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The Chapmans

In the Chapman Tripp centennial memorial history by Ross Gore published in 1975 there is a frontispiece of Martin Chapman whose name has remained with the firm since it was founded. Martin Chapman (1846-1924) was the son of Mr Justice Henry Chapman (1803-1881) and the elder brother of Mr Justice Frederick Chapman (1849-1936). This new book by Professor Peter Spiller *The Chapman Legal Family*, published by Victoria University Press, details the interesting histories of these three personalities. Professor Spiller had access to a very substantial collection of Chapman family papers. The papers were collected by Frederick Chapman and passed on down the family through his eldest daughter Clara Vera Eichelbaum, a distant relation by marriage of the present Chief Justice. Mr Justice Eichelbaum contributes a Foreword to the book.

In his Foreword the Chief Justice refers to Henry Chapman as having had a multi-faceted life and career. He goes on to summarise it: "he was politician, journalist, barrister, civil servant and judge, and not in any orderly progression". He was a man who made a remarkable contribution to colonisation in Canada, New Zealand and Australia.

William Martin had been appointed Chief Justice on 5 February 1841 and was sworn in on 10 January 1842. Henry Chapman was sworn in as the first New Zealand Puisne Judge on 26 December 1843. He subsequently resigned (March 1882) and went to Tasmania and Victoria, was reappointed a Judge in New Zealand, resigned and was later reappointed again on a temporary basis. This is not the sort of career we now expect our judges to follow.

Professor Spiller has divided his book into two parts. The first deals with the colourful, or at least varied career of Henry Samuel Chapman. The second part, of about equal length, deals with the rather more sedate careers of the two sons Martin and Frederick.

When he was 20 Henry Samuel Chapman left England for Quebec. He went as a representative of a mercantile business firm. He was there 10 years and took an active interest in local politics and journalism. During this time he read for the Canadian Bar but does not appear to have been admitted. On visits to England he attended legal lectures. In 1835 he returned to England and pursued a journalistic career and acted as intermediary between Canadian and English politicians. In his journalism he adopted a rather radical stance. He was finally called to the Bar on 12 June 1840. He had already become friendly with Edward Gibbon Wakefield and consequently he was interested in and became a journalistic promoter of Wakefield's colonisation plans for New Zealand. After some political manoeuvring Chapman was offered a judgeship in New Zealand.

This was the man who founded the New Zealand legal family. His subsequent career involved being Colonial Secretary in Tasmania (1852-1854), a sojourn in England, 10 years in Victoria, and his return as a New Zealand judge in 1864. All these activities attest to his energy, his ability and his restlessness. Peter Spiller describes him well in 100-odd pages and sums him up as a man of wide experience, with considerable knowledge, liberal beliefs and an optimistic faith in the improvement of humanity through individual human endeavour.

Both Martin Chapman who eventually became a KC while still remaining a partner in the firm, along with Skerrett who also became a KC, and Frederick Chapman made substantial contributions to New Zealand legal history. Frederick Chapman was our first New Zealand-born Judge and was for a time Judge of the Arbitration Court (1903-1907). The two brothers practised in different cities when at the Bar; Martin in Wellington and Frederick in Dunedin where his father finally lived.

Professor Spiller has written an engaging book. Given the personalities and varied activities of the father and the two sons he has presented a useful and interesting history of New Zealand legal activity in the 19th century as illustrated by these three lives. Obviously in 200 pages he could not give full detailed biographies but he has drawn the three characters in an informative way to illustrate their differences as well as their family similarities. There are slightly fuller versions of some parts of the book in the articles by Professor Spiller on Frederick Chapman published in the *New Zealand Law Journal* at [1990] NZLJ 244 and [1991] NZLJ 447.

The Chapman Legal Family is a valuable addition to our legal historical writing and adds to the two histories of Bell Gully Buddle Weir and of Russell McVeagh McKenzie Bartleet recently published and reviewed at [1992] NZLJ 149. Professor Spiller sums up – with justification – the point of his book as being of significance in terms of human interest and as giving insights into the social and legal developments of the period in which the Chapmans, father and sons, lived.

He concludes:

> Further, to look into the frame of mind which characterised men like the Chapmans "is to see some primary sources of the modern mind". While much of the Victorian excitement and wonder has retreated in the face of scepticism and disillusionment, yet certain basic attitudes have persisted; the underlying optimistic striving for a better future, the commitment to the work ethic, the stress on individual human improvement, and the value placed on domestic family life. Likewise, to examine the legal careers of the Chapmans causes us to reflect upon modern legal developments, particularly in New Zealand; notably, the continued strength of inherited English legal traditions, counterbalanced by the steady development of a unique New Zealand jurisprudence.

P J Downey

Case and Comment

The Domestic Protection Act 1982; Literal vs liberal interpretation

Gera v Gera [1992] NZFLR 478;

Gera v Gera is the latest in a short line of cases dealing with the interpretation of the Domestic Protection Act 1982. The applicant was applying ex parte for an interim non-violence order in respect of her son, due to be released from prison. The applicant had custody of the respondent's 7-year-old daughter and expected a visit from the respondent on his release. The applicant had never been the victim of violence on the part of the respondent, although she had "felt intimidated and threatened by him and she [had] witnessed violence by the respondent against another member of the family", her husband. Her husband did not, and under the legislation could not, seek any order, and so the applicant sought it on the basis of the violence to her husband.

The application was declined on two separate grounds, each going to jurisdiction: (i) there was a failure to satisfy the requirement of "a man and a woman [who] are or have been living together in the same household" – s 4; and (ii) there was a failure to satisfy the Court that "the respondent has used violence against, or has caused bodily harm to, the applicant or a child of the family" – s 6.

The arguments relating to the first ground faced two adverse precedents, both on point and both referred to by Judge P F Boshier in *Gera*. *Grefstad* (1984) 3 NZFLR 124 (mother's application for interim non-molestation and occupation orders against son) held that the legislation did not extend to persons " 'occupying the same household' or 'residing in the same household' " [Judge Mahoney, at 127], and *G v G* (1984) 4 NZFLR 492 (mother's application for non-molestation order against son) held, on appeal to the High Court, that the reference to "a man and a woman . . . living together in the same household" was restricted to spouses de jure or de facto [McGechan J at 497]. Counsel for the applicant in *Gera* suggested that the difference in wording between s 4, dealing with applications for non-violence orders, and s 13, dealing with applications for non-molestation orders and therefore the focus in *Grefstad* and *G*, was sufficient to enable the Court to adopt a more liberal approach to s 4. Unfortunately, counsel's argument on that point is not spelled out in the report. There seem to be two possible differences between ss 4 and 13, but neither seems weighty enough, in itself, to warrant a reversal of *Grefstad* or *G*. First, in s 4 the parties might still be together, whereas in s 13 they must be living apart at the time of the application. Section, s 4 contains reference to a range of victims – "the applicant or a child of the family" – whereas s 13 does not (although s 15 deals with the point later, in terms similar to those of s 13) does not (although s 15 deals with the point later, in terms similar to those of s 13). In any event, counsel's argument was rejected, Judge Boshier seeing "no essential difference in the wording between s 4 and s 13". The literal interpretation adopted by Judge Mahoney and McGechan J was endorsed.

A more liberal approach to the Act had been taken by Judge Inglis in *Minogue v Minogue* (1988) 5 NZFLR 633, referred to in *Gera*, in which an interim non-molestation order was issued, on an ex parte application, against the applicant's former husband *and* his present wife. Judge Inglis was swayed to the liberal approach for two reasons. First, the application was for interim relief only and "should be decided, at least provisionally, in favour of the applicant and her children against the consequences of a family dispute which appears likely to escalate if it is not controlled" [at 635]. On that point, one might note, this is no different from *Gera*. Second, s 13 defines the applicants but places no express limits on the field of respondents, so long as one of them (if more than one) is the ex-partner of the applicant: ". . . s 13(2)(b) . . . is silent on whether a non-molestation order is limited to the former partner or whether it may include both him and his second wife" [at 634]. (Indeed, the requirement that one of the respondents be the applicant's ex-partner is not evident in the section; rather it is reflection of the facts of *Minogue*. One can only ponder the outcome if the applicant had sought the order against her former husband's present wife, but not the former husband also.) *Pace* counsel for the applicant in *Gera*, s 13 may have more scope than s 4 for a liberal approach to be taken, given that s 4 specifies and limits the field of respondents. Both, however, still retain the threshold for the applicant to be or have been married to or living with the other party.

The literal/liberal debate, and the continual balancing of apparently clear wording of legislation with the purpose for which that legislation was passed, is highly pertinent in respect of the Domestic Protection Act. The point was addressed at some length by McGechan J in *G v G*, and resulted in the literal approach prevailing. Less debate, but a similar result, can be seen in *Bicknell v The Police* (unreported, AP 68/90, High Court, Rotorua; see [1991] NZLJ 37). *Gera* now adds more authority, quantitatively at least, to that approach. The application in *Gera*, in the face of clearly unsupportive precedents, seems to indicate a belief that there is a gap in the protective legislation, and a hope that eventually the Courts will interpret the legislation to close that perceived gap. Though the line of authority remains relatively short, and the incidence and effects of domestic violence all

too real, it is probably safe to assume that this literal approach is unlikely to change easily, despite the suggestion that it fails to achieve the purpose of the Act. As for that purpose, and whether the Act was intended to encompass parent-child relationships, Hansard yields some food for thought. During the passage of the Bill, the Minister of Justice, the Hon J K McLay, addressed the fact that there was opposition to the application of the Domestic Protection Bill to de factos as well as to married couples. He suggested that by narrowing their focus, those who were so opposed failed to see that

> . . . the Bill applies when persistent physical violence is visited on a man or a woman or a child within the victim's own home. As legislators, we cannot so easily ignore the existence of such violence. We all abhor violence in the streets, no matter who the victims might be, and no matter what the victim's legal status might be. The Bill states that we reject violence in the home, whatever the victim's status *(New Zealand Parliamentary Debates* Vol 448, 1982: 4838).

That, he concluded, justified its extension to de factos. It might also have justified its extension further. Perhaps like negligence, the categories of domestic violence should never be closed. The range of perpetrators, victims and acts seems limited only by the extent of the human imagination – a fact which the legislation, if not its interpretation, should acknowledge.

Whether there is a "gap in the protective legislation" is admittedly debatable. The applicants in *Gera, Grefstad* and *G*, for instance, may well have been covered by ss 186-191 of the Summary Proceedings Act 1957, which enable a complainant to apply for an order that another enter into a bond to keep the peace. Those provisions were useful in pre-Domestic Protection Act days, when the Family Proceedings Act 1980 did not provide non-molestation protection for victims in de facto relationships (see *Khan v Brown* (1982) 1 NZFLR 369), and may still be useful in addressing the gap illustrated by *Gera* et al. Nonetheless, *Grefstad* and *G* are clearly instances of violence in the domestic sphere (as would *Gera* have been, had the violence been proven), albeit of a particular type possibly unforeseen at the time of the passing of the Domestic Protection Act. They are better dealt with under that Act. If nothing else, the signal of rejection which J K McLay attributed to that Act would be underscored.

The facts of *Gera* made it an inappropriate test case by which to pursue a re-appraisal of the literal approach. The applicant was always going to lose on the basis that there had been no actual violence to the applicant at the hands of the respondent. There was a fear of violence to the applicant, and there was actual violence to the husband, but neither of those will suffice for the purposes of s 6. Ironically, the effect of *Gera* may have been to reinforce the literal approach to the interpretation of the Domestic Protection Act. However, the more the Courts feel themselves bound to such an approach, and the more apparent it becomes that change is unlikely to come from the Courts, the more pressure there may be for legislative amendment. If that be the case, the value of *Gera* may have to be reassessed.

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Legal professional privilege and policemen

An interesting application of the principle of legal professional privilege is to be found in the Australian case of *Dunesky v Elder* (1992) 107 ALR 573. This was a decision of Foster J in the Federal Court of Australia.

The case involved a member of the Australian Federal Police, a Detective Sergeant Purvis. The applicant Dunesky claimed that a Search Warrant in respect of his premises was invalid and sought an order restraining Purvis from inspecting the items that had been seized under it. In the course of the proceedings the applicant administered interrogatories to Purvis, but Purvis died without having answered them. He had, however, made certain handwritten notations on a draft of the notice and had given this to a Mr Bromwich who was a barrister employed by the Commonwealth Director of Public Prosecutions. The production of the document with the handwritten notations was sought by subpoena, and Bromwich claimed that it did not have to be produced. This was argued on the basis of legal professional privilege.

Two arguments against legal professional privilege being applicable were advanced on behalf of the applicant. It was first submitted that legal professional privilege could apply only in relation to an action brought specifically against the Australian Federal Police as a legal entity and not against an individual officer. The reason given was that the relevant relationship of solicitor and client only existed between Mr Bromwich the barrister and the Australian Federal Police as such.

Foster J considered the statutory provisions relating to both the Director of Public Prosecutions and to the Australian Federal Police. In the light of the statutory provisions he came to the view that an individual member of the Australian Police Force would be an authority of the Commonwealth. This was personal to him as a member of the Australian Police Force, and accordingly Mr Bromwich as an officer of the Director of Public Prosecutions could act as Solicitor for Detective Sergeant Purvis. To an outsider this would appear to raise an interesting issue in relation to the separate professions in New South Wales. However the Director of Public Prosecutions, who was the employer of Mr Bromwich, has statutory authority to "act as counsel or solicitor" for an authority of the Commonwealth. In view of the statutory provisions, therefore, Foster J rejected the objection to Mr Bromwich acting as solicitor for Detective Sergeant Purvis.

The second objection to the claim of legal professional privilege was that subsequent to writing the notes Detective Sergeant Purvis had died. It was argued that legal professional privilege could not be held to exist after the death of Detective Sergeant Purvis unless some relevant detriment were demonstrated at the time the privilege was claimed. This contention was not accepted by the Judge who added that in any event an

order made in the proceedings could, in certain circumstances, be enforceable against the estate of the deceased. Accordingly, even if the contention were valid, it would not be accepted because of the inherent possibility of the estate being involved. His Honour did not cite authority for this, but relied on a passage in *Wigmore on Evidence*, McNaughton Revision, Vol 8, para 2323 in which it was stated that "there is no limit of time beyond which the disclosure might not be used to the detriment of the client or his estate". The case is interesting as an example of two State agencies or authorities being regarded as being at arms' length as it were. Legal professional privilege is normally thought of in terms of a defence against the State. This case however shows, at least in certain circumstances, the defence of legal professional privilege can be invoked as between State authorities, to the detriment of the citizen.

