3) of the Strata Titles Act 1973 (NSW):

> *Cubic space:* a reference in this Act to cubic space includes a reference to space contained in *any three-dimensional geometrical figure* [author's italics] which is not a cube.

The point of referring to these definitions is to make it transparent that Australasian legislators are still struggling to find a suitable definition of "land" when used in the artificially created sense of an "air lot" that is known as a strata title in Australia and a unit title in New Zealand.

When dealing with artificially created air lots, is there any need to refer to "land"? Is it not more sensible to continue the artificiality by deleting reference to "land", but instead to use the concept of a three-dimensional horizontal "plane" with a nominal "thickness" at the base of the air lot, whose boundaries are defined on a plan, as being the equivalent of "land" for the purposes of that unit or lot? This concept aids surveyors, who must lodge a unit plan upon which are depicted the spatial relationships of the units at a specific height: the basal plane of the lot. It appears that Canadian legislators have moved in this direction.

Nonetheless, because the rating legislation in New Zealand and the Valuation of Land Act 1951 require a stratum estate to have both a "land value" and a "value of improvements", it is necessary to wrestle with the conceptual problem of how to assess a "land value" for property in a unit title. Also, the need for a method of assessing a "land value" to such a unit is exacerbated by the Resource Management Act 1991 which stipulates that a consent authority may impose on the developer of units a "reserve contribution" based on "land value".

Whilst, in theory, it is possible to conceive a multi-floored structure that is a body corporate under the Unit Titles Act 1972 comprising, say, three principal units each of which is a complete floor, and above it future development units comprising air space into which it is proposed that the building will be extended at some future date, it does not occur in practice. Therefore, bearing in mind that s 5A(1)(a) of the Unit Titles Act 1972 requires that any building must be completed to the extent necessary to enable all boundaries of every unit to be shown on the plan, and that future development units do not form part of a body corporate (s 9 of the Unit Titles Amendment Act 1979), how is a valuer going to find comparable "bare land" sales evidence upon which to base an assessment of "land value" for a stratum estate under the Unit Titles Act 1972?

O'Keefe (1973) was correct at the time that "the unimproved cannot exist without the improvements" because then a "principal unit" was defined by s 2 of the Unit Titles Act 1972 as being a unit "designed for use . . . as a place of residence or business . . .". Section 10(1) of the Unit Titles Act Amendment 1979 inserted the words "or otherwise" after the word "business" in this definition of a principal unit. Because of this, it is now theoretically possible to develop a multi-floored structure with principal units above it that are "air lots" which have no building in them. Hence, today, it would be incorrect for anyone to assert that "the unimproved cannot exist without the improvements" but, since at least one unit has to be built so that the boundaries of the other principal units can be defined relative to it, it may be said that for all practical purposes the statement is valid.

Valuers are faced with a paradox in that, under the current legislation and in the current market circumstances, there are no sales of principal units which are "vacant air lots" or "bare land" that can be used as factual evidence upon which to extrapolate a land value for other unit titles. One might argue that, because there have been a few sales of future development units (FDUs), analysis of these sales could provide the basis of an assessment of land

values for principal units. However, although each principal unit is part of a body corporate, the registered proprietor of a future development unit is not. Hence, sales evidence of FDUs, like that of non-stratum estates, is not comparable. Since a fundamental premise of valuation lore is the use of comparable sales evidence to assess the value of another property, there is no means by which a valuer can convincingly justify the assessment of a land value of a principal unit with a unit title in a multi-storeyed complex.

It might be argued that, because it may be possible to analyse a land value for principal units that have unit titles in developments that are separated by vertical planes, the data so derived can be used to assess a "land value" in a multi-floored unit title complex where the units are separated by horizontal planes. It is submitted, however, that this approach should be rejected on the basis that it would be comparing apples with pears. In support of this, one needs only to contemplate the difficulty of assessing the value of a "view", which is increasingly important as one ascends a multi-floored building, but is present to virtually the same extent in a single-level multi-unit development that is constructed across a site so that each unit obtains a view.

A fundamental difference between owning a unit with a composite cross-lease title and a stratum estate under the Unit Titles Act 1972 is the method by which the unit owner is entitled to vote and participate in the benefits and duties of ownership of that interest in the estate. A co-owner in a composite cross-lease title is a tenant in common with the other lessors as to a specified share, which is usually proportional to the number of lessors in the development. In a cross-lease development, the voting rights and proprietary interest in the land and buildings are not related to the relative values of the units. By contrast, a "unit entitlement" is assigned by a registered valuer to each principal and accessory unit ". . . on the basis of the relative value of the unit in relation to each of the other units on the unit plan" (Unit Titles Act 1972, s (6)(1)).

Once a unit entitlement has been assessed, and the unit plan has been deposited, it can not be altered unless there are additions to the common property or the project is "redeveloped" within the meaning of s 44 of the Unit Titles Act 1972. A unit entitlement corresponds to the level of an individual unit proprietor's responsibility within the body corporate and his or her residual rights in the development because it specifies:

1 that proprietor's share in the common property, and
2 the share in the land which is to vest in the proprietor upon cancellation of the unit plan.

Because s 6(2) of the Unit Titles Act 1972 stipulates that ". . . no change shall be made in the unit entitlement of any unit after the plan is deposited", the land value of a stratum estate is fixed, for all time, relative to the other units in the development as soon as the unit plan is deposited. Thus any assessment of a "land value" of a stratum estate must consider its unit entitlement, ie, it is a fact that, statutorily, the value of that stratum estate has been fixed relative to the other units in the body corporate, irrespective of whether or not an individual proprietor has allowed the improvements to deteriorate or has upgraded them subsequent to the deposit of the unit plan.

Because many valuation principles are derived from legal or valuation "fictions" such as the definitions of "land" in the various statutes or from other doctrines such as that of the "willing buyer – willing seller", it is suggested that the dilemma of how to assess the "land value" of a unit title in a multi-floored complex be resolved by resorting to a new type of pseudo-legal and pseudo-valuation fiction that deems the "land value" to be, say, one-third of the capital value of the unit.

As a general rule, purchasers of residential sections tend to spend approximately twice the price of the land on improvements, such as the dwelling, and associated garages, paths and gardens. In this situation, a rough "rule of thumb" would be that the land value is one-third of the capital value. It is suggested that, in the absence of comparable sales evidence as to the value of unit title "air lots" without improvements therein, and with the obvious semantic difficulties as to precisely what is meant by "land" or "land value" in such a situation, it would be sensible to obviate the problem by statutorily introducing this concept as a new type of "fictional valuation". The assessment of a land value by this means takes into consideration the immutability of a unit entitlement and yet would, after all, be reverting to the basic tenet that all property valuations should be related to market value. Chapman-Smith (1991) observed that, in other countries, a "unit entitlement" is capable of being adjusted, and recommended that the Unit Titles Act 1972 be amended to allow a body corporate or a proprietor to apply to the Court to change a unit entitlement in a situation where not to do so would be inequitable.

Support for the "rule of thumb" that the ratio of section value to the capital value of house plus land is 1:3 can be found in statistics such as those by Valuation New Zealand in their provisional report on the real estate market in New Zealand for the half year ended June 1990. In a table showing total sales in New Zealand for the main urban markets, Valuation New Zealand (1990, Table F) showed that the sales for the half years ending June 1988 and June 1990 had average section sale prices of $33,184 and $43,418 respectively, whilst the average house sale price (ie house plus land) was $99,696 and $115,508 respectively. These figures mean that the ratio of section to house sale price was 1:3.0 for the half year ending June 1988 and 1:2.66 for the half year ending June 1990. Valuation New Zealand recorded that in Auckland in the half year ending June 1990 there were 149 sales of sections which had an average price of $62,500, and 2,873 house sales that had an average sale price of $192,500. In these sales the ratio of section price to house price was 1:3.08.

Conclusions

The definition of a "unit" as being "a part of the land" (s 2 of the Unit Titles Act 1972) is an antinomy because of the way "land" is defined in the Land Transfer Act 1952. This leads to increased confusion when a valuer is required to assess a "land value" for, say, rating purposes. It is suggested that the novel innovation to the Land Transfer System of a stratum estate under the

Unit Titles Act 1972 that has a fixed unit entitlement should not require the assessment of a "land value" *per se*, and that rating assessments should be market related and fixed at 33⅓% of the current market value of that unit.

Thus, while the methodology of assessing the "land value" of a unit within a body corporate remains arcane, it is proposed that the problem be resolved by amendments to the rating legislation and the Valuation of Land Act 1951 so that the "land value" of any stratum estate under the Unit Titles Act 1972 is deemed to be, say, one-third of that unit's "capital value" as defined in s 2 of the Valuation of Land Act 1951. □

Acknowledgement

Mr R L Jefferies is thanked for his constructive criticism of the manuscript. In acknowledging Mr Jefferies, the writer wishes to stress that some of the ideas presented do have the reviewer's approbation.

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Correspondence

Dear Sir,

[1992] NZLJ 21: "Property: some Pacific reflections"

The illuminating article, "Property: some Pacific reflections" by Alex Frame, published in the January 1992 issue of the Journal, contrasts the Lockean view of property with a view of property from Tamati Ranapiri at the turn of the century. This contrast serves admirably to identify the different concepts of property operating in industrial or "developed" societies and non-industrial or "developing" communities. Mr Frame considers that the difference is an economic one; the contrast is between property thought to be common or public in Polynesian communities but in the developed world, now regarded as capable of private ownership.

Although the Constitutions of South Pacific island states protect a Lockean derived concept of individual property, Mr Frame considers that this will be unlikely to defend the self-interest of business enterprise. Mr Frame implies that such states might act, inspired by a view that certain property is still of a public rather than a private nature.

I am a part-time tutor in Land Law at the University of the South Pacific and offer some comments upon Mr Frame's article which I have only just read.

Tamati Ranapiri probably did not see Blake's satanic mills and his intelligent perception of the differences between exchange as part of a complex system of social obligation and Adam Smith's bargained-for market exchange does not carry any warning of the consequences of industrialisation, (the global indicator of development) a cause of the destruction of a complex form of social exchange by which such non-industrial communities subsist. Many South Pacific states are considered "developing". This will entail the destruction of their subsistence lifestyle based on complex social obligations attaching to what are more than gifts.