P J Downey

Being informed of the right to consult a lawyer

The cases of *R v Dobler* (High Court, Auckland 92/1367) and *Barr v Ministry of Transport* (High Court, Christchurch 92/1674) raise important issues regarding requirements that must be fulfilled by the police with regard to the right to consult a lawyer conferred by s 23(1) of the New Zealand Bill of Rights Act 1990. The section provides as follows:

> 23(1) Everyone who is arrested or who is detained under any enactment –
> (a) . . .
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right.

In *Dobler*, a decision by Smellie J on voir dire, defence counsel sought the exclusion of statements made by the accused to the police. The accused had been taken into custody as the result of an investigation into heroin smuggling. Counsel for the accused argued that the accused had not been made aware of his right under s 23(1)(b) until he was formally charged, some six hours after being taken into de facto custody. It was further argued that this omission rendered inadmissible statements made by the accused during that period.

The Court firstly held that once an accused has discharged an evidentiary burden of showing that a breach of rights is an issue, the onus then shifts to the Crown to prove that rights were not infringed. Although rejecting proof beyond reasonable doubt in favour of proof on a balance of probabilities, the Court held that because of the seriousness of the issue, it would not be satisfied lightly that the onus had been discharged. In other words, it was held that there are varying degrees of rigour with which the balance of probabilities test will be applied, and that in cases where the Crown wishes to refute an allegation of a breach of rights, the Courts will require more persuading than they would in a civil case before finding that the onus has been discharged. Turning to the facts of the instant case, the Court was not persuaded that the accused had been informed of his rights at any time before being charged, and for this reason excluded the admissions the accused had made.

The importance of *Dobler* is therefore to establish the standard of proof which must be borne by the Crown in countering a *prima facie* allegation of deprivation of rights, and to show that admissions obtained before informing a suspect of his or her s 23(1)(b) rights are likely to be ruled inadmissible.

Barr relates to an earlier stage in the detention process, and poses the question of at what stage, even *before* evidence or admission have been obtained from a suspect, that suspect should be informed of his s 23(1)(b) rights. In this case, decided by Williamson J, the appellant appealed against a conviction in the District Court of driving while the proportion of alcohol in his breath exceeded the statutory limit. Following a motor accident in which the appellant had been involved, a traffic officer had come to the appellant's home and had asked that he accompany him to Transport House. Upon arrival at Transport House the officer informed the appellant of his s 23(1)(b) rights, as a result of which the appellant made a telephone call to his wife before taking the evidential breath test. It was argued for the appellant that the evidence of a breath test should have been excluded because the officer had not informed the appellant of his right to consult a lawyer under s 23(1)(b) immediately he went to the appellant's home. In other words it was argued that where s 23(1)(b) uses the words "without delay" these words (a) refer not only to the right to consult and instruct a lawyer but also to the right to be informed of that right, and (b) mean that a suspect must be informed of the right as soon as his detention begins which, according to *Ministry of Transport v Noort* and *Police v Curran*, CA 369/91 and CA 378/91 (unreported), per Richardson J, is when he is required to accompany the officer.

So far as the first issue (which parts of s 23(1)(b) are covered by the words "without delay"?) is concerned, it was noted by Williamson J that although the phrase strictly refers only to consultation and instruction, it is clear that if a person has the right to consult and instruct "without delay", this means that he must be advised of that right at a time when it is indeed possible to exercise it "without delay". It is submitted that it follows from this that the information that the right exists must itself be given "without delay". This is borne out by Williamson J's quotation of a dictum by Richardson J in *Noort* and *Curran* that "if the detainee is to have reasonable opportunity to exercise the right he or she must know of it. . . The corollary of that right [to consult a lawyer] is the obligation on the part of those responsible for the detention to ensure that the detainee is informed of the right. .". Similarly, Williamson J quoted Eichelbaum CJ in *Moki v Police*, AP 84/92 (unreported), where the Chief Justice, referring to s 23(1)(b) rights to consult and to be informed, said: "For myself I have no doubt that the injunction 'without delay' by implication amplifies the second right as well as the first, subject to justifiable limitations such as emergencies."

Moving then to the second issue of what "without delay" means, Williamson J adopted with approval the statement by Richardson J in *Noort* and *Curran* that "without delay" means "before the legitimate interests of the person detained have been irretrievably jeopardised",

explictly rejecting Eichelbaum CJ's suggestion in *Moki* that it meant as soon as a person is requested to accompany an officer, adducing in support of this conclusion the fact that Parliament had not used the words "immediately" or "forthwith" in s 23(1)(b). Applying the test in *Noort* and *Curran* to the facts of the case before him, Williamson J noted that although there had been a telephone at the appellant's home, failure to advise the appellant of his s 23(1)(b) rights until he reached Transport House had in no way jeopardised his legitimate interests. Even had he telephoned his lawyer from home that action would not have improved his position – the only possible decision which legal advice at that stage could have affected would have been whether to accompany the officer or not, and as Williamson J pointed out, failure to do so would in itself have been an offence. Furthermore, the journey to Transport House had taken only 22 minutes, and the appellant had been informed of his right and had been given access to a telephone before the crucial point of agreeing to take an evidentiary breath test. On the basis of these facts the Court had no difficulty in concluding that the appellant's legal position had not been jeopardised.

But this will not always be so. Although *Barr* supports the proposition that there is no general requirement to inform a suspect of his s 23(1)(b) rights as soon as he is detained or there is an opportunity to use a telephone, one must remember that the outcome of the "irretrievable jeopardy" test will depend heavily on the facts of each case. If, for example, a suspect initially locked in police cells for twelve hours was only then informed of his rights, waived those rights, and made damaging admissions, a Court might well find that that "irretrievable prejudice" had taken place because the suspect's capacity to decide whether or not to exercise his right to contact a lawyer had been overborne by the psychological pressure of being isolated for twelve hours. Detaining officers will therefore be well advised to err on the side of caution in the timing of their compliance with s 23(1)(b).

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Practice Note

Civil Proceedings in the District Court

On 30 November 1987 the former Chief Justice, the Right Honourable Sir Ronald Davison GBE CMG issued a Practice Note, [1987] 1 NZLR 483, concerning the provision of a synopsis of counsel's argument in writing. I propose to adopt the practice note adapted as appropriate.

The requirements for practice and procedure in the District Courts from 1 July 1992 for longer or more complex civil proceedings will be:

1 As a general rule counsel should provide a synopsis of argument in writing. This will ensure:

(a) that hearing time is lessened;
(b) that the Court and other counsel have an accurate record of the argument;
(c) that counsel has formulated the argument in a carefully considered way.

2 In hearings not involving oral evidence where the issues are apparent, the synopsis of argument should be provided in every case by counsel for the plaintiff/appellant and for the defendant/respondent unless there are compelling reasons why this cannot be done.

3 In hearings with oral evidence, the practice must vary according to the nature of the case. Counsel for the plaintiff should normally provide at opening a written synopsis of the legal principles and authorities upon which reliance will be placed. At closing, a synopsis of argument should normally be provided by all counsel. No written synopsis will be required for motor vehicle cases or for simple debt collection cases.

4 The synopsis is intended in part to enable Court and counsel to listen to the argument, rather than taking lengthy notes. It should be concise. It is not intended to be a substitute for oral argument.

5 The structure and content of a synopsis of argument will vary according to the nature of the case. The following guidelines may assist:

(a) briefly summarise the facts relied on (with references to notes of evidence or affidavits where appropriate):
(b) set out headings of the argument and the submissions relevant to each:
(c) refer to the authorities relied on.

6 Two copies of the synopsis should be supplied. It should be typed on international sized paper with a wide margin and be sufficiently spaced to enable a degree of notation by the Court and opposing counsel. A separate list of authorities should also be handed in.

7 Full copies of all judgments relied on should be supplied.

8 Prior simultaneous exchange of lists of authorities is encouraged by the Court.

Silvia Cartwright
Chief District Court Judge

5 August 1992

Judicial recollections

By the Hon Mr J F Jeffries, former Judge of the High Court of New Zealand

This is an edited version of the after dinner speech given by Mr J F Jeffries on the occasion of a Bar Dinner on his retirement from the High Court Bench held at the Wellington Club on Friday 31 July 1992. The speech is edited mainly by deletion of the weak jokes. [That is the view of Mr Jeffries, but would not be supported by those who heard them.]

I suppose the most difficult social occasion I have found to deal with is the one that is determinedly pleasant and gracious as this one is. I hasten to add, not that I would have it any other way. Tonight I do not want to hear the naked truth about myself and I am grateful to the speakers who have been so economical with it. I listened with interest to Mr Collins recite the groups and organisations with which I have been associated since I became a lawyer and on hearing that account I thought only someone completely shameless would have attempted what I did. However, I can now reveal to you that I have, throughout my life, followed the dictum of G K Chesterton who said "If a thing is worth doing, it's worth doing badly".

Tonight marks for me the re-entrance to the profession which I left 16½ years ago. However, I want to assure you I have no intention of taking out a practising certificate, not that the competition from that quarter would give any of you cause for concern.

As Dick Collins has already said, no longer am I to be addressed by any titles but simply as one of your brethren and he has already disclosed to you that when I turned 60, for the want of something better to change, I changed by name from John to Jack.

I listened with great interest to what your President, Peter Connor, said about me and also my old friend Dick Collins who I have known for 35 years. I very much appreciate the great care and thorough preparation and research that went into his speech and I find it quite overwhelming.

It is true what he said, that from the moment I joined the legal profession, rather later in life than most of you, I have had a great regard and respect for the law, and what it can achieve in society.

Looking back

A month or two back I had the pleasure of attending a dinner to honour the 90th birthday of one of New Zealand's most highly respected Judges of this age and of any other age, namely Sir Alexander Turner.

He delivered what might be called a paradigm of a judicial after dinner speech.

Full of interest and mixed with some quite fascinating observations and stories about the personalities and characteristics of Judges with whom he had been associated over his long life.

You will be well pleased to have my assurance I will not be attempting that kind of speech tonight, but should I live to be 90, and providing I can remember and anybody cares to listen, I will then reveal all!

Recently when I admitted many young lawyers, I told them that when an old man approaching the end has a captive audience, despite himself, he will preach. On that occasion I took as my text for the sermon a quote from an essay of the French philosopher, Montaigne, when he said:

> No one is free from uttering stupidities; the harm lies in doing it meticulously.

I am afraid uttering stupidities in a meticulous and careful way is a besetting sin of lawyers, but particularly recently retired Judges.

Profession of a lawyer

Tonight I am going to spend a short time on two subjects which I hope are of interest to you — your profession as lawyers and my recently held office as a High Court Judge.

My theme, if that is not too pompous a way of putting it, is that the legal profession has changed quite dramatically in the past 16 years since I first took up office as a High Court Judge in early 1976.

For my part I do not think the Judiciary has undergone any fundamental change over the period of 16 years I have been a Judge, but it will in the future because the profession itself is changing.

It is perhaps somewhat radical to say there has been little change in the Judiciary, but that is the way it seems to me. I think the Judges have responded to attitudes in society and adapted well to word processors, computers, women barristers, so-called new social engineering law, Waitangi Treaty issues, Bill of Rights etc. An insignificant exception has been the inability of the Judiciary to take the step of abolishing wigs, but that is unimportant and will come in time. In others words, the Judiciary, almost exclusively drawn from skilled practitioners at the Bar with long experience in Court work, have continued the high standards of the past.

As I said, over the past 16 years I think the profession has undergone many fundamental changes. I think those changes began with the abolition of common law claims for personal injury and that set in motion in this very small, even tiny, nation, considerable changes in the legal profession.

Generalists or specialists at the Bar

I ask you to excuse me reading to you what I wrote 20 years ago when

I then forecast those changes to the profession which I think have now manifested themselves. The extract is from the Annual Report of the Wellington District Law Society 1972/73 on the occasion of my retirement from the office of President:

> Without in any way becoming involved in a debate on the merits or otherwise of the legislation [the Accident Compensation Act] as an example of social engineering, it must be acknowledged that it will have a far reaching effect on the profession such as no precedent comes to mind. The possible ultimate effect on the profession makes its future and its development somewhat difficult to predict. For instance, the litigation that has resulted from personal injury claims in the past has served as a training ground in the smaller cases for young lawyers, and has occupied a major part of the Court practices of many of our senior members at the Bar. The passing of the Act will be the virtual death knell of civil jury trials. The number of practitioners in the future who will be engaged exclusively in Court work will be reduced. The legal profession has developed over the years doing this type of work and has consequently become accustomed to the income which has resulted. The profession faces the prospect of being deprived of a sizeable percentage of its total income over a fairly short period, with little possibility of a replacing source. In some ways there is a parallel, although by no means exact, with the future faced by New Zealanders as a whole through the United Kingdom's entry into Europe and the legal profession by the implementation of the Accident Compensation Act. In both instances, at least, it can be said the change is fundamental and the future extremely difficult to predict.

Not all would agree but I think the profession has undergone that fundamental change that was then predicted.

There is now much greater specialisation at the Bar. The leaders of the Bar in the early years when I began practice were all general practitioners. Some of them are here tonight.

From the past some of the names that most readily come to mind are:

Denis Blundell — Dick Wild
Wilf Leicester — Thaddy McCarthy
Reg Hardie-Boys — George Kent
Harry Arndt

and many others, some of whom now occupy the Bench with distinction. In that group also there are several here tonight such as:

Frank O'Flynn — Dick Collins
Bob Edgley — Maurice O'Brien
Bill Shires — Trevor de Cleene
Jim Thomson

All of those men, past and present, made very frequent appearances in the Supreme Court in ordinary day to day cases.

It is very difficult to resist the conclusion that those senior men were all, or nearly all, funded, to a greater or lesser extent, by personal injury work that went many years ago.

These structural changes in the profession I think have shown through to the cases we deal with in the Courts in some of these ways:

1 Some reduction in the old-fashioned skills of lawyers in litigation dealing with witnesses and plain fact matters.

2 A very marked increase in the skills of lawyers in presenting legal argument.

3 Combining those two, a tendency to make legal arguments out of straight fact litigation.

All Judges are very familiar with the bending of *Wednesbury* principles to make law out of fact.

Criminal work

One could say, perhaps, that experience in criminal work among our top legal persons who are candidates for judicial office is not strong, yet criminal work is and will always be the staple diet of our whole conventional Court system. What I am not saying is that the changes in the profession will cause any decline in standards and quality. What I am saying is that in a very very small country with the social changes mentioned, such as much decision-making in society outside of the conventional Court system, the opportunity for our talented lawyers to gain day to day experience in Courts with ordinary people is very much reduced.

Before leaving the legal profession I have chosen one sentence from all the judgments I have written in nearly 16½ years, and it was contained in a judgment delivered by me six months after I was appointed:

> Throughout the centuries it has been recognised in our law that the strongest bulwark against gross foolishness, incapacity, catching and snatching bargains, undue influence, sharp practice, and any and every species of fraud, is a completely independent, qualified, legal profession.

Having just left the Bench I adhere to every single word I said then, but particularly emphasise "independent, qualified, legal profession". I regard the legal profession as the guardians in society of almost everything we hold of value.

Judicial experience

Perhaps now for just a few more minutes I will make some observations about my last 16½ years as a Judge. What I am about to say lacks profundity — even, it might be said, is deeply superficial.

I assure you it has been an incomparable experience for me and looking back now I am pleased that I was rejected by a certain political party as a parliamentary candidate, and grateful to the other political party that took up my cause and appointed me to the then Supreme Court. It effectively shut me down for that period, for I seem to recall I had plenty to say politically until 1976.

I can honestly say, with one exception which I will mention, I have enjoyed all judicial work. I did not mind criminal jury trials, mainly because they were always of immense human interest and in any event did not entail a reserved judgment. In later years I found the sexual abuse cases over children very distressing, but I say no more on that.

Sentencing was always

troublesome but I think I was fairly predictable and middle of the road and recall only a few months ago a young lawyer writing a note for his companion at counsels' table in the Courtroom, and when I pronounced sentence he looked at his companion, grinned, and audibly said: "I told you so".

Once I had reached a certain stage in the drafts, I actually enjoyed writing judgments. The only claim I ever made to myself and for myself about the written judgments was that for nearly all of them I tried to take care in the writing. Absolutely no higher than that. Accuracy with the facts, diplomatically expressed where that was possible, but particularly in Family Court matters such as custody and matrimonial property. My overall aim was to express myself clearly, giving as little offence as possible, consistent with doing the business.

The exception I mentioned earlier is strangely enough Family Protection cases, for I was never really comfortable with them.

When I read all those affidavits of family members making allegations and counter allegations – sometimes venomously – I somehow got the feeling of being a jurisprudential voyeur.

The daughter who was left $982,000 by her mother, and her sister $13.20, but claiming she was absolutely uninterested in the money and only wanted to uphold her mother's wishes which somehow she had begun to regard as sacred and inviolate. The last great act of obeisance to her mother was to take the money and run.

Administrative law

I want to finish on a positive note and say administrative law cases I did really enjoy and it is my impression that overall they have had a wide and significant effect on the community generally.

It is perhaps hard for us lawyers to understand – some of us anyway – that ordinary people generally have a very limited understanding of the necessity to hear both sides and not to be biased. A lot of people seem actively to avoid informing themselves of facts, even at a low level, if they are likely to run against preconceived ideas. To give someone a fair hearing used to be – but in the past, and I say why in a moment – beyond the comprehension of many, many people.

Some of the worst advocacy experiences of my life were encountered in appearing before some Judicial Committees of Racing Clubs and Town Planning Committees of some of the lesser local bodies in New Zealand.

Now I think there has been a quite remarkable change in the community.

I think most people occupying positions of authority understand much better the obligation to be fair and listen to both sides when there is a dispute. One often hears a sports administrator say "We have to give him (or her) a basinful of natural justice first!"

That is progress. Thank you very much for the dinner. □

Correspondence

Dear Sir,

Re; Land value in a stratum estate

As a Registered Valuer I read with interest Michael Chapman-Smith's article published in your July issue relating to land law, and I would address the following letter to the Letters to the Editor column of your journal.

Michael Chapman-Smith's article at [1992] NZLJ 242 provides a reasoned analysis of what constitutes land value in a stratum estate. However his conclusion of providing a set formula for determining land value for rating purposes could only be described as an over simplification of valuation practice and at best a de facto valuation.

Whilst it is true that directly comparable evidence may not be readily available, it is also true that valuation is not an exact science. However Valuers are trained to analyse, to compare and make value judgments which provides the rationale for comparability in all situations relating to land; that is the nature of the profession.

To abdicate the valuation function in favour of a formula would in fact be a draconian measure totally disregarding factors of supply and demand and therefore insensitive to the market at large.

It is true to say that in any cross-lease or unit development on strata title the improvements are inextricably linked to the land and that the land value will therefore be a reflection of the legal development capabilities of that separate property. Notwithstanding the absence of sales evidence for that vacant land parcel, the land value for that separate property can be arrived at by alternative analysis:

(1) Residual approach to a hypothetical development usually coinciding with the existing development.
(2) Analysis of improved sales to arrive at a land value residual.

These methods are acknowledged as being less reliable than directly comparable sales evidence, but valuation is a matter of analysis and adjustment and therefore of no great concern to a trained professional.

Statistics at best are a useful tool usually requiring close interpretation and as most politicians know can mean different things to different people.

Although on average some properties would conform to Mr Chapman-Smith's formula requiring land value to be fixed at 33⅓ percent of the current market value of the unit, many others would not. In my own experience on Auckland's North Shore the ratio of land value to capital value differs from one location to another. Within the low cost areas of Birkdale, Glenfield and Torbay the ratio is generally less than one 1:3 whilst in the high priced areas of Takapuna, Milford and Devonport the ratio is more like 1:2.

Accordingly the blanket approach of the formula advocated in itself will create distortions and lead to inequitable apportionment of capital value between land and improvements and would certainly not be market related nor acceptable as a rating base.

R G Sadler
Registered Valuer

UNCITRAL and its work — Harmonisation and Unification of International Trade Law

By Giora Shapira, Senior Lecturer in Law, University of Otago

New Zealand is a country that lives off foreign trade. The legal aspects of international trade and business are therefore of considerable importance. In June this year a congress on Uniform Commercial Law in the 21st Century was held in New York. The meeting was organised by the United Nations Commission on International Trade Law (UNCITRAL). Giora Shapira of Otago University attended. This paper discusses UNCITRAL and its significance as a legal source.

The United Nations Commission on International Trade Law (*UNCITRAL*) has recently celebrated its 25th year. To mark the anniversary, a Congress on *Uniform Commercial Law in the 21st Century* was held in June, at the United Nations Headquarters in New York (in the General Assembly Hall). On that occasion, and as part of the events of the United Nations Decade of International Law, the Commission, for the first time, opened part of its annual Session to interested individuals. The five day Congress was attended by 450 delegates from 56 countries, including lawyers, judges, legal academics, economists, people in commerce, shipping and banking. I was one of the three participants from New Zealand, being there because of my interest in private international law and international trade law.

Not enough is known in New Zealand about *UNCITRAL* and its work. Yet this is an important legal source on which we should draw. A greater New Zealand involvement on all levels — governmental, institutional, professional and private, is called for. Our interest here is in line with the universal goal of a more efficient international trade.

To this end I would like to report in this paper about *UNCITRAL*; its origin and mandate, work methods, structure and organisation, achievements to date and future programme. The concluding part considers application and benefits to New Zealand.

UNCITRAL—origin and mandate[1]

UNCITRAL was established by the General Assembly, as a United Nations Commission, in 1966, in response to a call for the United Nations to play a more active role in removing, or reducing legal obstacles to the flow of international trade.

The Commission was given a mandate "to further the progressive harmonisation and unification of the law of international trade" by:

(a) Co-ordinating the work of organisations active in the field and encouraging co-operation among them;
(b) preparing or promoting wider participation in existing international conventions and wider acceptance of existing model and uniform law;
(c) preparing or promoting the adoption of new international Conventions, Model Laws and Uniform Laws, and promoting the unification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organisation operating in this field;
(d) promoting ways and means of ensuring uniform interpretations and application of international Conventions and Uniform Laws in the field of the law of international trade;
(e) collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of international trade.

Membership

UNCITRAL is composed of States representing the various geographic regions and the principal economic and legal systems of the world. There are 36 member States — the larger block is that of African countries, then Asian, Eastern European, South American, Western European and others. The Australasian Pacific region is not represented as such.

All interested member States can be involved as observers.

Work methods

UNCITRAL holds one regular session each year, alternating between Vienna and New York, and reports to the General Assembly. For the purpose of preparing draft legal texts it has set up several working groups, which meet once or twice a year. Draft texts completed by these groups are submitted to governments and international organisations for their comments. The comments are considered before adopting a final text.

Such a text may be in the form of a Draft Convention, which would be submitted to a Diplomatic Conference open to all States; or in the form of Model Law which States might use as a model for their domestic legislation; or in the form of Model Rules or clauses, which merchants might wish to

incorporate in their commercial contracts (more on unification techniques later).

Secretariat

The International Trade Law branch of the United Nations International Law section acts as the secretariat of *UNCITRAL*. It is based in Vienna and is part of the Office of the Legal Affairs of the United Nations.

Sometimes assisted by outside experts, the ten professional lawyers in the branch carry out legal research in subject matters included in the *UNCITRAL* programme of work, prepare preliminary draft texts and represent the Secretary-General at meetings with other legal bodies.

Techniques to promote harmonisation and unification of the law of international trade

Two types of techniques have been mostly used —

(a) Legislative techniques

(i) Convention:

When maximum uniformity is important the desirable form is a convention. A convention is designed to unify law in its States' parties by establishing an international obligation for them to adopt legislation in line with provisions of that convention.

Adherence by a State to the convention involves a formal declaration of the State that it wishes to become a party to the convention.

A convention is generally considered an appropriate approach in the unification of international transport liability, where it is important for all parties involved in an international transport contract to be able to rely on a uniform standard of liability and in particular on certain and uniform financial limits of liability.

In addition "convention" is an appropriate method when the good functioning of the system created by it would be facilitated by a group of States having the same law on the given issue — eg for an *UNCITRAL* International Bill of Exchange (see below) to circulate, it is important that several States are party to the unified regime.

An advantage of a convention is that it provides a high degree of uniformity of law within the States adhering to it. A convention reduces the need for a party to undertake a research of the law in a State party to it, since the international obligation assumed by the State with the adherence to the convention provides an assurance that the law in that State is in line with it.

Limitations of a convention lie in the fact that it does not provide flexibility to the States adopting it. States considering that they cannot adhere to a convention because of one or a limited number of its provisions, would not be able to adhere formally to the convention. Experience shows that those States will often not incorporate in their legislation the provisions with which they are in agreement.

If the drafters of a legislative text that is to serve as a basis for unification consider that the lack of flexibility inherent in a convention might hinder unification, they might prefer the technique of model law.

(ii) Model Law

This is a legislative text that is recommended to States for adoption as their national law. Unlike convention, a model law does not require the State adopting it to notify an organ such as a depository, or other States that may have adopted it. Furthermore, the State may, in incorporating the text of the model law in its system, modify or leave out some of its provisions. Thus the degree of unification and the degree of certainty about the extent of unification achievable through a model law is likely to be lower than in a case of a convention. The model law, however, offers more flexibility in that a State is free to tailor the text of the law to its needs. In order to increase the likelihood of achieving a satisfactory degree of unification and to provide a degree of certainty about the extent of unification, States may be invited, eg by a resolution of the United Nations General Assembly, to make as few changes as possible in incorporating the model law into their legal systems.

A model law, as opposed to a convention is an appropriate vehicle for modernisation and unification of national laws, when it is expected that in drafting legislation based on it States will wish to make adjustments in the uniform text that will differ from system to system. A model law would also be appropriate when the purpose of the uniform text is, on the one hand, to establish a standard of a modern law in an area where national systems are widely disparate, undeveloped or outdated, and on the other hand, to provide an incentive for a movement towards unification. An additional consideration in favour of the model law approach is that the expense involved in preparing it is lower than the expense involved in preparing a convention. A model law is finalised and adopted by the Commission, whereas a convention requires in addition to the work in the Commission, convening a universal Diplomatic Conference.

The *UNCITRAL* Model Law on International Commercial Aribitration is the first model law adopted by the Commission. Under preparation are the draft Model Law on International Credit Transfers and the draft Model Law on Procurement.

(b) Contractual techniques — (uniform rules)

When parties draft contracts, issues are likely to exist that can be solved in a uniform manner. For example, a dispute settlement clause may be standardised to a large measure. It may be wasteful, and not conducive to optimal results, if parties draft clauses on such issues for each individual contract. Contract drafting, in particular in international trade, can be greatly facilitated, modernised and unified if parties could incorporate into their contracts model clauses prepared at the international level. Prominent examples of such clauses prepared by the Commission are the 1976 *UNCITRAL* Arbitration Rules and the 1980 *UNCITRAL* Conciliation Rules.

(c) Explanatory technique — (legal guides)

When it is not feasible or necessary to use one of the foregoing techniques, it may be useful to prepare a legal guide, a text that

gives explanations concerning legal drafting or statutory or regulatory work. The immediate purpose of a legal guide is educational. Its further purpose is to stimulate modernisation and harmonisation of contract practices and laws.

Parties negotiating complex international contracts (eg construction contracts) often experience difficulties in negotiating and drafting appropriate contract clauses. Such difficulties may be particularly acute for parties from developing countries. Because such contracts must be tailored to the circumstances of the case, it is normally not possible to elaborate a model contract text, at least not a model that would be usable in a sufficient number of cases to justify the expense of its preparation. Parties, however, can be assisted by a legal guide that discusses various issues underlying the drafting of a particular type of contract, considers various solutions to the issues, describes implications, advantages and disadvantages of solutions, and recommends the use of certain solutions. Model contract clauses may be added to illustrate some solutions. The *UNCITRAL* Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works is the first text of its kind prepared by the Commission.