Such gifts bear not only ritual and symbolic courtesies but also are, in different contexts, the means of living. One might be obliged by custom to give part of one's slaughtered pig to one's wife's brother who may not be under any direct reciprocal duty to the donor. However, our donor will undoubtedly be the recipient of other gifts of food, services or talismans from other persons who are under social obligations by status to him. Property thus has both an individual and public nature at the same time because it is not seen as independent of the social fabric of mores, customs and mythologies which binds the community together.

A penetrating analysis of economies which are thus "embedded" in webs of custom and tradition is contained in several volumes by Karl Polyani, Professor of Economics at Columbia University, circa 1940/1950. Polyani's work is referred to now by a growing body of historians, sociologists and economic anthropologists who have deepened the understanding of the economic organisation of non-industrial and peasant communities. Tamati Ranapiri's remarks are now the tip of an iceberg of academic research into early economies.

Mr Frame concludes his article by predicting that South Pacific island states may use appeals to the Privy Council to protect what remains of the public aspect of some property.

I suggest alternative means of protecting the "embedded economy", other than the use of constitutional law appeals to the Privy Council. Usufructory rights, profits-a-prendre, licences, the law of the commons (there is still an entry under this title in *Halsbury* 4th ed), easements, rights-of-way are all historical remnants of a pre-industrial English land law where the individual was granted rights of use of public or other lands. These might be usefully applied in many of the imported English law systems operating in the South Pacific.

Another path lies by way of the Treaty of Waitangi. Whether one takes the English or Maori version of the Treaty in the First Schedule to the Treaty of Waitangi Act 1975, one may read into it a reference to the protection of traditional subsistence use rights (by which language, tradition and mythology live). In the Maori version, what is retained is the "rangatiratanga o o ratou wenua, o ratou kainga me o ratou taonga katoa" or the kingdoms, the sovereignty, of all their lands, all their homes and villages and all their treasures. Only the prosaic forms of governorship (kawanatanga) is given to the English. The Treaty of Waitangi might be emulated in local Bills of Rights which protect lands for individual subsistence uses.

Seonaid Abernethy, LL M (Hons), Solicitor, Department of Social Welfare, Auckland.

References to Karl Polyani's work and subsequent academic writing is available on request.

Judicial review of administrative action: Some recent developments and trends (II)

By Rodney Harrison, Barrister of Auckland

This is the second part of the article on judicial review, of which the first part was published at [1992] NZLJ 200. It has been decided to publish the balance of the article in this issue rather than divide it into three parts. The author discusses in this part the substantive grounds of review under five headings — with subdivisions. Dr Harrison then considers what he calls the ultimate outcome, involving discretion and invalidity; and the effect of the Bill of Rights Act 1990. His general conclusion is that the high water mark of judicial review in New Zealand may already have been reached although he recognises a different view is indicated by John Fogarty, QC, [1991] NZLJ 338.

III The substantive grounds of review

1 Introduction

In recent times there have been many attempts to synthesise the numerous grounds of review recognised in the case law, under more manageable heads. Perhaps the two most well-known are those of Lord Diplock and Sir Robin Cooke.

In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410-411, Lord Diplock proposed a three-fold categorisation of the grounds of review, being illegality, irrationality and procedural impropriety. Sir Robin Cooke's attempt to cover the field avers that an administrative authority is "bound to act in accordance with law, fairly and reasonably".

While neither analysis is fully exhaustive, I have a slight personal preference for the term "irrationality" over "unreasonableness",[2] and will therefore adopt the Diplock analysis for the purposes of this review. I will add a catch-all category, "Additional Grounds of Review", to deal with certain recent developments which in my view require separate treatment.

In two recent High Court cases, *Martin v Ryan* [1990] 2 NZLR 209, 223-6 and *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606, 626-639, there are useful general discussions of the overall grounds for review, and reference should be made to these.

2 Illegality

"Illegality" can of course take a variety of forms. The usual case is where the source of the power to act, whether legislative or otherwise, is itself contravened, exceeded or abused.[3] Occasionally, administrative action may contravene some other legislative provision, quite independent from that relied upon as the source of power to act. It is somehow satisfying to see that the Bill of Rights of 1688 not only still has teeth but also a continued relevance even in modern times, as witness its successful invocation against the Minister of Commerce and Broadcasting in *Professional Promotions and Services Limited v Attorney-General* [1990] 1 NZLR 501.

Of course, issues of illegality generally turn on arguments over the interpretation of statutes. In this area as in others, a recent trend would appear to militate against intervention with administrative decisions by way of judicial review. Although strictly speaking an aspect of statutory interpretation rather than a matter of substantive administrative law, it is nevertheless a development of such significance that it cannot be ignored in the judicial review context. I refer to the "make the statute work" school of statutory interpretation. The apparent first flowering of this uniquely New Zealand approach to statutory interpretation was the Court of Appeal's 1988 decision in the *Northland Milk* case *(Northland Milk Vendors Association Inc v Northern Milk Limited* [1988] 1 NZLR 530). In that case, the Court was concerned with a gap in the recently-passed Milk Act 1988 in relation to town milk supply. The legislation had not dealt specifically with what was to happen in relation to home deliveries in the interval before the new administrative system introduced by the Act came into effect. In effect, there was inadequate provision for the transitional period. Sir Robin Cooke P delivering the judgment of the Court identified and then proceeded to remedy the problem:

> This is one of a growing number of recent cases partly in a category of their own. They are cases where, in the preparation of new legislation making sweeping changes in a particular field, a very real problem has certainly not been expressly provided for and possibly not even foreseen. The responsibility falling on the Courts as a result is to work out a practical interpretation appearing to accord best with the general intention of Parliament as embodied in the Act — that is to say the spirit of the Act . . . [T]he Courts must try to make the Act work while taking care not themselves to usurp the policy-making function, which

> rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended. (at 537-8).

Cooke P reiterated this approach in *Ports of Auckland v Kensington Swan* [1990] BCL 722 and again in *Auckland City Council v Minister of Transport* [1990] 1 NZLR 264, 289, (but cf Richardson J at 296), both "rushed legislation" cases.

But it should not be thought that this approach is limited to rushed legislation or to "new legislation making sweeping changes in a particular field". In *New Zealand Labourers' Union v Fletcher Challenge Limited* [1988] 1 NZLR 520 a judgment given almost contemporaneously with the *Northland Milk* case, the "make the statute work" approach was applied to the Labour Relations Act 1987 — not by any means rushed legislation nor even involving sweeping changes in its field. As we saw, Cooke P also applied the "make the statute work" approach in the *Hawkins* case [1991] 2 NZLR 530 at 534 (cf Richardson J at 538).

This interpretative approach received high praise from Thomas J in the recent *Doctors' Contracts* case [1990] BCL 1863:

> I readily acknowledge that this principle is one of the most commendable principles yet fashioned by any Commonwealth Court for the purpose of giving effect to Parliament's intention which, after all, is the object of judicial interpretation of statutory enactments.[4]

Some may like His Honour Mr Justice Thomas see the *Northland Milk* approach to statutory interpretation as a jurisprudential achievement on a par with sliced bread. Others may see it as simply a pithy restatement of the principle of s 5(j) of the Acts Interpretation Act 1924. However, for my part I must confess to a measure of concern. The "make the statute work" principle appears to envisage quite sizeable "gaps" in legislation being filled by the Courts, even those where "a very real problem has certainly not been expressly provided for and possibly not even foreseen". It used to be the case that an administrative action purportedly taken pursuant to statutory authority would be struck down unless authorised either expressly or by *necessary* implication under the relevant enactment. It seems to me that the *Northland Milk* approach goes significantly further than this.

The urging of the Court in a judicial review application to make the statute (or the section) work is when boiled down likely to be, in the majority of cases, a plea for an interpretation sympathetic to the Executive. The notion that Courts should interpret statutory powers in a manner sympathetic to the Executive has major implications for the constitutional position of the Courts and for the independence of the judiciary. There is I respectfully suggest a danger, if this approach is adopted too enthusiastically, that the Courts will cease to be a constitutional bulwark for the rights of the individual against the State. They will become mere curial interior-decorators, papering over the cracks in inadequately drafted statutes. "Make the statute work" can if unbridled easily degenerate into "make the State work".

Be all that as it may, this so far uniquely New Zealand approach[5] clearly needs to be taken serious account of by any Counsel wishing to run an application for judicial review based on illegality.

3 Procedural impropriety

Procedural fairness — in the form of what used to be called *audi alteram partem* — is still very much alive and well in New Zealand. Nevertheless, a breach of procedural fairness will only be found after a very careful consideration of the entire circumstances of the case. The modern approach is stated by Tipping J in *Isaac v Minister of Consumer Affairs* (supra), as follows:

> . . . in this field the Court should take an essentially practical rather than a legalistic approach. For that purpose the whole of the evidence should be reviewed in making a decision as to whether [the Applicant] has had practical justice in the sense of fair notice of what the Minister's concerns were, what she was proposing to do and of the grounds and material upon which she was proposing to act. (at 626).

Isaac also illustrates the inter-relationship between review on the grounds of procedural fairness, and Official Information legislation. The case dealt with a ministerial recall pursuant to s 32 of the Fair Trading Act 1986 of 1200 bicycles sold by the applicant, Isaac, on the grounds that they were unsafe. Isaac was supplied with a summary of a crucial report, but was not supplied with either the full report or with communications from various interest and specialist groups. The summary of the Minister's concerns was accompanied by an invitation to Isaac to seek further information if he wished. Tipping J concluded that the crucial issue was whether in its correspondence to the applicant the Ministry gave him "a sufficient indication of the thrust and substance of the material upon which it was relying". Noting that the applicant had had legal representation from an early stage, His Honour concluded that he was satisfied that it was fair for the Ministry to summarise the report in the way it did in the first instance, coupled with the offer to supply more material if requested. On the particular facts of the case, matters did not develop to a point where it was incumbent on the Ministry to supply full copies of adverse materials of its own motion and in the absence of a request. The *Isaac* decision suggests that, in some circumstances at least, failure to avail oneself of opportunities to access adverse materials when these are available may preclude a later successful challenge on the grounds of procedural fairness.