It should be noted that the focus of a legal guide may not be contract drafting. A legal guide may have a broader purpose in giving considerations of interest to legislators, regulators, as well as contract parties. Such a text is the 1986 *UNCITRAL* Legal Guide on Electronic Funds Transfers. It discusses issues relating to the use of electronic means of communication in making international payments.

Work and achievements

In its 25 years of existence *UNCITRAL* has dealt with topics in the following wide categories: International Sale of Goods; International Payments; International Commercial Arbitration and Conciliation; International Transport of Goods; Legal Aspects of the New Economic Order, and International Countertrade.

Below is a brief description of the main achievements in these categories.

(a) International Sale of Goods

International Sale of Goods was an early *UNCITRAL* effort. In view of the wide scope and complex nature of this topic, the initial work focused on time limits and limitations (prescription) in the international sale of goods.

(i) Limitation (prescription) period in International Sale of Goods

The numerous disparities among national legal systems with respect to rules according to which legal claims would be extinguished or barred after a certain period of time were seen to create great practical difficulties with respect to claims arising from international commercial transactions. In view of the time that might be needed for negotiations and then for the institution of legal proceedings in a foreign and often distant country, some limitation or prescription periods seem too short to meet the practical requirements of such transactions. Other periods seemed inappropriately long for transactions involving the international sale of goods and failed to provide the basic protection that limitation or prescription rules were intended to accord, such as protection from the uncertainty and threat to business stability posed by the delayed presentations of claims and from the loss or staleness of evidence pertaining to claims presented with undue delay. Not only did national rules differ, but in many instances they were also difficult to apply in claims arising from international sale transactions, a problem that was magnified by the fact that merchants and their lawyers were often unfamiliar with the import of legal rules and with techniques of interpretation used in foreign legal systems.

The Convention on the Limitation in the International Sale of Goods was adopted by a United Nations conference in June 1974. It provides uniform international legal rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings. The basic aims of the limitation period — four years — are to prevent the institution of legal proceedings at such a late date that the evidence relating to the claim is likely to be unreliable or lost, and to protect against the uncertainty and injustice that would result if a party were to remain exposed to unasserted claims for an extensive period of time.

(ii) United Nations Sales Convention

Work towards unification of International Sales law has been going on from as far back as the early 1930s. It culminated in the United Nations Convention on Contracts for International Sale of Goods, adopted by a United Nations Conference in April 1980. The Convention deals with all aspects of sale of goods, including formation of the contract, obligations of buyers and sellers, passing of risk, etc. It applies to contracts of sale of goods between parties whose places of business are in different States when both States have adopted the Convention ("Contracting States") or when the rules of private international law lead to the application of the law of a Contracting State. It should be noted that flexibility and freedom of contract are preserved by allowing the parties to the contract to exclude the application of the Convention or to vary its terms.

The Sales Convention which came into force in 1988 is one the most significant products of the Commission's work. The 38 States that have ratified it to date represent every geographical region, state of development and major legal social and economic system. They include the United States, China and Australia (but exclude the United Kingdom, Japan, and for that matter New Zealand — more on this later).

(b) International Payments

(i) International Negotiable Instruments

The two principal systems of negotiable instruments law that operate respectively in various parts of the world contain many disparities in their respective treatment of many issues. Hence, it was concluded unification could only be achieved by formulation of uniform legal rules that would be applicable to a special negotiable

instrument for use in international transactions. This system is confined to payments that are international in character and it is not designed to supersede national laws and practices relating to domestic transactions. Moreover, the uniform rules apply only to transactions where the drawer of a negotiable instrument had opted for the application of the uniform rules by a use of an international instrument bearing an appropriate designation.

The United Nations Convention on International Bills of Exchange and International Promissory Notes was adopted by the General Assembly in 1988. It provides a comprehensive legal regime for bills of exchange and promissory notes, often combining features of different legal systems and presenting new solutions on such issues as the rights and defences of two categories of holders, forged endorsements, transfer by mere delivery, guarantee and *aval*. It also offers a number of novel solutions of increasingly practical importance such as negotiability of instruments bearing a variable rate of interest and recognition of instruments denominated or payable in a unit of account.

The Convention has been signed by three States – Canada, the United States and the Russian Federation. Guinea became the first State to accede to the Convention. To come into force, the Convention requires ten ratifications and accessions.

(ii) Electronic funds transfers

Developments in electronic and in computer technology have greatly increased the efficiency and speed with which it is possible to compute, store and transmit data. One way in which international trade is benefiting from such developments is that transfers of funds between parties to a transaction can now be effected rapidly, by electronics, rather than by the physical movement and handling of paper. Certain legal issues have arisen, however, with the advent of this technological advance and the accompanying changes in international payment and banking practices.

Studies undertaken by *UNCITRAL* since the mid 1970s noted that electronic funds transfer systems have developed in a partial legal vacuum. In many countries it was assumed that the law relating to paper-based transfers also applied, at least in part, to electronic funds transfers. However, it was seldom clear to what extent this was the case. Moreover, the law developed to govern paper-based funds transfers might not be appropriate in all respects for electronic funds transfers. These problems were magnified in the case of international funds transfers, where no adequate legal framework existed within which such problems could be settled.

The *UNCITRAL* Legal Guide on Electronic Funds Transfers, in preparation for over ten years, was published in 1987 as a United Nations publication. It identifies the legal issues, discusses the various approaches for dealing with them and suggests alternative solutions. It is oriented towards providing guidance for legislators or lawyers preparing rules governing particular funds transfers systems. It was hoped that in setting forth the various practices world wide, pointing out legal issues and canvassing the solution, the Legal Guide would itself promote the international harmonisation of practices and legal rules with respect to electronic funds transfers.

(c) International Commercial Arbitration and Conciliation

Harmonisation and unification of the law relating to international commercial arbitration was another early topic on *UNCITRAL's* agenda. *UNCITRAL* Arbitration Rules, in effect since 1976, contain detailed provisions for the different stages of arbitral proceedings and have been implemented worldwide. The work in this area has culminated in *UNCITRAL* Model Law on International Commercial Arbitration, adopted by the Commission in 1985. A General Assembly resolution has recommended that all States give due consideration to the Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The Commission regards the Model Law as a sound and promising basis for the desired harmonisation and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a world wide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and to different legal and economic systems of the world.

Conciliation of trade disputes has also received the attention of the Commission. The purpose of conciliation is to achieve an amicable dispute settlement with the assistance of an independent third party. Conciliation, unlike arbitration, is not in all circumstances a final method of dispute settlement. However, one particular advantage of conciliation is its non-adversary character, which in some cases can be conducive to, or even necessary for, the preservation of good business relationships.

The Commission finalised and adopted the *UNCITRAL* Conciliation Rules in 1980. A General Assembly resolution recommends the use of the Rules in disputes arising in the context of international commercial relations, where the parties seek an amicable settlement by recourse to conciliation.

(d) International Transport of Goods

(i) Carriage of Goods by Sea

A Convention on the law and practice relating to bills of lading and their effect on cargo interests (the Hague Rules) has existed since 1924 and has been adopted by many States.[2] More recently, however, it was considered that some of the international rules and practices in this area created uncertainties in the application of laws and the interpretations of terms. The removal of those uncertainties could, in various instances reduce transport related costs in international trade, which were onerous for cargo owners, especially in developing countries. *UNCITRAL* therefore decided to review the existing Convention and prepare a new one.

In 1978, the United Convention on Carriage of Goods by Sea (the "Hamburg Rules") was adopted by a United Nations Conference held in Hamburg. The objectives of the Convention were to remove difficulties arising from the operation of the Hague Rules, and to establish a better balanced allocation of risks between the cargo owners and the carriers. It also took into account developments in conditions, technologies and practices relating to shipping.

To bring the Convention into force, 20 ratifications or accessions were needed. It was observed that States with strong shipping lobbies were under pressure not to ratify, since the Hamburg Rules create greater liability for carriers. Subsequent to accession by the twentieth State, Zambia, the Convention will come into force in November 1992.

(ii) Liability of operators of transport terminals

In recent years, the law governing the international transport of goods by various modes of transport has become increasingly harmonised and unified through international transport conventions. However, the liability of operators of transport terminals for loss of, or damage to goods before, during and after international transport has remained regulated exclusively by widely disparate national laws. Moreover, some national legal systems permit terminal operators to modify the legal rules applicable in those systems and to restrict their liability through contractual conditions. These circumstances led to work towards establishing a mandatory and unified regime governing the liability of operators of transport terminals.

The international work towards uniform legal rules governing the liability of operators of transport terminals was designed to fill the gaps left in the harmonised legal regime created by international transport conventions. Uniform rules in this area are considered desirable in order to give due protection to parties with interests in cargo in the custody of transport terminal operators, and to facilitate recourse against terminal operators by carriers, multi-modal transport operators, freight forwarders and similar entities when held liable for loss of or damage to goods that occurred while the goods were in the custody of terminal operators.

The uniform rules dealing with these matters, The United Nations Convention on the Liability of Operators of Transport Terminals, was adopted by the Vienna United Nations Conference in 1991. Five ratifications or accessions are necessary to bring the Convention into force.

Legal aspects of the new international economic order

In 1974 and 1975 the United Nations General Assembly adopted a number of resolutions dealing with economic developments and the establishment of a new international economic order. *UNCITRAL* responded by including in its work programme the topic of legal implications of the new international economic order. The two main works so far under this heading are –

(i) Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works

The preparation of the Guide was largely motivated by an awareness that the complexities and technical nature in this field often make it difficult for purchasers of industrial works, particularly from developing countries, to acquire the necessary information and expertise required to draw up appropriate contracts. The Guide, adopted by the Commission in 1987 after extensive consultations, seeks to assist parties in negotiating and drawing up international contracts for the construction of industrial works by identifying the legal issues involved in those contracts, discussing possible approaches to the solution of the issues and, where appropriate, suggesting solutions which the parties may wish to incorporate in their contracts. Examples of large industrial works include petrochemical plants, fertiliser plants and hydroelectric plants. The discussion in the Guide and the suggested solutions are written in the light of the differences between the various legal systems of the world, towards promoting an international common understanding as to the identification and resolution of issues arising in connection with those contracts.

(ii) Procurement

The Commission undertook work in this area because procurement was a subject of great importance for the economic development of developing countries and was a significant source of international trade. The work included a comparative study of national procurement laws and practices and of guidelines and regulations of international financing institutions and national development funding agencies. The Draft Model Law on Procurement, prepared by the Secretariat, establishes a structural legal framework for the procurement of goods and construction by governmental organs and other entities in the public sector. It seeks to harmonise national laws and practices relating to procurement and enables States to promote economy and efficiency in procurement, integrity and public confidence in the procurement process. The Model Law, currently under preparation, is also designed to promote international trade by removing obstacles in national laws to participation by foreign contractors and suppliers in procurement proceedings in which the procuring entity seeks such foreign participation.

The Congress

The 25th anniversary Congress was time for introspection as well as for looking ahead. Some of the delegates were *UNCITRAL* veterans who have nursed the work from its inception, sat on working groups, chaired committees, sessions and conferences. They have thus acquired invaluable expertise in this unique field. Certain others were users of international trade law – carriers, traders, bankers, lawyers. They were all, it seemed to me, true believers, keen on the work to expand and accelerate. This can be interpreted as indicating true world wide demand for uniform commercial law. The sessions included reviews of existing instruments and comments on their application by "Voices of International Practice".

The key to *UNCITRAL* success is the quality of its legal texts and

the rate of their acceptability. There seemed to be a consensus among the delegates that the often slow rate of acceptance was often due to political inertia and bureaucratic indifference. Further obstacles to harmonisation/unification were identified by Dr Gerold Herrmann, Secretary of *UNCITRAL*, as:[3]

- different ideas of justice;
- different legal concepts and techniques;
- the "known devil" is preferred to the "unknown angel";
- rejection of novel law as synthetic compromise on lowest common denominator without supporting case law;
- aversion by special-interest groups fearing disadvantages.

To overcome these obstacles Dr Herrmann suggested responsibility and care in electing projects and conscientious delimination of their substantive scope; and

> Utilising the common wealth of experience of experts from diverse regions and legal systems, from all States and interested international organisations, for elaborating a text of high quality with just and practicable solutions in plain words in and corresponding language versions in Arabic, Chinese, English, French, Russian and Spanish.

Dr Herrmann also emphasised the prime importance of disseminating information to all interested parties in all stages of the work.

New Zealand involvement

To my knowledge, New Zealand has not been officially actively involved in the Commission's work of producing legal texts. On the domestic front, however, there have been some promising developments in the areas of Arbitration and Sale of Goods.

In its October 1991 Report No 20, *Arbitration*, the Law Commission has recommended

> a new legislative framework for both domestic and international arbitration in New Zealand, a framework largely based on the Model Law on International Commercial Arbitration produced by . . . [*UNCITRAL*] (Report, p ix).

The Law Commission had no difficulty in recommending the Model Law for New Zealand international arbitration. For domestic arbitration it recommends certain options for adaptations and elaboration of the Model Law's provisions. By basing both international and domestic arbitration principally on the Model Law, the Law Commission has followed the example of other nations in the Pacific Rim – British Columbia, California, Australia and Hong Kong. The proposed legislation also achieves *UNCITRAL*'s ideal of a Model Law serving as a "transparency" for domestic legislation.

Even more recently, in a Report tabled in Parliament on 30 June 1992, the Law Commission has recommended that New Zealand become party to the United Nations Convention on Contracts for the International Sale of Goods. (NZLC R23 *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand Proposed Acceptance*, (1992)).

As noted in the Report, over 50% of New Zealand's foreign trade is with the 34 countries which have already accepted the Convention. The Convention can already apply to much of this trade even though New Zealand is not presently a party. Hence the need for New Zealand lawyers and business people to be more aware of the Convention. "The Report is designed to provide background to the Convention and a description and evaluation of the Rules it states . . ." (*Report*, para 4) The Report also contains a valuable description of the work of *UNCITRAL* and other international organisations in the area of International Trade Law. Acceptance will also assist in trans-Tasman harmonisation.