The recent judgment of His Honour Mr Justice Fisher in *Martin v Ryan* (supra) is both an important authority and a cautionary tale. This was an application for review that arose out of an ex parte order made in matrimonial property proceedings in the District Court. The order followed in the wake of an earlier judgment as to division of matrimonial property and sale of a farm, which reserved leave to the parties to seek further directions as to the sale of the property. In the face of a perceived absence of co-operation from the husband over a proposed sale of the property, the wife's solicitor made ex parte application for, and obtained, an order that the Registrar of the Court execute on behalf of both husband

and wife proposed agreements for sale and purchase of the farm. The Registrar proceeded promptly to execute agreements for sale and purchase in favour of purchasers arranged by the wife, before the husband had a chance to overturn the order which had been made entirely without his knowledge. Because the validity of the agreements for sale and purchase was an issue, the husband ultimately applied for judicial review of the ex parte order. It was common ground that the material placed before the District Court Judge on the ex parte application contained a number of material mis-statements, although Fisher J was not prepared to hold that these mis-statements had been made fraudulently.

The application for review in fact succeeded on four grounds, and will therefore be referred to in a variety of contexts: illegality (absence of power in terms of the relevant District Court Rules); irrationality (fundamental flaw in the reasoning of the Judge on the ex parte application); mis-representation; and procedural unfairness.

In the present context, however, the judgment of Fisher J is a salutary reminder of what may easily be overlooked, namely that "an order made ex parte represents a fundamental denial of that natural justice upon which our whole system of civil litigation normally rests". Accordingly, His Honour listed and analysed five requirements which in his view need to be made out before such an order is proper:

(i) Clear case on the merits.
(ii) Irreparable injury if application proceeds on notice.
(iii) No delay by applicant.
(iv) Effect of order will be only brief and provisional.
(v) Strong grounds for overriding conventional requirements of natural justice.

His Honour held that none of these requirements had been satisfied in the case of the ex parte order in question. He concluded that the High Court had jurisdiction to deal with the matter by way of judicial review, and that the applicant was not limited to pursuing statutory rights of appeal. (at 229, 226-230).

Notwithstanding the Privy Council's rejection of the existence of any duty to consult in the *Petrocorp* case, the duty to consult remains an important one, as two recent High Court decisions show. *Air New Zealand Limited v Wellington International Airport Limited* [1992] BCL 362 contains a detailed analysis of the duty to consult and the correlative duty to disclose adequate information so as to make consultation meaningful. That case involved a challenge to the landing fees and user charges set for Wellington Airport. It was held that a breach of the duty to consult rendered the landing fees and charges invalid. In that case, the statute itself expressly recognised a duty to consult.

Failure to consult the pharmaceutical industry and "substantial members" of it such as the applicant, prior to changing a Health Department policy on setting subsidy levels for therapeutic drugs, coupled with a subsequent failure to inform the applicant of the policy change when the policy's application to the applicant's product was under consideration by the Department, led recently to invalidation of a Ministerial decision to reduce public subsidiary levels on the widely used antibiotic "augmentin". See *SmithKline Beecham (NZ) Limited v Minister of Health* [1992] BCL 366, also discussed earlier.

4 Irrationality

The expression "irrationality" is of course merely an attempt to encapsulate in a single word the several facets of the summation by Lord Green MR in the *Wednesbury Corporation* case (*Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, 229), in a passage so well known that it is otiose to reproduce it here. It is hard to think of another legal principle which has been so repeatedly restated in varying shades of language, ranging from "reasonable" (meaning "within the limits of reason" and avoiding epithets such as "gross" or even the "geographic epithet" Wednesbury[6]), continuing on through such expressions as "irrational", "perverse", "abuse of power", to "so absurd that [the decision-maker] must have taken leave of his senses": *R v Environment Secretary ex p Hammersmith LBC* [1990] 3 WLR 898 at 961.

Whatever one may think of the intermediate expressions, the verbal gulf between a decision-maker who has not decided reasonably and one whose decision is so absurd that he must have taken leave of his senses – contrasting an unreasonable but nevertheless sane decision-maker as against one possessed by demonstrable (even if only temporary) insanity – is I suggest so great as to leave uncertain whether there is at work a single standard of irrationality, or rather one that is variable according to the subject matter. (There is some support for this variable approach in the cases analysed earlier under "Reviewability/Justiciability".)

In the recent House of Lords decision of *Brind v Secretary of State* [1991] 1 All ER 720 Lord Lowry, after reviewing some of the ways in which "*Wednesbury* unreasonableness" has been described, commented as follows (at 737-8. See also Lord Ackner at p 731):

> These colourful statements emphasise the legal principle that judicial review of administrative action is a supervisory and not an appellate jurisdiction. . . . In that strong, and necessary, emphasis lies the danger. The seductive voice of Counsel will suggest . . . that, for example, Ministers, who are far from irrational and indeed are reasonable people, may occasionally be guilty of an abuse of power by going too far. And then the Court is in danger of turning its back not only on the vigorous language but on the principles which it was intended to support. A less emotive, but, subject to one qualification, reliable test is to ask: "*Could* a decision-maker acting reasonably have reached this decision?" The qualification is that the supervising Court must bear in mind that it is not sitting on appeal, but satisfying itself whether the decision-maker has acted within the bounds of his discretion.

This would seem to accord with the approach consistently espoused in recent times by Sir Robin Cooke.

Brind v Secretary of State is of general interest also. It involved a challenge by journalists to directives

issued by the Home Secretary to broadcasting organisations, prohibiting the broadcasting of direct statements by representatives of proscribed organisations in Northern Ireland, the directives having allegedly been imposed in the public interest to combat terrorism. Not surprisingly, given the relatively limited nature of the restrictions imposed by the directives, a challenge based on irrationality failed. The appellants also argued that the directives involved in an infringement of the fundamental right of free speech and in particular a breach of the rights recognised by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. So far as the Convention was concerned, it was held that, not having been incorporated into English domestic law, it could not be a source of rights and obligations and (in the absence of ambiguity in the domestic legislation, when it *could* be called upon as an aid to interpretation) could not be invoked as a means of challenging an administrative decision. (At 723, 733-5, 736. Contrast the judicial positions taken in *Attorney-General v New Zealand Maori Council (No 2)* [1992] 2 NZLR 147.) Lord Bridge stressed that this conclusion did not mean that the Courts were powerless to prevent the exercise by the Executive of administrative discretions in a way which infringed fundamental human rights. The Courts, his Lordship stated, were

> perfectly entitled to start from the premise that any restriction of the right of freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.

While the primary judgment was that of the Secretary of State, the Court was "entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment". (at 723).

Challenges based on irrationality fail so regularly that a successful challenge based on this ground is something of an event. As already noted, one such occurred in *Martin v Ryan*, discussed earlier.

In *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129, an appeal by the Crown against an interim declaration under s 8 of the Judicature Amendment Act 1972 was argued over three days before a five-man Court of Appeal. The issue was whether the Court should declare (in the interim) that the Minister of Broadcasting should have regard to anticipated findings of the Waitangi Tribunal in a claim under the Treaty of Waitangi Act 1975 relating to Te Reo Maori and for that reason should in the meantime refrain from disposing by sale of radio frequencies which the Crown wished to dispose of pursuant to the Radio Communications Act 1989. The Waitangi Tribunal had already made one report on the Maori language/broadcasting issue, and a further Tribunal hearing was scheduled to start in a matter of weeks.

A majority of the Court of Appeal (Richardson and Hardie Boys JJ dissenting) held that the interim declaration against the Crown should stand. It was held that, as the Crown conceded that it was bound to have regard to the Waitangi Tribunal's earlier report, it likewise necessarily must be prepared to treat any further recommendations of the Tribunal as relevant considerations. It was held that it would be wrong for the Minister at this stage to foreclose the possibility of a further relevant contribution to the material forming the basis of his contemplated decision. For the Minister to proceed to accept tenders without awaiting the further report of the Waitangi Tribunal would be a failure to take into account relevant considerations and (in the opinion of the President) not the act of a reasonable Minister (at 139, 143, 144).

5 Additional grounds of review

Lord Diplock's tripartite classification of the grounds of review was not intended to be exhaustive. His Lordship acknowledged that further development of the law might take place on a case by case basis, adding further grounds of review. He expressly mentioned as a possibility the principle of "proportionality", recognised in the administrative law of several members of the European Economic Community. (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.)

It is not proposed in this paper to review such recognised (although perhaps still contentious) ancillary grounds of review as "substantive fairness[7] and "mistake of fact".[8]. Rather, it is proposed to examine three possible additional grounds of review which have received judicial consideration recently. The first of these, misrepresentation, is it is submitted a "true ground", while the second and third – the so-called "innominate ground" and "proportionality" – are, it is suggested, "false grounds".

(i) *Misrepresentation*

In *Martin v Ryan*, the facts of which have already been outlined, Fisher J held that the misrepresentations by the wife and her solicitor when applying for the ex parte order were in themselves grounds for overturning the order by way of judicial review. His Honour expressed the view that "mistake or misrepresentation on the part of those parties who appeared before, or made representations to, the decision-maker" might "usefully be regarded as additional to the three categories proposed by Lord Diplock". His Honour further held that, given the duty of full disclosure and utmost good faith which must be observed on an ex parte application, where an ex parte order has been made by the District Court on the strength of material misrepresentations by the applicant, the High Court is able to set the order aside by way of judicial review. This is so whether or not there has been fraud on the part of the applicant. (See [1990] 2 NZLR at 224, 226, 233-4.) This ground of review accordingly succeeded.

While there would appear to be a close and yet unresolved kinship between the ground of "misrepresentation" and that of "mistake of fact", it is respectfully submitted that Fisher J's analysis is compelling, and this therefore can be accounted a "true ground" of review.

(ii) *The "Innominate Ground"*

This has its origins in certain statements of Lord Donaldson MR in *R v Panel on Takeovers and*

Mergers, ex p Guinness Plc [1990] 1 QB 146, 160. After referring to Lord Diplock's classification of the grounds for review, His Lordship stated:

> In the context of the present appeal he [Lord Diplock] might have considered an innominate ground formed of an amalgam of his own grounds with perhaps added elements, reflecting the unique nature of the panel, its powers and duties and the environment in which it operates, for he would surely have joined in deploring any use of his own categorisation as a fetter on the continuous development of the new "public law court". In relation to such an innominate ground the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court, and if so, what form that intervention should take.