Australia acceded to the Sales Convention in 1988, and it has been implemented by uniform legislation amending the Sale of Goods law in each State and Territory. Here, as in International Commercial Arbitration, it is good to see *UNCITRAL* Rules also serving as a model for bilateral trans-Tasman harmonisation of business law.

Conclusions

The Law Commission's adoption of the Arbitration Model Law and the Sales Convention are significant, and should point the way to further developments.

As the Law Commission has observed ". . . harmonising international trading laws can only assist a nation as economically dependent on international trade as is New Zealand." (NZLC R 20, *Arbitration*, para 78.) While trans-Tasman bilateral law harmonisation is a priority, we are clearly also looking further afield.

Just how much further use of *UNCITRAL* work is made in New Zealand is difficult to ascertain. Presumably government agencies, international traders, financiers, carriers, legal advisers and other interested parties are aware of the work and its potential benefits. For example, our largest exporter, the Dairy Board, would, no doubt, prefer, when dealing with far flung countries, to rely on standard, familiar, internationally formulated contractual terms, rather than to having to deal with unfamiliar disparate national laws.

All aspects of *UNCITRAL*'s work can be utilised in New Zealand. The process which serves our economic interests is available to us at almost no cost. The Law Commission's recommendations on Commercial Arbitration and International Sale of Goods are major steps in the right direction, and as promised by the Minister of Justice Mr Graham, legislation towards New Zealand acceding to the Sale Convention will be put on the parliamentary programme as soon as possible. (Press Statement, 30 June 1992.)

Active New Zealand participation in all stages of *UNCITRAL* work should be encouraged – Sessions, Working Groups and Committees, where topics are proposed, discussed and developed. Let us have a Kiwi voice in this process, speaking from our valuable experience and promoting our interests.

Further access to *UNCITRAL* work can be achieved through study, research, publications, systematic monitoring, and co-ordinated effort. The establishment of a comprehensive body of uniform law for world commerce in the 21st century is a worthy enterprise in which we should play our proper role. □

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Unhelpful evidence in paternity cases

By Bernard Robertson and G A Vignaux, Victoria University of Wellington

The authors discuss the scientific evidence of paternity given in Loveridge v Adlam *[1991] NZFLR 267 and in* Brimicombe v Maughan *[1992] NZFLR 476. They argue that the form in which the evidence was given is misleading and unhelpful and that if the evidence were presented in a different form it would solve many of the problems Courts have in dealing with such evidence.*

Some experts are giving evidence in paternity cases of blood and DNA analyses in a way which is confusing to Courts. The result is considerable uncertainty in the minds of Judges as to how this evidence should be thought about and in particular how it should be combined with the remainder of the evidence in the case. This in turn leads to pages of unnecessary ponderings in the reported cases on the relationship between "statistical" and "legal" probability. This note sets out the way such evidence should be given and explains how it should be thought about. It also points out the errors in the methods employed by some witnesses.

Consider a simple case in which a child has a genetic characteristic not present in the mother. That characteristic must have been transmitted by the father. We have a putative father who is found to have that characteristic. There are two hypotheses to be compared, one that the putative father is the real father and the other that someone else is the real father.

If the putative father, A, was the real father then there is a probability of 0.5 that the child would inherit the characteristic (because chromosomes occur in pairs). If someone else were the father the probability that the child would have this blood group is 0.5 multiplied by the frequency with which that characteristic occurs in the population from which the real father could have come. The two 0.5's cancel out so we are left with the frequency of occurrence of the characteristic. If the characteristic occurs in 1% of the population then we can say that the *evidence* is one hundred times likelier if A is the real father (since he certainly has the characteristic) than if someone else were the father.

If we have an alternative candidate, B, as father then we have to consider what we know about that man. If we know his blood group then either he can be excluded as the father or the blood group evidence will be neutral so that the decision will depend entirely upon the other evidence. If we do not know his blood group then the best we can do is say that there is only a 1% chance that he has that group and therefore that the evidence is 100 times likelier if A is the father than if B is the father. This assessment however, is highly unstable. That is to say we can identify a piece of evidence which would cause us to change the assessment radically one way or the other if we had it. It is evident that Judges, as in *Loveridge*, are intuitively reluctant to use the frequency of occurrence when an analysis of the alternative father is not available and the concept of stability of a probability assessment is the correct articulation of this reluctance.

Probabilities for evidence

Some tests do not merely exclude or include. Some will give probabilities for the evidence which vary according to which of two non-excluded men is considered. For example, a mother, a child and three putative fathers are tested for the PGM iso-enzyme blood factor. There are four possible alleles, 1-, 1+, 2-, 2+. Each of us inherits two, one from each parent. The results of the tests are as follows:

Mother	Child	
1- 1-	1- 1+	
Father A	Father B	Father C
1- 1+	1+1+	1- 2+

The father must be the source of the 1+ allele in the child, since the mother does not have it. Father C can therefore be excluded. The probability that Father A would pass on the 1+ allele is obviously 0.5 while it is certain that Father B would do so. The evidence is therefore twice as likely if Father B is the father than if Father A is.

Now we know this what do we do? We have to consider the other evidence in the case, the frequency and timing of alleged intercourse, the credibility of the witnesses and so forth. On the basis of this evidence we have to come to some assessment of the odds in favour of the proposition that the defendant

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1 Some of the following account includes edited reproduction of text in *UNCITRAL—The United Nations Commission on International Trade Law*, second edition, 1991, an advanced version of a forthcoming United Nations publication.

2 Including New Zealand, in the Sea Carriage of Goods Act 1940.

3 Summary (No 21) of Address to *UNCITRAL* Congress on Uniform Commercial Law in the 21st Century.

was the father. In a particular case it may be a matter of comparing the probabilities in favour of one candidate and another.

Bayes Rule tells us that we then take those prior odds and multiply them by the likelihood ratio of the blood/DNA evidence in order to arrive at the posterior odds in favour of the defendant's paternity. The Court then has to consider whether those odds meet the required standard of proof. Thus the expert should say "however likely you think it is that the defendant is the father on the basis of the other evidence, my evidence multiplies the odds X times". Alternatively the expert might say "my evidence somewhat/strongly/very strongly supports the proposition that the defendant was the father".

This is simple, clear and logical and is roughly what a CRI forensic scientist will say. Unfortunately it is not what all expert witnesses in paternity cases in New Zealand will say. Many experts give two figures in their evidence. The first is the "probability of exclusion". The second is the "probability of paternity". Thus a witness might say "the probability of exclusion in this case is 98% and the probability of paternity is 99%".

Probability of exclusion

The "probability of exclusion" tells us what proportion of the population the test would exclude, regardless of who is the father of the child. Thus if some characteristic is shared by only 2% of the population the probability of exclusion is 98%. Some experts regard this as a vital measure of the efficacy of a test. In fact it is answering a question which is of interest to investigators deciding which tests to use but of no interest to Courts. The question it is answering is "how likely is this test to exclude the subject if he is not the father?" Where a test can only exclude or include, as is the case with some blood-typing, this question will have the same answer as the question we ought to be asking namely, "how much more likely is this evidence if A is the father than if some randomly selected person were?" The person either has the characteristic or does not and the frequency of occurrence of the characteristic gives the likelihood ratio. But the probability of exclusion *per se* is irrelevant to the question the Court has to decide.

Probability of paternity

The "probability of paternity" is obtained by multiplying the likelihood ratio (often called the "paternity index") by a "neutral prior" of 0.5. This is entirely inappropriate. Two errors have been made. First, a "neutral prior" of even odds (or a probability of 0.5) has been assumed. There is no warrant for this. The prior should relate to the two hypotheses in the light of which the analysis is being considered. The prior odds should be determined by the Court after considering the other evidence relating to those two hypotheses. Since it is not the witness's job to form a judgment on that evidence the scientist should be confined to expressing the value of the evidence in the form of a likelihood ratio.

Secondly by using an alternative hypothesis of "occurrence by chance" the witness assumes that there is no information as to who else might have been the father. But where there are alternative putative fathers their fatherhood should be treated as alternative hypotheses.

Giving evidence of a "probability of paternity" potentially leads to absurdity. We could achieve the result that two non-excluded fathers might both have high probabilities of being the father (totalling more than 100%). This situation has arisen in cases overseas without the expert apparently noticing the absurdity involved.

Another absurdity that evidence in this form leads to actually occurs in *Loveridge*. The witness stated: "Using conventional tests the probability of paternity was calculated to be 99.9%, and by DNA 99.5%." What does this mean? One cannot simultaneously hold two different beliefs as to the probability of paternity. What it seems to mean is that one would assess the probability of paternity, deliberately ignoring one piece of evidence as 99.9% and deliberately ignoring the other piece of evidence, as 99.5%. Furthermore the whole import of the language used is that the probability of paternity is some external reality, related to the blood or DNA. The external reality, of course, is that the defendant either was or was not the father. The problem is that we have to come to some assessment of the probability that he was the father based on imperfect information. When assessing a probability one should take into account *all* the evidence available, and as new evidence becomes available update one's assessment. The way to do this, of course, is by multiplying the odds one has already assessed by the likelihood ratio of the new evidence.

Instead of doing this the witness stated "it is extremely rare for DNA results to provide any additional information when conventional tests show a very high probability of paternity". This comment is also strange. Either the probes examine chromosomes which are not examined by the blood tests, in which case the tests are independent and provide valuable fresh evidence, or they examine the same chromosomes in which case there is some degree of dependence. The fact that a DNA test produces a lower likelihood ratio than the blood evidence does not mean that it does not provide valuable extra evidence. If the two pieces of evidence are independent the likelihood ratios can simply be multiplied together (as, in fact, the witness had already done with the results of numerous blood tests in order to arrive at the "paternity index"). The report does not state the true likelihood ratio of the DNA evidence but assuming a value of 199 (see below) we obtain a joint likelihood ratio of 1,835,178. In other words only 1 man in 1.8 million (roughly the male population of New Zealand) would be expected to have all these characteristics.

The only problem with this may be an expressed lack of confidence in the DNA figure owing to the small size of the database. This problem should not be overstated however. A database of a few hundred people enables several thousand comparisons to be done and work done by the Home Office Forensic Science Service has shown that deliberately using wrong databases usually has little practical effect on the value of the evidence. Furthermore since in *Loveridge* the higher figure (by far) was provided by the blood analysis the joint likelihood ratio is relatively insensitive to variations in the DNA figure. For example if the DNA

likelihood ratio ought to have been only 150 this would give a joint likelihood ratio of 1,383,300. In practical terms in a case in New Plymouth the difference does not matter much.

This calculation causes one to question the outcome of the case. Judge Inglis QC found that "it would be quite unsafe to hold that the respondent had intercourse with the applicant at the time when the child had to be conceived". He went on to consider whether he could regard the scientific evidence as evidence that intercourse had occurred but the way in which the evidence had been given prevented His Honour from seeing the answer to that question. Whether the couple had intercourse at the appropriate time is simply a matter of evidence. Obviously if it could be demonstrated that the two could not possibly have had intercourse during that period then the prior odds would be 0 to 1 and no scientific analyses could alter those odds. But that would require unimpeachable evidence that the defendant was overseas throughout the period and this was not the case in *Loveridge*. There is no reason in logic or in law why intercourse has to be proved to any particular standard. If His Honour believed, after considering the evidence of the parties, that the prior odds were 100 to 1 *against* the defendant's paternity then after considering the scientific evidence those odds would have become 18,351 to 1 in favour.

Further problems arose in *Loveridge* out of the way the evidence was given. Not only did the witness express a "probability of paternity" but he allowed himself for comment "at this level of probability paternity is practically proven". This conclusion adds nothing to the evidence which ought to be presented to the Court, in fact it distracts attention from it. There is a rule, commonly regarded as anachronistic, which says that experts should not express an opinion as to the ultimate issue. The analysis above shows that this rule is correct and logical; it should be departed from only in cases where there is no probability model available, as with fingerprints.

Additionally, scientists' evidence is often rendered opaque by rounding when translating from odds to probability. This is owing to an entirely proper caution about the accuracy of one's figures but it does obscure the way in which the final figure is obtained. A probability of 98% corresponds to odds of 49 to 1. A probability of 99% corresponds to odds of 99 to 1. If rounding is carried out to the nearest 1%, as has often happened in the past, it is impossible to work out the true value of the evidence. (In *Byers v Nicolls* (1987) 4 NZFLR 545 the "probability of paternity" was 99%; examination of the papers reveals that the likelihood ratio was 85.) Even if rounding is to the nearest 0.1%, as is becoming more common, a probability of 99.5% corresponds to odds of 199 to 1 while a probability of 99.6% corresponds to odds of 249 to 1, which is why we do not know the true value of the DNA evidence in *Loveridge*. Probabilities approaching 1 are notoriously difficult to handle intuitively and it would be much better if witnesses stuck to giving evidence in the form of a likelihood ratio. In the exposition above we have deliberately not rounded the figures, not out of confidence in their precision but simply so that our reasoning is clear.

Once it is realised that this method of giving evidence embodies fallacies then the difficulties the Court faced in *Loveridge* and alluded to in *Brimicombe* fall away. The task of the Court is, as Judge Inglis QC said, to determine the true value of the scientific evidence and *combine* it with the remainder of the evidence in the case. If witnesses gave their evidence in the way explained above the Court would be enormously assisted in its task. The way the evidence was given in *Loveridge*, and is still being given today by some experts, obscures the issues and complicates the task of the Court.

A footnote: paragraph (2) of the holdings in the NZFLR report of *Loveridge v Adlam* requires comment. As it stands it indicates that all a scientific analysis can do is include or exclude and if it includes it merely leaves the question open. What Judge Inglis QC meant, as is clear from the judgment, is that if the defendant is not excluded one then has to consider a database relating to the frequency of occurrence of the detected characteristics, in other words to consider the second half of the likelihood ratio. This will then give a value to the evidence. □

Billable hour loses favour

Under this heading a short piece in *The Law Society's Gazette* for 26 August 1992 reports a poll released during this year's conference of the American Bar Association held in San Francisco. The survey was commissioned by Aetna Life & Casualty insurance company.