This "ground" was urged upon Tipping J by counsel for the applicant in *Isaac v Minister for Consumer Affairs*. Having pointed out that he had already determined that there was neither unfairness nor unreasonableness in the way the matter was handled by or in the ultimate decision of the Minister, His Honour went on to say:

> While I accept that there should be no such categorisation of grounds as might represent a fetter on the Court's powers of development in the field of judicial review, it would seem to me to be unlikely in a case where there is no unfairness and no unreasonableness for the Court to be able to say that something had gone wrong of a nature and degree requiring its intervention. (at 639.)

I would go further and say that, given the plethora of existing grounds and sub-grounds for review and the well-established limitations on interference by the Courts with administrative decisions, the so-called "innominate ground" is (as gently hinted by Tipping J) nothing more than a tautologous distraction from the established grounds of review. It is predicted that, while it may from time to time provide a tempting refuge for desperate Counsel, it is unlikely to be of any real assistance in a difficult case.

(iii) *Proportionality*

"Proportionality" is the potential import from European administrative law which, as has already been seen, Lord Diplock expressly mentioned when leaving open the possibility of further categories in addition to his three-fold one of illegality, procedural impropriety and irrationality. The absence of a reasonable relationship between object sought and means used, or between "crime" and "punishment" — in other words, an absence of proportion — can, under the law as it stands at present, be regarded as a manifestation of unreasonableness or irrationality.[9] But "lack of proportion" has not hitherto been considered to be an independent ground of review in itself.

In *Brind v Secretary of State*, supra, the facts of which have already been outlined, the House of Lords was pressed with "proportionality" as an independent ground of review. In particular, it was submitted that a European test of proportionality, that is, "whether the interference complained of corresponds to a pressing social need", should be applied.

Of their Lordships, Lords Bridge and Roskill were content to say that the case was not one for the application of a European principle of proportionality, while leaving open to possibility that the "increasing influence of Community law upon [United Kingdom] domestic law" might at some time in the future lead in that direction. (at 724, 725.) Lords Ackner and Lowry were more emphatic in rejecting proportionality as a separate ground, because of its inevitable tendency to require the Court to inquire into and decide upon the merits of the decision under consideration. (at 735-6, 738-9.) Lord Lowry was particularly forthright:

> In my opinion proportionality and the other phrases are simply intended to move the focus of discussion away from the hitherto accepted criteria for deciding whether the decision-maker has abused his power and into an area in which the Court will feel more at liberty to interfere. . . . [T]here is *no* authority for saying that proportionality in the sense in which the Appellants have used it is part of the English common law and a great deal of authority the other way.

His Lordship went on to list a number of significant objections to the continental doctrine in the common law context.

"The principle of proportionality" was also prayed in aid by counsel for the applicant in *Isaac v Minister of Consumer Affairs*. In rejecting this as a ground for review, Tipping J stated:

> In truth I do not consider that the so-called principle of proportionality is anything other than a criterion upon which the Courts should consider whether a decision is unreasonable . . . Depending on the circumstances the imposition of a sanction or other order grossly disproportionate to the circumstances may well lead the Court to the view that the decision is unreasonable. (at 636.)

It is submitted that this correctly states the position, and that there is no separate ground of review based on "proportionality".

IV The ultimate outcome

1 Discretion

Relief on an application for judicial review is of course discretionary, and it should never be assumed that the relief sought, or any relief, for that matter, will follow as a matter of course if a ground for review is made out.

In modern administrative law factors like the existence of an alternative remedy such as a right of appeal or reconsideration or the fact of a full reconsideration having occurred will be highly relevant to the exercise of discretion and may well militate against a grant of relief. In *Fraser v Robertson* [1991] 3 NZLR 257, 260;[10] the Court of Appeal has recently reaffirmed that, notwithstanding the existence of s 4(1) of the Judicature Amendment

Act 1972, it is established practice that relief under the Act will be refused if the remedy of appeal is more appropriate. In *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR at 639, Tipping J stated that, even if he had found procedural unfairness prima facie justifying relief, he would have been minded to refuse relief as a matter of discretion, in the light of the fact that the Minister subsequently accepted all further material which the applicant wished to put forward and undertook a *bona fide* reconsideration of the matter.

In *Martin v Ryan* [1990] 2 NZLR at 243, Fisher J listed and took into account the following factors as relevant to the exercise of his discretion in that case:

(a) Conduct and position of affected third parties;
(b) Gravity of the errors vitiating the decision;
(c) Degree of prejudice to the applicant;
(d) Availability of other remedies;
(e) Conduct of the applicant;
(f) Delay;
(g) Conduct and position of the respondent wife.

The recent Court of Appeal decision in *Ritchies Transport Holdings Limited v Otago Regional Council* [1991] BCL 1871, where the Court concluded that there were "significant defects" in the process of conducting public tenders for a restructured Dunedin city bus service, provides a further illustration of the judicial pragmatism which invests the exercise of the discretion to grant relief. In that case, the Court of Appeal adopted a balancing approach, weighing "the detriment [to the applicant] flowing from the established grounds against the disadvantages that inevitably will follow any order to set aside". It stressed the disruption, likely public inconvenience and "inevitable commercial uncertainty" which setting aside contracts awarded to the successful tenderers would involve, and in the end granted only very limited relief.

2 Relief: Invalidity

Some interesting and novel legal issues arose in *Martin v Ryan*, discussed above. The challenged ex parte order authorising the District Court Registrar to execute agreements for sale and purchase of the farm on behalf of the husband and the wife had already been acted upon before the proceedings were issued, the Registrar having executed the agreements, which had already been signed by the prospective purchasers. On the face of it, binding agreements for sale and purchase of the land had come into effect. The ultimate remedy sought by the applicant husband was therefore declarations not only that the ex parte order was invalid, but also that the act of the Registrar in signing the agreements, and thus the agreements themselves, were legal nullities. This in turn gave rise to a series of difficult issues concerning the nature of invalidity in administrative law, and as to whether relief could be granted retrospectively and with consequences for third parties such as the prospective purchasers.[11]

The judgment of His Honour Mr Justice Fisher contains a lucid and scholarly discussion of these various issues, and of the "absolute" and "relative" theories of invalidity (the well-known "void/voidable" debate).[12]

Counsel for the applicant argued that the effect of the various defects associated with the ex parte order was to render it "a nullity ab initio". Counsel for the respondent wife, on the other hand, submitted in effect that the order was valid at the time the agreements were concluded, with the consequence that any judicial act of invalidation at the present time would have prospective effect only or, if retrospective, would not be retrospective for the purpose of agreements already made. Fisher J found himself unable to accept either of these submissions. His Honour accepted that the current approach is that "Except perhaps in comparatively rare cases of flagrant invalidity, the decision in question is recognised as operative unless set aside";[13] and ultimately concluded that the Court had power to retrospectively invalidate the ex parte order in a manner which would invalidate the agreements for sale and purchase. His Honour stated:

> . . . I think that in most, if not all, cases the judgment of a Court acting by way of judicial review to impeach an earlier decision is more usefully regarded as constitutive than declaratory. I would prefer to describe the usual case as the positive act of "retrospective invalidation" rather than the passive act of merely recognising an absence of legal consequence which has always prevailed. . . . At least in the majority of cases the vitiating features of an impugned decision create no more than a latent invalidity which will be of no consequence unless and until it is rendered operative by the decision of a Court of competent jurisdiction. The occasion for the latter decision might never arise. When it does arise all intervening events are potentially relevant. It seems to me that if the superior Court does ultimately strike down the decision, the act of the superior Court is not so much passive discovery of the still-born as selective euthanasia of the congenitally deformed. In short, I think that in most cases "retrospective invalidation" more accurately reflects the Court's role than "declaration of nullity ab initio". [1990] 2 NZLR at 237.

This judicial approach to issues of invalidity now seems firmly established and clearly illustrates the pragmatic nature of modern administrative law.

V Judicial review and the New Zealand Bill of Rights Act 1990

This is a separate topic in itself. It is therefore not proposed to canvass the various individual rights and freedoms dealt with in the New Zealand Bill of Rights Act 1990, but simply to direct attention to the potential of the Bill of Rights in the judicial review area. However, in the administrative law context, particular attention should perhaps be drawn to s 27(1), giving the right to 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 . . . rights obligations or interest protected or recognised by law", and to s 27(2), which provides an express right to apply "in accordance with law" for judicial review of any such determination. In deciding the precise extent in application of particular

rights and freedoms in the particular case, regard must of course be had to the test of "justified limitations" contained in s 5 of the Act.

One aspect of the applicability of the Bill of Rights in administrative law arises in the context of interpretation of statutes. Section 6 provides that whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, "that meaning shall be preferred to any other meaning".

Issues of statutory interpretation apart, the further question arises as to the availability of the Bill of Rights either as a direct ground of review in itself, or in support of one of the established grounds such as irrationality.

Section 3 of the Bill of Rights provides:

> This Bill of Rights applies only to acts done –
>
> (a) By the legislative, executive or judicial branches of the government of New Zealand; or
>
> (b) by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law.

The wording of (b) necessarily means that, in most cases where it is possible to say that an administrative decision-maker is exercising a statutory power or statutory power of decision in terms of the Judicature Amendment Act 1972, he or she will also be performing an "act" to which the Bill of Rights is applicable. The only issue of substance militating against the applicability of the Bill of Rights to particular administrative acts or decisions may well be whether the function, power or duty in question can be said to be a "public" one![14]

Certainly – and this may not yet have been fully appreciated – it is strongly arguable that a large number of administrative authorities, including local authorities, educational authorities such as school Boards of Trustees, and professional disciplinary bodies, will be subject to the provisions of the Bill of Rights.

However, to say that the Bill of Rights applies to a particular administrative decision or act is not necessarily to say that an apparent breach of the Bill can be relied upon either as, or in support of, a ground of judicial review. Where the source of power for the administrative act or decision in question is an "enactment",[15] the provisions of s 4 of the Bill of Rights have to be taken into account:

> Other enactments not affected – No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), –
>
> (a) *Hold any provision* of the enactment to be impliedly repealed or revoked, or *to be in any way invalid or ineffective;* or
>
> (b) *Decline to apply any provision* of the enactment –
>
> *by reason only that the provision is inconsistent* with any provision of this Bill of Rights. (emphasis added)

Section 4 therefore is a prohibition on (inter alia) any Court holding any provision of an enactment to be "in any way invalid or ineffective" or declining to apply any provision of an enactment *by reason only* of the inconsistency of the provision with the Bill of Rights. In the administrative law context, the prohibition in s 4 will only apply when the source of the power to act or decide, or the criteria for decision, is an "enactment" *and* that enactment is itself inconsistent with the Bill of Rights. Given the terms of s 6 referred to above, it is submitted that the inconsistency would have to be an express inconsistency. Otherwise, it is likely that the enactment would (as s 6 requires) be capable of being given a meaning consistent with the Bill of Rights.

It is therefore submitted that s 4 of the Bill of Rights will only provide an obstacle to the Bill's application in a judicial review context, where the administrative action or decision – or criteria for action or decision – which would otherwise violate the Bill are authorised by an enactment which is *expressly* inconsistent with the relevant provision of the Bill of Rights.

It is noteworthy that the Bill of Rights does not make any express provision in respect of remedies, where its rights and freedoms are infringed. In *Palmer v Superintendent Auckland Maximum Security Prison* [1991] 3 NZLR 315, 318, Wylie J commented on this, stating:

> It is to be noted that the New Zealand Bill of Rights Act 1990, while identifying a number of important rights, contains no provision expressly dealing with the remedies which may be granted for breach of those rights. It may well be that the Bill of Rights Act itself impliedly empowers the Courts to grant whatever remedies may be appropriate to safeguard the rights therein.

To date no major test of the Bill of Rights in the administrative law context has arisen![16] But even in the absence of a Bill of Rights, it is clear law that a breach of human rights such as an unjustifiable discrimination on the grounds of sex may result in an administrative decision being overturned on the grounds of irrationality. (See *Van Gorkom v Attorney-General* [1978] 2 NZLR 387. Note also the discussion in *Brind*, supra.)

It is submitted that the increasing use of the Bill of Rights in the criminal sphere as a ground for exclusion of evidence obtained in breach of it shows that the Courts consider that the Bill of Rights was intended by Parliament to have teeth, despite its silence on the question of remedies. (See *R v Accused (CA 227/91)* (1991) 7 CRNZ 407 (CA); *R v Kirifi* (1991) 7 CRNZ 427 (CA).) The maxim "*ubi ius, ibi remedium*"[17] must also give rise to a strong argument that infringement of the Bill of Rights should operate as a separate ground of judicial review in itself![18] Breach of its rights and freedoms should not therefore be regarded as merely lending weight to an argument based on illegality, procedural impropriety or irrationality.

VI Judicial review under the Employment Contracts Act 1991

The Employment Contracts Act 1991 introduced sweeping changes not only in our system of labour relations but also in the legal institutions involved in the resolution of labour (or if preferred, employment) disputes. In place of the former Labour Court there are now two institutions, the Employment Court and the Employment Tribunal. As is well known, the former Labour Court had a jurisdiction under s 280 of the Labour Relations Act 1987 to hear and determine applications for judicial review in certain defined circumstances. That provision bestowed on the Labour Court jurisdiction over the administrative acts and decisions of a number of persons and bodies given status or recognition by the Act, including employers and trade unions, in relation to statutory powers or statutory powers of decision "conferred by or under" the 1987 Act, the State Sector Act 1988 and (in the case of a union or employers' organisation) the constitution, rules or by-laws of the union or organisation.

Under the Employment Contracts Act 1991, that jurisdiction was transferred to the Employment Court, with certain significant modifications. Section 105(1) of the 1991 Act gives the Court full and exclusive jurisdiction in respect of an application for judicial review or its common law equivalent:

> . . . in relation to the exercise, refusal to exercise, or proposed or purported exercise by –
>
> (a) The Tribunal; or
> (b) An officer of the Tribunal or the Court; or
> (c) An employer, or that employer's representative under this Act; or
> (d) An employee, or that employee's representative under this Act, –
>
> of a statutory power or statutory power of decision (as defined by section 3 of the Judicature Amendment Act 1972) conferred by or under this Act or the State Sector Act 1988 . . .

One feature of the new provision is that a number of the categories of decision-maker listed by the 1987 Act have been removed. This in large measure follows from the abolition by the 1991 Act of the decision-makers themselves, or at least the removal from the legislation of any controls over their relevant powers and functions.

It can be seen that it remains possible, in the circumstances defined by s 105, to apply for judicial review of the exercise, non-exercise or proposed exercise by an employer of a statutory power or statutory power of decision. However, for the Employment Court to have jurisdiction under s 105, the statutory power or statutory power of decision must be one "conferred by or under" the Employment Contracts 1991 or the State Sector Act 1988. While at first sight this wording would appear to create a jurisdiction comparable to that which existed under the Labour Relations Act 1987, the 1987 and 1991 Acts are so radically different in content and purpose that there is at present considerable uncertainty as to what, if any, exercises of statutory power or statutory power of decision by employers or their representatives – or of employees or their representatives for that matter – will be subject to judicial review in terms of s 105. In the current economic and industrial environment, the question whether and if so to what extent employer-initiated change can be subjected to judicial review is obviously a crucial one, and it is proposed to examine the issues and the present state of the authorities at some length.

Two major possible categories of potentially reviewable acts of an employer arise under the Employment Contracts Act 1991. The first can be characterised as acts taken in reliance on the enabling regime introduced by the Act, in particular (for example) acts taken with a view to negotiating an employment contract or contracts in terms of Part II of the Act. The second relates to decisions and actions taken by an employer either pursuant to or at least consequent upon the existence of an employment contract. Examples of the latter include decisions to dismiss, demote or otherwise to vary existing conditions of employment, and declarations of redundancy.

An application for judicial review of the actions of an employer falling within the first of these two categories was in issue in the Full Court of the Employment Court's decision in *Northern Local Government Officers Union v Auckland City.* (Employment Court, Auckland Registry, AEC 42/91, 3 December 1991, Goddard C J, Castle and Finnigan JJ.) In that case ten employees of the respondent City Council and their Union sought to challenge the employer's actions in advertising and offering promotions and transfers on the basis that successful internal applicants would be required to enter into fresh individual employment contracts. The applicants claimed – with justification, as the Full Court held – that the actions of the employer in that regard constituted a breach of the existing individual employment contracts of the employer's salaried staff, as these contracts contained detailed provisions relating to job progression imported from the since-expired registered agreement betwen the Union and the Council. The plaintiffs/applicants sought a compliance order and an injunction to restrain the breaches of employment contract, and applied for judicial review. The Full Court upheld the claims for compliance order and injunction, but refused the application for judicial review.

In relation to the application for judicial review, the crucial issue was whether it could be said that the actions of the employer in formulating and offering the proposed terms and conditions of employment which were held to breach existing employment contracts could be said to involve the exercise of a statutory power or statutory power of decision conferred by or under the Employment Contracts Act 1991. Counsel for the applicants argued that, in formulating and making offers of job vacancies to existing employees, the employer was engaging in the conduct of negotiations with its employees pursuant to Part II and specifically ss 9(b), 18(1) and 19(1) of the Act. Its actions were accordingly subject to judicial review. In response to that submission, the Full Court stated:

> We agree that s 9(a) confers a

right, but it is an absolute right, to make an election to conduct negotiations for an employment contract "on his or her own behalf" or "to be represented by another person, group or organisation". That establishes a liberty or freedom. It does not confer a power or a right that could be reviewable. Similar observations can be made about s 9(b) and also about s 18 which is aptly summarised in its marginal note "Freedom to negotiate". Section 19(1) empowers employees and employers by using the word "may" to enter into "such individual employment contract *as they think fit*" (emphasis added). . . .

No powers or functions of any kind are to be found in the provisions mentioned contained in Part II of the Act. Indeed, it is significant that the Act nowhere seeks to define the functions or powers of either employers or employees. . . . [But] we should not be taken as holding that review is never available in relation to other provisions of Part II or in the event of a breach of an employment contract. (33-34.)

The Full Court therefore draws a distinction between a "liberty or freedom" *established* by the Act, and a "power or right" *conferred* by it. That is with respect a difficult distinction. It is suggested that Part II of the 1991 Act is either enabling (or empowering) of employers, or it is not. If the former, then it is submitted that exercise of what may be characterised as a "liberty or freedom" under Part II must necessarily be the exercise of a statutory power or power of decision. While it is no doubt possible to argue that an employer or employee in negotiating for an employment contract is in fact exercising purely common law (contractual) freedoms, the legislative history including the previous high degree of legal regulation of at least some sectors of the workforce and the provisions of the 1991 Act itself would tend to suggest (as the Full Court apparently considered) that the conduct of negotiations is in fact regulated and empowered by the statute and not by the common law. (See *Northland Milk*, supra, where so-called "common law" rights were in issue, and it was held (at p 453) that there was "sufficient statutory connection to warrant resort to the [Judicature Amendment] Act".)

It will be noted that the Full Court characterises the right of negotiation as "an absolute right". This may be a way of saying that in the Court's opinion, the nature of the right is such that it should as a matter of policy be unreviewable. But even if that were thought to be the case – and there are certainly counter-arguments to be made on that score – this would not be a matter excluding the Employment Court's statutory jurisdiction under s 105, but rather, it is submitted, a matter relating to an alleged absence of substantive grounds of review.

It should perhaps be added that the decision does not rule out the possibility of judicial review of the acts or decisions of a local authority or other employer established under statute, on the basis that it has acted by or under its particular enabling legislation. Thus in the case of a local body, judicial review may be possible in the High Court, on the basis of an exercise of statutory power "by or under" the Local Government Act 1972. And in the case of an educational authority such as a school Board of Trustees, a basis of review may exist if power has been exercised "by or under" the Education Act 1989.

The second of the two major possible categories of reviewable acts of an employer already referred to is that of decisions and actions taken by an employer either pursuant to or at least consequent upon the existence of an employment contract. In the early days of the 1991 Act, there have been a number of attempts to challenge by way of judicial review action or proposed action by an employer purportedly taken pursuant to, or allegedly in breach of, employment contracts of affected employees. Thus far, the Employment Court has been concerned only with applications for interim relief, so that there has been no final resolution of the jurisdiction issues which arise.