> A new poll shows a marked disenchantment with the concept of the billable hour with some 68% of lawyers saying they would prefer to be rewarded on a value basis. The poll by Harris canvassed the views of 250 corporate legal officers of Fortune, 1000 companies and 500 senior law partners of the country's largest firms.
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> The survey shows that many lawyers now feel that the billable hour is set to be replaced by flat fees and contingency fees as business clients become increasingly value-conscious. The poll also shows that over the last five years, corporations have been looking for more flexibility from outside firms, including alternatives to hourly billing in an effort to control costs. . . .
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> Two-thirds of the senior partners surveyed acknowledged that the legal profession had entered a new era in which corporate law partners would have to adjust to lower remuneration. However, a move away from hourly billing will not come easily. . . .
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> Nonetheless, Zoe Baird of Aetna Life & Casualty which commissioned the survey, says: "Billing by the hour is an accounting system not a means of valuing services and fails to align the economic interests of lawyers and their clients". □

The rules of the game

By Tony Holland, an English Solicitor, and a former President of the Law Society

This article originally appeared in the New Law Journal *for 7 August 1992 at p 1129, and is reprinted by arrangement. The author is concerned about liability of the profession as a whole for the defalcations of dishonest practitioners in England. It is thus particularly apposite to the present unfortunate circumstances facing the New Zealand profession in respect of the Fidelity Fund. Mr Holland deplores the decision to abolish scale fees that was made under the political pressure of Austin Mitchell's private member's Bill which obtained a second reading on 16 December 1983. Mr Holland argues that it is not possible to blend professional rules that incorporate unlimited liability into a situation that emphasises cut-throat competition. He says it is neither realistic nor fair to maintain rules of indemnity as a carry-over from an age of professionalism that has unfortunately passed. The present situation in England he describes frankly as a shambles. In short the question implicitly raised by this article is whether the practice of the law is essentially to be a profession or a business in the principles applicable to members — and if it is a business what need or justification is there for a law society?*

It was around 10pm on the evening of Friday, December 16, 1983 that the foundations were laid for the present calamity that the profession has to face in the terms set out in the recent publication, *The Cost of Default*. I remember the evening well, as the song goes, because I had spent the previous four months or so with a few (very few) helpers, trying to stem the onslaught in relation to the so-called conveyancing monopoly that the profession then enjoyed. It was, of course, not a monopoly at all but politicians being habitually loose with our language had no hesitation in describing it as such. What it was, in reality, was a privilege given to a learned profession to undertake certain limited kinds of work to a minimum standard for the benefit and protection of the public. There was no doubt that the cost was sometimes higher than it might have been and it was that factor above all else that led, inexorably, to the evening of Friday, December 16.

There were one or two ill-informed and simple-minded people who were of the view that conveyancing was nothing but a clerical exercise, but the primary reason that Austin Mitchell's Bill got its second reading was the widely held view that conveyancing was just costing too much to the ordinary hard-pressed house purchaser. In fact, the Bill was passed by one vote.

Had the Bill not had a second reading, the outcome might have been different, although I doubt it, because by then the Government was determined, having dithered for the previous four months, to set up the Farrand Commission and also to give certain undertakings as to the future direction of this kind of legal work.

These events led directly to the problems that we now face in relation to funding our Compensation Fund and indeed to the cost of our indemnity insurance. If there are those who doubt this, let me set out, below, an extract from this firm's own conveyancing scale (there was no prescribed scale as such, the matter being one of competition between firms) in 1983.

Non-registered price	Registered scale	Scale
£30,000	£355	£290
£35,000	£380	£320
£40,000	£395	£350
£45,000	£455	£400
£50,000	£505	£450

I do not suppose that over the past five years or so, any provincial firm carrying on domestic conveyancing has been able to charge those kind of fees. If you want to make yourself feel even worse, it is perhaps useful to look at what your conveyancing income was in 1983 and compare it with 1990s. You will then begin to realise the extent to which conveyancing income fell, while the volume, the complexity and the responsibility increased.

Parallel with this fall in income, there has been the increasing legislation that has affected the responsibility involved in conveyancing. If conveyancing ever was a clerical exercise, then it certainly is not now — one has only to look at the cases over the last five years, ranging from the problems arising out of joint ownership of unmarried couples to those encountered in relation to the division of properties into leasehold dwellings, to realise that conveyancing is now a deal more complex than 10 years ago and almost unrecognisable compared to 25 years ago.

And yet, at the same time as this complexity has increased the profession has been indulging in insane competition so that now conveyancing on a £50,000 property in the average provincial town will be done for a fee of probably between £100 and £150 or, if we are really lucky, £200.

So when we read that "conveyancing claims" now account for almost half the negligence claims against the Indemnity Fund, we know the explanation. We have been the victims of those siren voices that told us that conveyancing was merely a clerical exercise and,

believing them, we have tried to deal with it in our offices on that basis. It has been carried out by people who sometimes are not qualified to understand what they are doing or, if they are, have no ability to spot the hidden traps. As the picture unfolds, so now we are faced with a situation where for every two claims the Indemnity Fund receives one will be conveyancing-based — probably because the legal work was done on the cheap, quickly, without any kind of understanding of what was being done, by those who did not want to understand what they were doing anyway, such was the pressure of turnover.

And if that weren't enough, there is the problem of mortgage fraud. While the level of claims upon the Compensation Fund have, excluding mortgage fraud, risen, it is the mortgage fraud cases that have really punched it into insensibility. Fraud has flourished for a number of reasons, quite apart from pure greed. So-called professionals have seen what they perceived were easy pickings given the increasing disinterest in hitherto careful controls. Vendors and purchasers have equally been beguiled by the siren voices telling them that conveyancing is purely clerical work, that surveys and valuations, and the numerous cross-checks and counter-checks, are all so much legal gobbledegook which can be ignored in a headlong rush to lend as much as possible to as many as possible. There was a time, in 1989, when a man from Mars would have been able to borrow five times his earnings in Martian currency to buy a second home on the Moon and no one would have batted an eyelid. The legal work would have been done in a flash — probably badly — and the end result would be tears in 1992.

In case any reader believes this picture is unjustified, I would make this point: nothing in our professional rules prescribes a minimum fee for which quite complex legal work can be done. If solicitors want to compete to drive the fee down to almost nothing, then so be it. The end result will be an increase in the number of claims on the Indemnity Fund to the point that those who are doing the work properly cannot sustain it. This is the result of market forces.

Clearly, something has gone seriously wrong. Sensible, competent firms are being driven by events outside their control to compete on prices so that they cannot do the work properly, and as a result there is an ever-increasing burden upon such firms in terms of insurance premium and Compensation Fund contributions. Just how many firms have to go out of business before legal practice in its present form becomes impossible?

This now brings me, and I am sorry for this long introduction, to the issues posed by *The Cost of Default*. The Society's Council has sent out a consultation paper which deserves careful reading by every member of the profession.

The Cost of Default

A number of fundamental issues will affect both indemnity insurance and the Compensation Fund. There were those who warned in 1983 that if legal work were "de-professionalised" the end result would be the kind of situation that has now developed. The difficulty is that some clients would like to have the best of both worlds. They would like to see the work done as a professional exercise, while at the same time seeking to have the market force of competition brought to bear to the utmost extent, even if that means that firms go to the wall. Like all issues, however, there have to be parameters and it seems to me that no one has tried to identify what those parameters are — let alone to lay them down.

If there is complex professional work required in the transfer of property then to have outright price competition as the *only* determining factor will in the end produce chaos. That chaos is now upon us. It is impossible for the Society, within the realms of competition law, to do anything about this but it is possible for us in terms of the Compensation and Indemnity Funds to have regard to the realities of the market place.

If outright market competition is to be the predominant factor then unlimited liability cannot, forever, be sustained if only for financial reasons. It simply will not be possible in 1995 to have conveyancing transactions carried out at, say, less than £100, with unlimited liability not only for our Compensation Fund but also for our Indemnity Fund. There would have to be a cap, if only to allow those firms that were still able to practise on sensible terms to pay the appropriate premiums. The present problems have arisen because no one was prepared, in 1983, to contemplate the ultimate outcome of what was proposed. I have not touched upon the fact that these reforms have caused the enormous pressure upon legal aid work which now has to stand on its own two feet (and so it should) but it does indicate the haphazard nature of the piecemeal reforms that have been imposed upon the profession without any attempt to identify the issues they are trying to resolve and without any identification of the effect that such resolution might have.

In the real world there is no question of any government, let alone this one, back-pedalling on the issue of price competition, not even to the extent of allowing the Council to lay down a figure below which conveyancing for value should not be carried out. Although it is ironic that it intends to impose standard fees upon the same Council in relation to legal aid work. Nevertheless the profession cannot be subject to the regime of unlimited liability for an indefinite period. Even the most cynical of observers will have to realise there are prices to be paid in terms of the competitive practice of the law as presently carried on. It is not possible to supply the Rolls-Royce service which endures when the public primarily requires price competition at the level that it now does.

I am not saying that the public is wrong in that demand; it could well be right, particularly given the level of fees that are required in most legal matters, but it has to accept some limitations for the price it seems prepared to pay for the services it demands. The difficulty is that the profession has not yet come to terms with this. *The Cost of Default* will inevitably mean that it now has to.

It was quite in order, and indeed natural, to expect the profession to have unlimited liability both in terms of dishonesty and negligence when it had a genuine monopoly in respect of certain legal work and when there were certain levels of fees laid down. Now that those have

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A Banking Ombudsman for New Zealand

By Ann Farrar, Victoria University of Wellington

Alternative dispute resolution is very much the fashion. In this article Ann Farrar considers the recent introduction into the commercial world of a Banking Ombudsman as a mechanism for settling disputes. This is in accordance with a growing pattern overseas.

1 Introduction

On 1 July 1992 New Zealand's Banking Ombudsman commenced office. The first person to be appointed to this position is Mrs Nadia Tollemache, known to New Zealanders in her previous role as one of the Parliamentary Ombudsmen. Introduced as a voluntary initiative of the banking industry, it is intended that the Banking Ombudsman scheme will provide an impartial system for the resolution of disputes between banks and their customers. The scheme thus adds a further mechanism for the resolution of consumer disputes to those already existing in New Zealand.

The appointment of a Banking Ombudsman will no doubt be greeted with enthusiasm by customers aggrieved by any action of their bank. Early signs are that bank customers are already seeking her assistance. Whether and to what extent the Banking Ombudsman is able to satisfy the hopes of these customers remains to be seen. The jurisdiction and powers of the Banking Ombudsman are closely circumscribed by a set of rules devised by the banking industry itself. An analysis of these rules reveals a more limited role than consumers might have hoped for.

What follows is a description of the new Banking Ombudsman scheme and the factors that led to its adoption, as well as an attempt to analyse the place of the Banking Ombudsman scheme within dispute resolution procedures generally.

2 Background to the New Zealand Ombudsman scheme

a The United Kingdom and Australian experience

The New Zealand Banking Ombudsman scheme is closely modelled on similar schemes in the United Kingdom and Australia.[1] The United Kingdom pioneered the idea of a Banking Ombudsman by introducing a voluntary scheme in 1986. This scheme in turn had been influenced by an earlier similar model in the insurance industry. Consumer pressure played an important part in influencing the United Kingdom banking industry to establish an external complaints mechanism. The report of the National Consumer Council in 1983 on Banking Services and the Consumer revealed substantial customer dissatisfaction with banking complaint procedures and advocated both improved internal procedures and the establishment of an independent Ombudsman. The banks themselves perceived it as being in their interest to appoint an Ombudsman. To do so would arguably give them a competitive marketing edge over building societies, which were also offering traditional banking services. What is more, government legislative intervention to regulate complaints procedures seemed inevitable if the banks did not act first. The original United Kingdom Banking Ombudsman acknowledged that it was largely to ward off such intervention that the banking industry introduced its own scheme. Self-regulation was seen as preferable to government regulation which might well prove more onerous and less flexible. Indeed the inaction of the United Kingdom building societies resulted in their regulation by statute under the Building Societies Act 1986. This created the first statutory Ombudsman in the private sector. Unlike the voluntary banking industry scheme, membership in the Building Society Ombudsman scheme is mandatory.

The threat of government intervention also seems to have influenced the Australian decision to adopt a voluntary Banking Ombudsman scheme in 1989, with the

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been removed and there is competition from the non-qualified sector as well as price competition from all concerned, it is neither right nor sensible that the old rules of professional practice should continue to operate. It is no good playing chess when the rules laid down are for a game of ludo.

I do not pretend to know the ultimate solution to these intractable issues but if I am sure of anything it is this: it is not possible to attempt to blend professional rules incorporating unlimited liability into cut-throat competition of the kind that those charged with these matters seem currently to favour. It is neither realistic nor fair, in this context, to demand a solution from the profession which continues to incorporate all those kinds of rules which are really the product of an age that I fear has passed. At some stage a decision has to be made as to exactly what is required from a lawyer in the market place of the 90s and then devise the rules accordingly. What we have at the moment is frankly a shambles which will lead, eventually, to disaster.

first Banking Ombudsman commencing office in 1990. The Australian scheme was largely modelled on that in the United Kingdom. With the benefit of United Kingdom experience to guide it, however, the Australian banking industry made a number of alterations to avoid what were regarded as deficiencies in the United Kingdom model. In particular, moves were made to lessen procedural complications and encourage a practical, common-sense approach to dispute resolution.

In 1989 the United Kingdom Review Committee on Banking Services Law (The Jack Report) made substantial recommendations as to the regulation of the banking industry. One chapter of its report was devoted to an analysis of the Banking Ombudsman scheme and various recommendations for its modification were made. It was recommended, for example, that the Ombudsman scheme be statutory based and that its jurisdiction extend to small businesses as well as individuals. These particular recommendations were not adopted, having been rejected by a later United Kingdom Government White Paper on banking services in 1990. However the original terms of reference of the United Kingdom scheme have been amended in a number of other respects in response to recommendations in the Jack Report. For example, powers have been given to the Ombudsman to compel production of relevant documents and the basis of the Ombudsman's decisions have been widened to include consideration of what is "fair in all the circumstances".