In *NZ Seafarers' Union v Shipping Corporation of NZ Limited* (Employment Court, Wellington Registry, WLC 57/91, 28 June 1991, Goddard CJ), the interim application concerned a substantive application for judicial review of imminent dismissals, purportedly on the grounds of redundancy. The argument proceeded on the basis of a concession by counsel for the employer that the proposed dismissals would involve the exercise of a power conferred by or under the Employment Contracts Act 1991, and the case therefore is of little if any assistance on the point of principle.

Hyndman and Others v Air New Zealand Limited (Employment Court, Auckland Registry, AEC 19/91, 16 September 1991, Colgan J) also concerned impending dismissals which the employer claimed to have initiated by reason of redundancy. Counsel for the applicants argued on an application for interim relief that the employer had exercised a statutory power or statutory power of decision conferred by or under the Employment Contracts Act, when giving to its employees the challenged notices of termination. Colgan J reviewed at length the arguments of counsel on the jurisdiction issue as well as the substantive grounds of review advanced by the applicants; and, overall, concluded that there were clear, important issues for trial between the parties on the basis of an expectation of fair and reasonable conduct between them. His Honour did not however rule directly on the jurisdictional issue, but by implication can be seen to have concluded that there was a serious question.

In *Davis and Others v Ports of Auckland Ltd* (Employment Court, Auckland Registry, AEC 38/91, 15 November 1991, Travis J), similar issues arose on an interim application relating to proposed redundancies of which the employer had given preliminary notification to the employees' Union. Unlike the *Air New Zealand* case, the employer had not yet moved to the second stage of giving actual notice of termination in respect of individual employees. Once again, the authorities and arguments of counsel were dealt with at some length by Travis J. Dealing with the argument of counsel for the employer that what was being exercised was contractual rights and

not a power or right conferred under the Employment Contracts Act, Travis J, whilst professing himself sympathetic to that argument, pointed to a possible distinction from cases of pure contractual powers in that the defendant employer was expressly relying on a redundancy procedure

> which finds its way into the individual employment contracts because they are based on expired collective employment contracts in terms of s 19(4) of the Act.

His Honour therefore concluded that "for present purposes the plaintiffs have passed the threshold of establishing that there is jurisdiction for the Court to review the issue of the notices under the redundancy procedure" (at 8). His Honour stressed that this was a tentative conclusion only.

As well as being interlocutory arguments only, the three Employment Court decisions just referred to all predate the Full Court's decision in the *Northern Local Government Officers' Union* case. If the reasoning in this decision is correct, it is difficult to see much if any scope for judicial review by the Employment Court of the acts or decisions of employers (or employees for that matter) taken in pursuance of the various rights and freedoms conferred by the 1991 Act. In particular, it is difficult to see how decisions as to negotiating tactics, or the actual conduct of negotiations, or as to strike or lock-out, or as to termination or variation of contractual relationships, to name perhaps the key issues, can be said to fall within the ambit of the Employment Court's judicial review jurisdiction.

Given that judicial review is by no means the only remedy available in these situations, that may not necessarily be a bad thing. Actions for breach of or "founded upon" an employment contract may be brought in the Employment Court, and of course there remains the full ambit of the personal grievance procedure. If that is the case, however, then s 105 would appear to be of little or no utility in relation to the actions of employers and employees and their representatives, and one wonders why they are mentioned in the provision at all.

VII Conclusion/Future trends

Modern administrative law is a sometimes bewildering but always heady mix of sophisticated legal reasoning and a very large measure of judicial pragmatism. It therefore takes a bold if not indeed rash commentator to venture to identify an overall trend in this field. At the risk of attracting either epithet or even both, I offer the view that recent cases do tend to suggest that the understandable and indeed proper judicial cautiousness over intervention by way of judicial review may be hardening somewhat; and, indeed, that, except perhaps in relation to issues of procedural fairness, we may well have seen the high water mark of judicial review interventionism in New Zealand![9]

There are a number of factors which combine to suggest such a tentative conclusion. First, there are the developments already noted in relation to reviewability/justiciability, where we have seen the proposition judicially advanced that certain categories of administrative decision involving a high level of policy content or specialist knowledge may be either unreviewable or at least reviewable only on certain limited grounds. Secondly, there is the "make the statute work" approach to the interpretation of statutes, which necessarily it is submitted impinges upon and limits intervention on the ground of illegality. Thirdly, there is the continued – one would hesitate on the available evidence to say increased – judicial robustness in relation to the exercise of the discretion to refuse relief on a variety of grounds, including the existence of alternative remedies. Fourthly, given the frequency and prominence of some of the dissenting judgments in recent major judicial review cases in the Court of Appeal, the judicial realist can perhaps muse – in this instance, discreetly to himself and not out loud – upon the possible future impact in the administrative law field of the two latest permanent appointments to the Court of Appeal.

All this is not to say that meritorious cases will not continue to succeed. But at least outside of the area of litigation in support of claims under the Treaty of Waitangi, where claimants would appear to be on something of a "roll", the applicants in the "big cases" involving issues of high policy may find the battle to be even more uphill than previously. □

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1 *NZ Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 552. See Sir Robin Cooke, "The Struggle for Simplicity in Administrative Law, in Taggart (Ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects*, (1986, OUP) passim.

2 Given the number and variety of the ways in which the "*Wednesbury* unreasonableness" ground of review has been expressed, it is suggested that "irrationality" is a more neutral and at the same time more all-embracing description of this particular ground.

3 The adoption of a policy or rule fettering the decision-maker's discretion can be seen as an aspect of this, and has provided the basis for two successful recent applications for review. See *McManus and Another v Palmerston North Boys' High School Board of Trustees*, High Court, Palmerston North Registry, CP 302-3/89, 5 December 1990, McGechan J (school discipline); *Tactical Shooting Institute (NZ) Inc. v Commissioner of Police*, High Court, Christchurch Registry, CP 435/90, 23 August 1991, Tipping J (ban on import of semi-automatic weapons).

4 At p 45 of the judgment. His Honour did not find it necessary to apply the principle in that case, considering the "purposive approach" to the issue of interpretation there faced an adequate one.

5 Cf G Taylor, " 'Making the Act Work' in the Privy Council", 14 *The Capital Letter* No 27, 23 July 1991, commenting on *NZ Stock Exchange v Inland Revenue Commissioner* [1991] 4 All ER 443 – where, it is respectfully submitted, the Privy Council does not adopt this approach, either expressly or by implication.

6 Refer Sir Robin Cooke, "The Struggle for Simplicity in Administrative Law", supra at pp 13-16. And see *Hawkins v Minister of Justice* [1991] 2 NZLR 530 where Cooke P considered, however, that the "geographical epithet" added nothing.

7 See Taylor, p 348-51. See also *Martin v Ryan*, supra, 224; *Isaac v Minister of Consumer Affairs*, supra, 629.

8 See Taylor, pp 321-5. See also *Isaac v Minister of Consumer Affairs*, supra, 636-8.

9 See 1(1) *Halsbury's Laws of England* (4th Ed), para 78; Taylor, p 343.

10 The decision also deals with delay and abuse of process in the judicial review context.

11 The prospective purchasers were, it should be stressed, joined as defendants in the proceedings.

12 [1990] 2 NZLR at 235-242. See further, M Taggart, "Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences", in Taggart (Ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986 OUP), at p 70.

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Getting the words right

By Professor Jim Evans, Faculty of Law, University of Auckland

This article is a review and critique of the Law Commission Report No 17 — a New Interpretation Act: To Avoid "Prolixity and Tautology" (GP Print Limited, Wellington, December 1990).

1 Introduction

In a snide review in the March 1991 issue of this Journal Don Dugdale roundly criticised the Law Commission's proposal for a new Interpretation Act and suggested that the effort put into it was a waste of public money. To set the tone of this review, let me begin by challenging this assessment.

I shall start with a simple point. The proposed new Act, including "the Contents" (the name proposed for what in present statutes is called "the Analysis"), but without the schedule of consequential amendments, takes up nine pages of the Report. In contrast, the equivalent portions of the present Acts Interpretation Act 1924, which are reprinted in the report, take up 23 pages. Since the layout of the proposed Act is much less dense than that of the existing Act the number of words used to cover similar subject-matter has probably been reduced to about a third. Yet utility has not been sacrificed. The Commission sometimes bends over backwards to achieve elegance, and as a consequence over-simplifies (as some of Mr Dugdale's comments illustrate); but in compensation there are many proposals for useful change. In addition, careful thought has enabled the Commission to achieve a standard of precision that the present Act lacks. Bertrand Russell once remarked about an argument he was putting that if he should turn out to be clearly wrong at least he hoped to be wrong clearly. The remark applies to the Commission's draft. Its simplicity and precision enables a reader to comprehend readily what is proposed, and in consequence makes assessing whether the proposals are desirably easy. If the Act is passed the same precision will enable readers to ascertain readily what the law is.

Lest it be thought that in the scale of things precision of language is not a very important virtue let me here remind the reader, interstitially, that in the events that led to the famous case of *Re Diplock* [1948] 1 Ch 465 some lawyer had Caleb Diplock say in his will that his executors were to apply his residuary estate "for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select". The prolixity of the lawyer's style might not have mattered had it not led to inclusion of the redundant words "or benevolent". After the executors had distributed £203,067 to 139 charities three of the next of kin took proceedings in which it was eventually held by the House of Lords that the bequest was invalid since benevolence, as distinct from charity, is not a sufficiently precise concept adequately to limit the executors' power (see *Chichester Diocesan Fund v Simpson* [1944] AC 341). The executors were then sued, and, when recourse against them was exhausted, the next of kin turned to the charities for recourse. Common rumour has it that one of the executors committed suicide as a consequence of the proceedings (see Petitt, *Equity and the Law of Trusts* (6th ed, 453, n 17). If more care had been taken to select the right words equity students would have been deprived of a leading case on tracing; but it is easy to think that the total sum of human well-being, not to mention the testator's intentions, would have been advanced.

Getting words right matters. And, as the *Diplock* case shows, aiming for simplicity is not incompatible with aiming for precision, rather the one aim furthers the other.