Both the Jack Report and the Government White Paper called for the adoption of a code of banking practice which would set out guidelines of good banking practice and which would act as a framework to assist the Ombudsman in reaching his or her decisions. It is only this year that such a code of banking practice has been adopted in the United Kingdom. As yet no code of practice has been adopted in Australia. However as part of its response to the recommendations contained in the Martin Committee Report on Banking and Deregulation, the Australian government has established a task force to develop and implement a code of banking practice. The task force is jointly chaired by the Trade Practices Commission and the Treasury and includes officials from the Federal Bureau of Consumer Affairs and the Reserve Bank. It is intended that the code will be implemented by January 1993.

b New Zealand

The New Zealand banking industry was not immune to these overseas developments. The recommendations of the Jack Report in 1989 and the United Kingdom Government White Paper in 1990 were closely monitored as having profound practical and cost implications for the banking industry. The Bankers' Association had been considering the adoption of a Banking Ombudsman from early 1989, although it was not until 1990 with the establishment of the Australian Banking Ombudsman that this took on any real immediacy. A number of issues of concern had been arising repeatedly for discussion within the banking industry – issues such as privacy, confidentiality, disclosure and concern over access to plastic cards. These issues were by no means unique to New Zealand. The same problems were being considered in the United Kingdom, Canada and Australia as well as several other smaller European jurisdictions. Overseas developments revealed a world-wide trend towards statutory regulation of the banking industry. This threat of possible government regulation prompted the Bankers' Association to adopt a form of self-regulation in an attempt to keep the initiative for reform within the banking industry itself.[2] Moreover there was mounting consumer pressure for review and regulation of banking practices, especially in relation to retail banking. This pressure was intensified following the establishment of the Australian Banking Ombudsman. As Australian banks operating within New Zealand were becoming increasingly familiar and comfortable with the operation of a Banking Ombudsman, it was difficult to argue that no similar external complaints mechanism should be adopted in New Zealand.

The culmination of these factors was the adoption on 1 March 1992 by the New Zealand Bankers' Association of a voluntary Code of Banking Practice. This seeks to codify what the banks themselves regard as minimum standards of good banking practice. The Banking Ombudsman scheme is set up as an integral part of the Code. However the establishment of a complaints mechanism is only one part of the Code, which provides for general regulation of banking practice, including the use of plastic cards. The Code is not intended to supplant the existing Electronic Funds Transfer (EFT) Code, although the new complaints mechanism is intended to extend to the EFT Code also. In addition to establishing the Banking Ombudsman scheme, the Code requires each member bank to establish its own internal complaints procedure. Only complaints which remain unsettled after first having been through an internal procedure are to be heard by the Ombudsman.

All members of the Bankers' Association are required to adhere to the Code of Practice and so are automatically participants in the Banking Ombudsman scheme. At present seventeen banks are signatories to the scheme. Only three registered banks are currently not members of the Bankers' Association and so do not participate in the Ombudsman scheme. None of these is a retail bank.

The adoption of a Banking Code of Practice as a preliminary to the establishment of the Banking Ombudsman marks a significant departure from the overseas schemes. Neither the United Kingdom nor Australia had such a code when their schemes began. By adopting a voluntary code of practice as a pre-requisite to the establishment of an external complaints mechanism, the banking industry sought to maintain a degree of control over a development that seemed inevitable. The gains to the industry in maintaining control of the reform process, together with the prospect of arguing for general banking law reform in the banks' favour in advance of when it might otherwise have occurred, no doubt acted to soften the banks' attitude to the establishment of the Banking Ombudsman.

Both the Bankers' Association and the Banking Ombudsman

anticipate that the Code of Practice will assist the Banking Ombudsman in carrying out her functions. Certainly it will provide the Banking Ombudsman with a measure by which to judge the required standard of bank conduct. It is interesting to speculate, however, on the extent to which reliance on the Code, which sets out what the banks regard as minimum standards of good banking practice, will stifle any potential role of the Ombudsman in encouraging the adoption of what the wider community regard as good banking practice. The United Kingdom experience has been for the various Banking Ombudsmen to adopt an active role in criticising and recommending changes in standard banking practice where this gives rise to a regular pattern of complaints. The Ombudsman's Annual Report not only reveals the working of the scheme to the public, but also provides a vehicle for such recommendations. However, to point to the publication of an Annual Report as an opportunity for making such recommendations begs the question of the extent to which the Ombudsman will regard her role in identifying appropriate standards of banking practice as being circumscribed by the Code. The Terms of Reference of the United Kingdom Banking Ombudsman are arguably more liberal in this regard than their New Zealand counterpart. Since 1990, the United Kingdom Banking Ombudsman in assessing standards of good banking practice, is required to consult not only with the banking industry but elsewhere as well. In New Zealand, the Ombudsman's obligation is merely to consult with the banking industry.

The basic issue is one of counterpointing the Banking Ombudsman's function in providing individual redress for aggrieved bank customers with a potentially wider function of identifying and promoting the adoption of *better* banking practice. It is clear that the Bankers' Association hope that the Ombudsman's decisions will focus on the former and result in practical, common sense solutions to problems as they arise. It will be interesting to observe to what extent and in what manner the Banking Ombudsman views her functions as including the latter objectives also.

3 Details of the scheme[3]

a Institutional structure

As noted, ultimate authority for the establishment of the Banking Ombudsman rests with the banking industry itself. The Code of Practice arose from the voluntary initiative of the Bankers' Association. In addition, bankers have been responsible for the drawing up of the Terms of Reference of the Banking Ombudsman, have drawn up the Rules, have appointed the first Chairman of the Banking Ombudsman Commission and have retained for themselves a wide power to alter or rescind these Rules and Terms of Reference. Despite this predominant influence over the establishment of the scheme, the Banking Ombudsman herself is structurally independent of the banking industry, which is to have no part in the day to day running of the scheme. Interposed between the banking industry and the Banking Ombudsman is an essential feature of the scheme, the Banking Ombudsman Commission. The establishment of this Commission, representative of the interests both of consumers and bankers, provides the fundamental safeguard for the independence of the Banking Ombudsman.

Membership of the Commission comprises an independent Chairperson (initially appointed by the Council of the New Zealand Bankers' Association and thereafter by the Commission itself) and four other members, including two representatives of participating banks and two consumer representatives, one of whom is to be nominated by the Crown on the recommendation of the Minister of Consumer Affairs and the other ordinarily being the Executive Director of the Consumers Institute. The first Chairperson of the Commission is Sir Gordon Bisson, a retired Court of Appeal Judge. The consumer representatives are Dame Stella Casey and the Executive Director of the Consumers Institute, Mr David Russell. The Commission has responsibility for the oversight of the Banking Ombudsman scheme. It has authority (amongst other things) to appoint the Banking Ombudsman, to monitor and make recommendations on alteration of the Banking Ombudsman's Terms of Reference, to receive and approve the Annual Report of the Banking Ombudsman, to approve a budget and to levy participating banks to finance the objects of the scheme. The Commission is also to assist the Banking Ombudsman in the performance of her duties. The manner and degree of this assistance will no doubt depend to a large extent on the individual Chairperson. Certainly it is not envisaged by the present Chairperson that this role extends to interference in the Ombudsman's day to day decision making.

The essential component of the scheme is of course the Banking Ombudsman herself. She has two principal powers. First, she is to consider at no cost to the complainant complaints in relation to claims not exceeding $100,000 arising out of the provision within New Zealand of banking services by a participating bank. Provision of these services may be to individuals or to groups of individuals, whether incorporated or unincorporated. Secondly, she is to facilitate the satisfaction, settlement or withdrawal of such complaints whether by the making of recommendations or awards or by such other means as shall seem expedient.

The two-tiered institutional structure of the scheme differs from that adopted in the United Kingdom and Australia, both of which have used a three-tiered system. Ultimately responsible for the United Kingdom and Australian schemes are incorporated bodies whose Boards comprise members of the banking industry. Interposed between each Board and the Ombudsman is a Council, similar to the New Zealand Banking Ombudsman Commission, representing both banking and consumer interests. The New Zealand structure was preferred largely for reasons of simplicity. If adequate safeguards for the Ombudsman's independence are included in the Rules and Terms of Reference, this alteration would seem to make little difference. What is important is that the Ombudsman is free from interference from the banking industry, regardless of

whether these industry interests are represented by a corporate body or the New Zealand Bankers' Association.

While its institutional structure provides the primary safeguard for the scheme's independence, it is not the only safeguard. The Banking Ombudsman herself must not be an employee nor hold any office or position with a participating bank. Nor shall the Ombudsman act in a professional capacity for the Commission either personally or by a firm of which she is a member.

Financing of the Banking Ombudsman scheme, together with other aspects of its operation, is entirely independent of government control. The scheme is self-financing with levies being raised by the Commission from participating banks to finance the scheme's operation. This is an improvement on the situation in the United Kingdom where finances are raised and controlled directly by the Board comprised of members of the banking industry. The New Zealand scheme's credibility is enhanced by removing direct control of financial matters from the banking industry to the independent Commission. After the first year of operation, 50% of each bank's levy is to be calculated on a basis proportional to the number of complaints against that bank which have been considered by the Ombudsman in the preceeding year. It is hoped that this formula will have the effect of motivating banks to improve their own procedures and internal complaints mechanisms, and so minimise the number of complaints reaching the Ombudsman. It is to be noted, however, that while reference of a complaint to the Ombudsman is expressed to be "at no cost to the complainant", it is inevitable that the cost of the scheme's operation will ultimately be passed on to all bank customers in the form of increased fees.

As with all aspects of the scheme, it is early days yet and one can only wait and see if the above measures do indeed effectively protect the Ombudsman's independence. Experience in the United Kingdom and Australia indicates that the banks have respected the Ombudsman's independence. It is in their own self-interest to do so, as the success of the scheme which operates by reason of the banks' own initiative so clearly requires it. It is to be hoped that any exercise by the New Zealand Bankers' Association of their powers to alter, add to, rescind or replace the Rules of the Commission or the Ombudsman's Terms of Reference will not jeopardise the Ombudsman's credibility as being truly independent of the banks. The requirement that 60 days' notice must be given to the Commission before this power can be exercised provides some opportunity for public opposition to amendments to be voiced. It is possible that any action by the banks will ultimately be guided by consumer pressure, but whether this is indeed the case remains to be seen.

It is interesting to note recent press reports of the Australian banking industry's intention to limit their Banking Ombudsman's Terms of Reference.[4] These reports followed allegations by the banks that the Ombudsman acted outside his Terms of Reference by compelling certain banks to make pay-outs over the use of third party cheques. Adverse publicity, which asserts the bankers' move is motivated by their desire to avoid liability in a large number of similar unresolved claims, has led the Board to deny that it will take unilateral action to change the current Terms of Reference. One bank has already withdrawn from the Australian scheme, giving as reasons for its withdrawal the high costs of compliance and dissatisfaction with the Ombudsman's interpretation of the extent of his jurisdiction.

b Procedure

The complaints resolution mechanism envisaged by the Banking Code of Practice is essentially double-edged. Establishment of an external complaints mechanism in the form of the Banking Ombudsman is accompanied by the requirement that the banks themselves establish a satisfactory internal complaints procedure. Access to the Banking Ombudsman will only be permitted after a complaint has been fully considered internally by the participating bank and a deadlock has been reached. If within three months of the receipt of a formal complaint the bank has failed to inform the complainant of a deadlock, the matter may also be referred to the Ombudsman. One side-effect of the Banking Ombudsman scheme is expected to be an improvement in internal procedures for dispute resolution. Not only are there financial incentives for banks to reach a settlement at this initial stage, but it is also envisaged that competitive opportunities will arise as a result of improved internal procedures for individual banks to promote themselves as being attuned to customer needs and grievances.

The Banking Ombudsman has sole discretion to decide whether or not a complaint falls within her Terms of Reference and, if so, the procedure to be adopted in its investigation. At the time of writing, the Banking Ombudsman was engaged in formulating these procedures in consultation with the banks. Obviously there must be some provision for complaints received by the Ombudsman to be referred back to a bank where the matter has not been through the bank's internal complaints procedure. To what extent the procedures will allow for personal interviews with the parties will presumably depend on the number of complaints to be processed.

The Banking Ombudsman's Terms of Reference recognise the confidential nature of much of the information to which she will have access in the course of her investigations. Banks are free to disclose to the Ombudsman information regarding a customer's financial affairs which would otherwise be held in confidence. The complainant must waive this duty of confidentiality and no proceedings can commence before such a written waiver is received by the Ombudsman. However if any party to a complaint requests that information supplied to the Banking Ombudsman be treated as confidential, the Banking Ombudsman shall not disclose this information to any other person without prior consent. Subject to this requirement of confidentiality, any information in the Banking Ombudsman's file shall be made available upon request to a party to a complaint.

The Banking Ombudsman has power to require banks to provide any information relating to the complaint in their possession. This

they must do as soon as reasonably practicable, unless disclosure would breach the bank's duty of confidentiality to a third party whose consent has not been obtained despite the bank's best endeavours. A similar provision exists in Australia. Until 1989 the United Kingdom Banking Ombudsman had no corresponding power and could merely request such information. In response to criticism the provision was amended and now confers on the Ombudsman a power to compel the production of relevant documents.

c Jurisdiction

Theoretically, the Banking Ombudsman has a wide jurisdiction to hear complaints arising out of the provision within New Zealand of banking services by a participating bank. "Banking services" is defined to mean "all financial services provided by each of the participating banks in New Zealand or in the ordinary course of their business to individuals or groups, including the use overseas of credit cards issued by participating banks, and advice and services relating to insurance and investments." This definition is presumably to reflect the trend in modern banking to move away from an exclusive concern with traditional areas of personal banking into a wider diversity of financial services. Non-financial services such as the arrangement of travel bookings are presumably excluded.