In any event, in promoting a simpler and more effective Interpretation Act the Law Commission is not following its own whim: the Commission is required by the Act setting it up to advise the Minister of Justice on ways in which

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13 *Burr v Blenheim Borough Council* [1980] 2 NZLR 1, 4, per Cooke J. Fisher J had some difficulty in seeing the utility of singling out a special category of "flagrant invalidity": [1990] 2 NZLR at 237-8.

14 Contrast *McKinney v Board of Governors of the University of Guelph* (1990) 76 DLR (4th) 545 (SCC). The Indecent Publications Tribunal has held that its functions fall within s 3(b) of the Bill of Rights: *Re "Penthouse (US)" Vol 19 No 5 and others* [1991] NZAR 289.

15 "Enactment" is not defined. In general it embraces any Act or rules or regulations thereunder or any provision thereof: *Black v Fulcher* [1988] 1 NZLR 417, 419 (CA).

16 The Bill of Rights received a very passing mention in a refugee case, *Hassan v Minister of Immigration* (1991) 6 CRNZ 771 (CA), and was briefly discussed in the interpretation context in *New Zealand Stock Exchange v Inland Revenue Commissioner* [1991] 4 All ER 443 (PC). For discussion of the Bill of Rights in the context of a discretionary discharge on leave of a committed mental patient, see *Re S* [1991] BCL 2103.

17 See *Ashby v White* (1702) 2 Ld Raym 938; 92 ER 126.

18 From a classification point of view, it can of course be argued that breach of the Bill of Rights is a form of illegality. Even if this is so, it is submitted that such a breach may be more helpfully addressed as a separate ground in itself.

19 It should in fairness (or self-defence) be pointed out that this thesis is not new: see G Taylor and J Timmins, "Administrative Law — The Changed Role of Government", New Zealand Law Society, August 1989, pp 17-29. Contrast the article by John Fogarty, QC in [1991] NZLJ 338.

the law can be made as understandable and accessible as possible. In fact, the proposed Act needs to be understood as one part of a broad programme designed to make statutes clearer and more accessible. The present report indicates four different ways in which the Commission is tackling its task. Firstly, many of the provisions within the proposed new Act have been designed to simplify the drafting of other statutes. For example, s 20, which states: "Where a word or expression is defined in an enactment, other parts of speech and grammatical forms of the word or expression have corresponding meanings", should considerably simplify the definition sections of statutes, allowing one definition to cover all variants of a word. Secondly, the proposed Act is itself intended to set new standards of drafting and presentation, and in this aim it plainly succeeds. Thirdly, the Commission indicates that it is working with the Parliamentary Counsel Office on a manual on legislation (para 16). Finally, this report itself contains a number of useful comments on drafting style (para 229).

That the Commission's enterprise is worthwhile seems to me hardly open to serious debate. Contrary to Don Dugdale's suggestion, the waste of public money will occur if after the Commission's extensive efforts the proposal for a new Act is not carried to completion. Given the pattern of our parliamentary process I consider it vital that the draft Bill should be introduced in the current parliamentary session to allow sufficient time for it to be passed after time has been allowed for public submissions, and before the rush of legislative activity that often occurs in the third year of a parliamentary term.

None of this should suggest that the draft is without fault, and that is why it is important that time be allowed for public submissions. That will allow lawyers interested in the proposed Act to make submissions on detailed points they believe can be improved.

I have my own list of detailed proposals. However, I shall not recite these here, but instead confine myself to commenting on one provision: the proposed replacement of s 5(j) of the present Act. I have one grammatical comment to make about the proposed substitute, but in the main I am interested in the theoretical issues raised by the Commission's attempt to express in a precise way the right general approach to interpretation.

2 The replacement for Section 5(j)

Section 5(j) is to be replaced by s 9(1), which reads as follows:

> The meaning of an enactment is to be ascertained from its text in the light of its purpose and in its context.

The careful reader will sense something slightly odd about the wording of this provision. The cause is that the interpreter is directed to ascertain the meaning of an enactment "in its context". But one does not ascertain the meaning of an enactment *in* its context — ascertaining can certainly be done *in* a place, but the context of an enactment is not a place in which it can be done — one ascertains the meaning of an enactment *taking account* of its context. Whatever else is done, the wording of this provision should be changed to read:

> The meaning of an enactment is to be ascertained from its text in the light of its purpose and taking account of its context.

Otherwise unnecessary confusion is inevitable.

Extent to which meaning should prevail

The interesting general question posed by this provision is the extent to which meaning *should* prevail in the application of statutes. No doubt meaning should generally prevail; but, as I shall show below, there are circumstances in which it clearly should not, and others in which whether it should is doubtful. To avoid any misunderstanding let me make clear that by "meaning" here I mean simply that which it was intended that the words should be understood as applying to, so long as this is a possible meaning of the totality of the words used allowed by the normal conventions of language. The qualification "so long as this is a possible meaning of the totality of the words used . . ." is needed because someone may intend an utterance to mean something that is not a possible meaning of it. In such a case "that which the words were intended to be taken to apply to" would not be a meaning of the words as I am using that expression here.

The provision does not state that meaning is always to prevail, it merely states how meaning is to be ascertained, but it might be taken to imply that meaning is always to prevail, at least in those cases where the issue allows for doubt. The Commission is vaguely aware of the significance of this issue (paragraphs 44 and 45, and parts of the following paragraphs), but in the end says nothing useful about it.

Simple cases where meaning should not prevail

One circumstance in which Courts should not apply the meaning of a provision is when a case is covered by some recognised qualifying doctrine of the law. I have in mind such doctrines as diplomatic immunity (as it is in the common law, or as it now is in New Zealand in the form of a set of rules given statutory form)[1] some of the criminal defences (such as self-defence), the doctrine of waiver as it applies to procedural rules,[2] crown immunity,[3] and the presumption that statutes do not apply outside the jurisdiction; all of which have as their role (or part of their role) to limit the application of statutory rules.

Someone might suggest that when, say, the doctrine of diplomatic immunity or the doctrine of waiver make an exception to a rule this is because the "meaning" of the relevant rule silently excepts any case covered by an applicable qualifying doctrine. However, it is unrealistic to imagine that those who frame a rule always, or even often, think of the need to except cases covered by qualifying doctrines. It is more realistic to see those who frame a rule as understanding that it is to become part of the whole corpus of the law and as such will naturally be subject to any general doctrines that apply to it. Thus, it is the intended *role* of a rule, rather than its intended *meaning*, that justifies the application of qualifying doctrines. (Note that intent is important here, for the doctrines I have in mind are

not constitutional limitations. The legislature can override them if it chooses, by evidencing an *intent* to do so.)

A second category of case to be considered are those in which the draftsperson has obviously made some more or less mechanical mistake in drafting that nevertheless leaves a provision with some meaning. In some instances when a mechanical mistake occurs the resulting provision has no meaning at all: an example is when an amending Act inserts words into an earlier statute in a place where they just make gibberish. In these cases the argument for correcting the error is obviously very strong, at least if the rule Parliament intended to enact is apparent (see eg *R v Vasey and Lally* [1905] 2 KB 748; *Colonial Sugar Refining Co v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 360). But there are cases in which a mechanical mistake leaves a provision with a possible meaning that nevertheless clearly was not intended. In these cases also Courts have generally been willing to correct the error (see eg *Murdoch v British Israel World Federation (NZ) Inc* [1942] NZLR 600 at 626-629, 635-637, 676).[4] That seems to me a sensible policy, so I believe this is a second type of circumstance in which meaning should not prevail.

More contentious issues

We come now to a third category of case, about which the issues are more contentious. These are cases in which it appears that the meaning of a rule applies to a situation only because of oversight by the legislature. I have discussed these cases elsewhere,[5] and shall not try to duplicate that discussion here, but enough needs to be said to explain the issues.

Broadly, the cases involved are those in which a conflict exists between the intended meaning of a rule, and the practical judgment upon which it was based. (By a "practical judgment" I mean simply a judgment about what should be done.) Such conflict can occur in two ways.

A rule reflects a judgment that a certain legal consequence should follow in a certain type of circumstance. Any rational jugment of this type must be based on a belief that every case within the rule will possess features that justify attaching the relevant consequence. That is so even if the rule applies to a wider class of case than is of direct concern to those who make the law, in order to achieve the object of capturing the cases that are of direct concern. (Think of speed limits, or parking regulations, which often apply to a wider class of case than exhibits the mischief that worries us in order to be certain of capturing the cases that do exhibit that mischief.) For rules of this sort the relevant feature is being one of the cases that it is desirable to include within the rule in order to make more likely capturing the cases that are of direct concern.

Now two things may go wrong. Either the features (or feature) assumed to be present in all cases within the rule may, through oversight, not be present — either at all, or with the force assumed — or those features may be present but accompanied by others that the interpreter believes would likely have led those who framed the rule to agree that it should not apply to this special case. In short, the judgment behind a rule may not apply to a case within its terms either because the considerations weighed in the judgment are not present in the way expected or because they are present but outweighed by other considerations.

Let me give a simple example of each type of case. As an example of the first type of case consider *In re Bidie decd* [1949] Ch 121. A time limit in the UK equivalent of our Family Protection Act stated that an order under the Act should not be made "save on an application made within six months from the date on which representation in regard to the testator's estate [. . .] is first taken out". In this case representation was first taken out on the assumption the deceased had died intestate. Fifteen months later a will was discovered; the first grant of representation was revoked; and a second grant made. The estate had not been distributed to the deceased's widow under the intestacy, and the will disinherited the widow. The widow sought to make a claim under the Act within six months of the second grant. The trial Judge rejected the widow's claim, but the English Court of Appeal allowed it, holding that in context "representation" meant "representation in respect of a will".

This decision solved the immediate problem, but did not reach the underlying cause. Suppose there had been two wills: an earlier will, in favour of the widow, that was believed to be the last will and was proved first, and a later will, disinheriting the widow, discovered after the six months had elapsed. Then the Court would have to have held that the widow could not claim. Yet this case and the case before the Court raise precisely the same difficulty. Surely the truth here is that those who framed the rule assumed that whenever someone might wish to challenge a will by applying under the Act the representation first granted in the relevant estate would relate to the will the applicant wished to challenge. They overlooked the case of lost wills. On that analysis the judgment behind the rule, that those wishing to challenge a will should have six months, but not more, to lodge their application, simply did not apply to this case. The case was within the meaning of the rule, but not within the judgment that lay behind it.

An example of the second, "outweighing", type of case is *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191. A tax statute stated: "Every person, whether a taxpayer or not [. . .] shall, if required by the Commissioner [or an authorised officer], furnish in writing any information or produce any books or documents which the Commissioner or any such officer considers necessary or relevant [to the administration of the Act]". A solicitor, required under the Act to produce books and documents of a client, resisted on the ground that they were information that under the common law was protected from production in Court. Despite the general words of the section the Court of Appeal held that it did not apply to solicitors.

Any argument that this result can be justified by the meaning of the language seems unlikely to be plausible. Solicitors are clearly persons, and that the framers of the rule silently exempted solicitors is unlikely. Even if they did there is no way the interpreter could know of this. Again, we need to recognise that the issues in the case do not have to do with meaning. If we are

sympathetic to the Court's decision it is because we judge that those who framed the rule did not consider the special considerations applicable to privileged information held by solicitors and did not intend to override these considerations in favour of disclosure to the tax authorities. Putting it more broadly, the considerations that weighed in the judgment that gave rise to the rule apply to the case but seem to be outweighed by others that we believe were not contemplated. We sense that the judgment that led to the rule does not extend to this case.

A common temptation of lawyers when cases of either of these types are brought to their attention is to say that the results arrived at can really be explained in terms of "meaning": not the literal meaning of the words, truly enough, but nevertheless the true meaning of what was said. I believe they are here equating this "true meaning" with their understanding of the judgment that led to the rule. That seems a mistake, for it prevents us seeing the issues clearly. If the true meanings of the provisions in the two cases just discussed exempt the facts illustrated by the cases then we have no basis for understanding the tension that exists in these cases. Why do we find such cases difficult? What are we to say of Judges who dissent in these cases? Are they just excessively literal-minded?

We should note that sometimes the literal meaning of the words of a provision does have to be modified to arrive at the meaning it was intended to convey. If a statute dealing with bankruptcy says, "the remaining moneys are to be distributed among all creditors" it plainly does not mean all creditors of anyone, but rather all creditors who have proved their debt in this bankruptcy. This is what was meant, and, if you like, what the words mean in this context. But the cases I have cited are not like this. We do not think that those who drafted the provision debated in *Bidie* really meant by "representation" "representation to administer the will the applicant wishes to challenge". That would be to assume they contemplated that the class of first represention in situations where a challenge under the Act might be appropriate and the class of representations to administer the will the applicant wished to challenge in such situation might be different, and intended to refer to the second by referring to the first. Patently, they did not: they simply overlooked the possibility of lost wills. Nor do we consider that the draftsperson who framed the provision debated in *West-Walker* meant by "every person" "every person other than a solicitor". The source of the tension in these cases does not have to do with an uncertainty about meaning, but lies instead in our sense that in them what was meant by a provision and what falls within the judgment to which that meaning was intended to give effect differ.

How these issues should be resolved

Which should prevail when meaning and judgment conflict is an issue of some difficulty. Arguing in favour of meaning is the need to protect the reliability of the expressed terms of a statute and the danger of allowing Judges to give effect to *their* judgments in the name of giving effect to those of the legislature; arguing in favour of judgment is respect for the will of the legislature and, at least in clear cases like those above, the common sense of the matter. Different legal systems tend to take different approaches to this conflict, as may the same legal system at different times. I suspect, for instance, that the present approach to interpretation in Courts in the United States of America tends to place very considerable emphasis on the judgment of the legislature as distinct from its meaning. But all systems, I think, tend to move uneasily between the two.

In my own opinion the right compromise is that an exception should be made to the meaning of a rule only when (i) the conflict with the judgment of the legislature is obvious, or would be obvious to someone familiar with the relevant subject matter; and (ii) in the outweighing type of case, when the ground for the exception is a preference between values recognised in the existing law or widely understood in the community.

I do not expect my fiat on this to be accepted just like that. Indeed it should not. Time and discussion are needed to develop clear understanding of the issues involved in these cases and sensible policies regarding them. But I hope I have said enough to indicate that a simple preference for meaning in all such cases is too blunt.

A final case

I believe there is a fourth circumstance in which meaning should not always prevail. This is when a case that was plainly within the judgment on which the rule was based fails to be within its terms because of some obvious oversight. However, enough has been said: I shall not discuss these cases, and mention them only for completeness.[6]

I should also point out, to avoid misunderstanding, that many cases that in a broad sense may be said to involve the interpretation of statutes do not turn on the *scope* of a statutory provision (ie what it applies to), but on other issues. An example are cases in which the question is whether the enactment of a rule implies the creation of a further rule or some other legal effect.[7] However, these cases do not seem likely to be affected by the proposed provision.

Contrast with s 5(j)

A consequence of trying to draft a precise Interpretation Act is that this brings into prominence theoretical difficulties that can be avoided in a cruder Act. Whereas the proposed provision puts the question to what extent meaning should prevail in the application of statutes squarely before us, s 5(j) of the present Act leaves it obscured. According to its terms every provision is to receive such "fair, large, and liberal *construction and interpretation*" [my emphasis] as will best ensure the attainment of its object and of the Act to which it belongs. Since applying a qualifying doctrine, correcting an obvious mechanical error, or following the judgment behind a rule rather than its meaning, can all be said to be forms of construction or interpretation, as can following meaning when any of these competing things might be appropriate, the use of these words does not attempt to settle when meaning should prevail. Nor is there elsewhere in the subsection any unequivocal election in favour of meaning. The "construction and interpretation" arrived at are to be such as will "best ensure the

attainment of the object of the Act and of such provision or enactment according to its [presumably the provision or enactment's] true intent, meaning, and spirit". Nothing is said about what should be done if intent and spirit conflict with meaning, as I have indicated they may.

Options for change

So what is to be done? Section 5(j) fudges issues that we ought to face. The proposed new section suggests (although it does not state) a stance on these issues that is not adequate. Is it possible to draft a provision dealing with the issues I have discussed above that would get things right? Of course it is possible: but it is not easy. To encourage discussion I shall append to the foot of this article a first attempt to frame such a provision. In the absence of an attempt to get things right, or until this is undertaken, the law-makers seem to me to have three choices.

The first is to leave things alone, continuing with s 5(j) and the rest of the present Act. That does not appeal to me much. There is too much good in the rest of this proposed Act to let it languish.

The second is to replace s 9(1) with a pruned down version of s 5(j) that continues to leave open when meaning should prevail. The following might suffice:

> Every Act shall be deemed remedial and every provision of it shall accordingly receive such fair and liberal interpretation as will best ensure the attainment of its object and the object of the Act to which it belongs.

If this is done then I hope that law teachers, students, lawyers, and Judges, will begin to confront the issues discussed here. Otherwise we shall never improve on our present muddle.

The third choice is to continue with the proposed s 9(1), modified as I have suggested above. If this is the option chosen then Courts should treat the provision as doing only what it says: indicating the correct method for ascertaining meaning. They should resist assuming, or drawing any implication, that meaning should always prevail, and begin the difficult process of developing a jurisprudence about just when it should. If that occurs then the Commission's attempt to be precise will have been worthwhile.

Appendix: Draft of an Adequate Provision Dealing with When Meaning should Prevail

1 A statutory provision that has a meaning shall be applied according to its meaning except in the following cases:

(a) when it is modified by some recognised general doctrine of law; or
(b) when it would be apparent to any fair-minded reader of the provision who was familiar with the factual subject-matter to which it relates, and any relevant law that because of mistake, oversight, or false assumption, the meaning of the provision does not express the rule the legislature believed it was enacting, in which case the Court shall apply the rule such a person would conclude the legislature believed it was enacting; or
(c) when considerations not applicable to the generality of cases within a provision that might reasonably be thought to justify an exception to the provision apply to a case within its meaning, but appear not to have been considered by the legislature, and excepting that case from the provision (i) would be consistent with evaluations already represented in the law or widely recognised in the community, and (ii) would not be inconsistent with the judgment made by the legislature when enacting the provision, in which case the Court may except that case from the provision.

2 If a statutory provision does not have a meaning but the rule the legislature intended to enact would be apparent to any fair-minded reader of it who was familiar with the factual subject-matter to which it relates, and any relevant law a Court shall give effect to the rule such a person would judge the legislature intended to enact.

3 Nothing in subss 1 or 2 above shall be taken to restrict the power of a Court when dealing with statutory law to engage in any other process than the application of the meaning of a rule that is presently accepted as a legitimate part of the law. □

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1 See the Diplomatic Privileges and Immunities Act 1968, which adopts the Vienna Convention on Diplomatic Relations 1961.
2 This doctrine, and a doctrine of impossibility of compliance that has a similar logical role, are discussed in Evans,"Mandatory and Directory Rules" (1981) 1 *Legal Studies* 227.
3 As it presently exists this is expressed in s 5(k) of the Acts Interpretation Act 1924. The Commission proposes to reverse the presumption that statutes do not apply to the Crown – see chapter 4 of the Report.
4 The issues are different if the error is not mechanical, as where the draftsperson has apparently misunderstood the effect of his or her words. For an interesting case of this type see *US v Locke* 105 SCt 1785 (1985); 85 L Ed 2d 64 (SCt).
5 See Jim Evans, *Statutory Interpretation: Problems of Communication* (1988) Ch 7.
6 They are discussed in Evans, *Statutory Interpretation* Ch 8.
7 Cases of this type are discussed in Evans, *Statutory Interpretation* Ch 10. Some other cases not involving questions of scope are discussed in Ch 11.

The English constitution

In a pre-war study called *The Law And The Constitution*, Sir Ivor Jennings once pointed out that, in Great Britain, Parliament "really means a partisan majority. A victory at the polls, obtained, perhaps by mass bribery or deliberate falsehood or national hysteria, theoretically enables a party majority to warp the law so as to interfere with the most cherished of fundamental liberties . . ."

The only reason it did not bring this about in practice was the alternating party system, Britain's approximation to democracy. As long as that endured, the worst tendencies of "parliamentary sovereignty" could be curbed. On the other hand, since there was nothing else to restrain them – no written constitutional apparatus or separate administration law – it seemed to follow that any failure of alternation might be dangerous, or even fatal.

Tom Nairn
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