The Banking Ombudsman's jurisdiction in New Zealand has been extended to cover complaints brought by incorporated and unincorporated groups as well as by individuals. This represents a departure from the position in the United Kingdom and Australia where the Ombudsman may only hear complaints brought by individuals. Incorporated bodies are excluded. The extended jurisdiction in New Zealand recognises that the needs of small businesses are often similar to those of individual customers. The Banking Ombudsman scheme is obviously not intended for use by large corporations, however. The New Zealand scheme has avoided the definitional problems of excluding such large corporations while including complaints bought by small businesses by setting a monetary limit of $100,000 on claims. This limit will automatically exclude most corporate claims from the Ombudsman's jurisdiction. Arguably a considerably higher monetary limit is warranted when one takes into account the current levels of mortgage funding required by many customers. Keeping the jurisdictional limit at $100,000 was seen as a trade-off for the inclusion of corporate complainants. Unlike its United Kingdom and Australian counterparts, limited provision is made for the Ombudsman to make awards and recommendations in excess of $100,000 where the bank named in the complaint gives its consent.

By its inclusion of corporate complainants, the New Zealand scheme will avoid much of the criticism aimed at its United Kingdom and Australian counterparts. Accessibility of the scheme to potential complainants, including small business complainants, is one criterion by which the scheme's success will be judged. The Banking Ombudsman's interpretation of her Terms of Reference with regard to accessibility will be noted with interest. The Australian Banking Ombudsman, Mr Graham McDonald, in interpreting his Terms of Reference has decided that it is not necessary for there to be a banker-customer relationship before the scheme can be accessed, thus opening the way for guarantors to apply for relief.

The apparently wide jurisdiction of the Ombudsman to hear complaints by bank customers is subject to a myriad of qualifications. First, the Banking Ombudsman may only hear complaints if the act or omission giving rise to the complaint first occurred on or after 1 January 1992 or first occurred not earlier than six months prior to that date, but the complainant did not become aware of it until on or after that date. Even at a very early stage in her appointment, the Banking Ombudsman has already had to turn away many complaints which fail to satisfy this criterion.[5] The Terms of Reference make no mention of a provision which exists in both the United Kingdom and Australia to the effect that the Ombudsman is precluded from considering complaints if the act or omission giving rise to the complaint first occurred six years or more before the applicant first complained to the bank. This omission is no doubt in response to criticism levelled at the overseas provisions to the effect that they could operate more restrictively than general limitation principles.[6]

Secondly, the Terms of Reference exclude complaints relating to a bank's commercial judgment in decisions about lending or security, although this does not preclude the Banking Ombudsman from considering complaints about administration in lending matters. Thus, while allowing the Ombudsman to consider matters of maladministration, the banks understandably do not envisage the Ombudsman encroaching on their discretion in matters involving commercial judgment, which is defined as "assessment of risk, of financial and commercial criteria or of character". Decisions about lending or security are defined as including "any decision, or consequence of such a decision, concerning any advance or similar facility, guarantee or security". In the United Kingdom, the maladministration proviso to the exclusion was only inserted in 1988. Until then commercial decisions reached as a result of procedural error were beyond challenge. In similar vein, the Banking Ombudsman has no power to hear complaints relating to a bank's interest rate policies, nor to make a recommendation or award in respect of a complaint to the extent that it relates to a practice or policy of a participating bank which does not itself give rise to a breach of any obligation or duty owed by the participating bank to the complainant. Complaints about charges for banking services may be considered, but the Ombudsman must have regard to any scale of charges generally applied by the bank.

Such provisions clearly reflect the banks' intention that the Ombudsman's role be that of an independent arbiter of disputes, taking banking policy as given. The underlying philosophy of the scheme is therefore quite narrow as conceived by the Bankers' Association. While it is fundamental that the Banking

Ombudsman is regarded as impartial and independent, and not as an advocate for either the banks or consumer groups, it is inevitable that matters of public concern relating to banking policy will become apparent to the Ombudsman. The extent to which her role also includes active promotion of reform in policy areas involves a consideration of matters which have already been discussed in relation to standards of banking practice. The future direction of the scheme and the attitude of the banks towards it obviously depends to a large extent on the way in which the initial Banking Ombudsman interprets and carries out her functions.

Explicit in the Terms of Reference is recognition that the Banking Ombudsman provides only one of a range of potential dispute resolution procedures. It may be that an alternative method of dispute resolution is more appropriate in any given case. The Terms of Reference thus provide that the Banking Ombudsman has no power to consider a complaint if at any time it appears to the Ombudsman to be more appropriate that the complaint be dealt with by a Court, under another independent or statutory complaints or conciliation procedure, or under an arbitration procedure. Similarly, the Ombudsman shall only consider a complaint that is not, nor has been, the subject of any proceedings in any Court, tribunal or arbitration, or any other independent or statutory complaints or conciliation body, or of any investigation by a statutory Ombudsman.

An interesting provision, modelled on similar provisions in the United Kingdom and Australia, allows a bank to remove test cases from the jurisdiction of the Banking Ombudsman and instead have them heard by a Court. This test case provision may be called into operation when in the bank's opinion the complaint involves (i) an issue which may have important consequences for the business of the participating bank or banks generally or (ii) an important or novel point of law. In addition, the bank must give an undertaking that if within six months either the complainant or the bank institutes Court proceedings in respect of the complaint, the bank will pay the complainant's costs and disbursements of the proceedings at first instance and any subsequent appeal commenced by the bank. The bank is to make interim payments on account of such costs, if and to the extent that it appears reasonable to the bank to do so. While it is also provided that the Ombudsman must concur with the bank's statement of reasons for bringing a test case before ceasing to consider the complaint, it is arguable that this may prove to be a matter of form only, particularly in light of the bank's undertaking to pay the complainant's fees in a subsequent Court action. While it may appear to undermine the scheme to allow banks, who have undertaken to be bound by the Ombudsman's findings, to remove complaints from the Ombudsman's jurisdiction, it is to be hoped that the necessary undertaking as to fees will discourage such action except in exceptional cases. The absence of use of similar test case provisions overseas would seem to indicate that concerns over the use of such a provision are theoretical only.

d Functions

Once jurisdictional matters have been complied with, the function of the Banking Ombudsman is of course to facilitate the satisfaction, settlement or withdrawal of complaints whether by agreement, by making recommendations or awards or by such other means as seem expedient. It is clearly envisaged that, where possible, complaints should be settled by agreement between the parties. Where agreement is not achieved, the Ombudsman's role undergoes a change. At the request of either party, the Banking Ombudsman may make a recommendation for settlement or withdrawal of a complaint. After receiving such a request the parties are to be given one month's notice of her intention to make a recommendation. During this period the parties may make further representations to the Banking Ombudsman in respect of the complaint, to enable a thorough investigation of the matter to be made. Recommendations are to be in writing and must state reasons. The precise nature of any recommendation is a matter within the Ombudsman's discretion and obviously must relate to the particular dispute. A direction to reconsider or reverse a decision as well as the payment of compensation might be appropriate. If a proposal for settlement or recommendation would involve the bank in paying some form of compensation, then it shall only be open for acceptance by the complainant if he or she accepts it in full and final settlement of the complaint.

If within one month any recommendation has been accepted by the complainant but not by the bank, the Banking Ombudsman has power to make an award against the bank. If within one month of issuing an award the complainant agrees to accept it in full and final settlement of the dispute, the award bcomes binding on the complainant and on the bank against which it is made.

The Banking Ombudsman's power to make a binding award against a bank represents a fundamental change from the powers of the Parliamentary Ombudsmen, who have powers of recommendation only. The ability to bind one party in the dispute to a decision of the Ombudsman is a reflection of the voluntary, non-statutory nature of the scheme. By reason of their membership in the scheme the participating banks are deemed to have undertaken to the Commission to be bound by any award made against them and accepted by the other party to the dispute. The complainant customer, on the other hand, may at any time prior to settlement by agreement or acceptance of a recommendation or award refer a dispute to the courts. It should be stressed again, however, that the primary function of the Banking Ombudsman is to promote a settlement by agreement between the parties. Overseas experience indicates that this attempt is normally successful. It is only in a very small minority of cases that a dispute reaches the award stage.

e Basis for decision making

In making any award or recommendation, the Banking Ombudsman is to have reference to what is in her opinion "fair in all the circumstances". In addition she shall observe any applicable rule of law

or judicial authority, and shall have regard to general principles of good banking practice and any relevant code of practice applicable to the subject matter of the complaint. She shall not however be bound by any previous decision made by her or any previous Banking Ombudsman.

By providing for reference to what is fair in all the circumstances, the New Zealand scheme follows an equivalent Australian provision. Originally the United Kingdom provision made no such reference, but was amended to do so as a result of recommendations by the Jack Report. The inclusion of this expression makes it clear that while the Banking Ombudsman must observe legal rules, it is not intended that an overly legalistic approach be adopted to dispute resolution. The Ombudsman's task is much wider than merely inquiring into the legality of an act or omission by a bank. It also involves an inquiry into whether any such act or omission complies with good banking practice. In establishing what constitutes good banking practice the Ombudsman must have regard to any relevant code and consult with the banking industry. The adoption by the Bankers' Association of a written Code of Practice prior to the establishment of the Banking Ombudsman scheme will simplify the Ombudsman's task. Again, it remains to be seen to what extent she is forestalled by this Code from considering developments in what the public perceives as good banking practice. This does not remain static. Recommendations in the Ombudsman's Annual Report is one potentially valuable way of informing the banks of public attitudes on this matter. Hopefully the banking industry will continue to maintain the initiative by amending its Code accordingly.

Just what it means in practice to make a decision based on what is fair, while at the same time observing the law and having regard to good banking practice, is difficult to predict. The Banking Ombudsman's Terms of Reference appear more restrictive than those of a Disputes Tribunal referee who has power to determine a dispute according to the substantial merits and justice of the case. The referee must have regard to the law but is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities. The Australian Banking Ombudsman has identified a number of factors that he will take into account when determining what is fair in all the circumstances. Included are the circumstances of the customer, the way in which the complaint has been handled by the bank and the capacity of the bank to control the systems which may be the subject of the complaint. In making such assessments, the Ombudsman's independence is essential.

f Publicity

Any scheme of alternative dispute resolution will only be successful if aggrieved parties use it. They can only do this if they know of its existence. The Rules of the Commission provide for each participating bank to publicise both its internal complaints procedures and details of the Banking Ombudsman scheme to customers. It is likely that this will be achieved by the distribution of information leaflets by individual banks throughout their branches. No explicit supervisory role in respect of publicity has been given to the Banking Ombudsman or the Commission, although presumably this could come under general responsibility for the day to day administration and conduct of the business of the Banking Ombudsman. It is likely that the Ombudsman herself will initiate some general publicity in the form of publicity leaflets.

It is questionable whether competitive forces between participating banks alone can be relief on to prompt adherence to the publicity requirement, although the scheme certainly provides banks scope for promoting themselves as "customer-friendly". An explicit sharing of responsibility for publicising the scheme between the banks and the Ombudsman would seem to be a preferable approach.

4 Trends in dispute resolution

Apart from the scheme's intrinsic interest to observers of the banking industry, in particular to customers wishing to achieve a speedy, cheap resolution of disputes with their banks, New Zealand's Banking Ombudsman scheme is of wider interest as a reflection of dispute resolution trends within New Zealand. The appointment of a Banking Ombudsman provides further illustration of the privatisation of justice. It also reflects the increasing use of techniques such as negotiation, conciliation and mediation as an alternative to adjudication as a means of dispute resolution.

The Ombudsman concept is of course not new to New Zealand. In 1962 New Zealand established the office of Ombudsman, an idea adapted from a much earlier Scandinavian model. The basic purpose of the Parliamentary Ombudsmen has been to provide individuals aggrieved by a decision of Government with a means of redress.[7] What is new is the importation of the Ombudsman model of dispute resolution into the private sector. This development is notable in several respects. First, it has been argued for some time that the growth of large, bureaucratic institutions in the private sector has blurred the formal distinction between what is public and what is private. The exercise by these institutions of monopolistic or oligopolistic economic powers are regarded as essentially governmental.[8] If this is accepted, then it is an easy step to transfer the Ombudsman concept into the private sector. No doubt the present Banking Ombudsman will be seeking ways of adapting her experiences as Parliamentary Ombudsman to assist her in the role of Banking Ombudsman.

The growth of private industry Ombudsmen is a marked trend in Western jurisdictions. The United Kingdom provides a very good example of the proliferation of industry Ombudsmen over the last decade. Jurisdiction covers dispute resolution in fields as diverse as the financial services industry and the newspaper industry. In Australia, there has also been talk of the establishment of a Corporate Ombudsman as an investor complaints mechanism. Indications are that this trend will continue. The quality and success of these diverse schemes varies considerably however. While there is widespread recognition of the success of the United Kingdom insurance and banking schemes as credible complaints handling mechanisms, in the financial services industry as

a whole there is little strategic planning or co-ordination between the various schemes. More serious criticism can be aimed at some of the recently established newspaper schemes for their lack of institutional and financial independence from the industry which funds them.[9] An unfortunate result of industry initiative may be a diminution of respect for the name "Ombudsman". It was no doubt with this in mind that in New Zealand an amendment to the Ombudsman Act 1975 was passed in 1991 to protect the name "Ombudsman". Under s 28A, approval must be given by the Chief Ombudsman before this name can be used. The banking industry Ombudsman is the first to receive such approval.

Essential elements of the office

Three features have been recognised as essential to the office of Ombudsman in the public sphere; its independence, its flexibility in the conduct of investigations and recommending remedies, and its credibility with both the Executive Government and the public![10] These elements are also essential to the efficient operation of a privately based Ombudsman scheme. In particular it is necessary to compare the Terms of Reference of the New Zealand Banking Ombudsman with these criteria when making an assessment of the scheme's likely effectiveness. There are of course obvious overlaps between these criteria. If the Banking Ombudsman is not adequately protected from interference by the industry which funds it, then doubts arise as to the Banking Ombudsman's credibility as an independent arbiter of customer complaints. The Banking Ombudsman must not only be independent, but must be seen to be independent. Together with the extent of her powers, the Ombudsman's independence in exercising those powers is one of the most important ingredients for the success of the scheme.

The limitations of a formal Court system of adjudication have been well documented. Included are the cost, delay and inflexible nature of Court proceedings. Consumer disputes are typically of a type not suited to resolution by litigation. Most consumer claims are small. The cost of pursuing such a claim through the traditional Court system frequently outweighs the value of the claim itself. Moreover the consumer, usually pursuing a one-off claim, is faced with the daunting task of pursuing it against an opponent who is usually more powerful, more experienced at litigation, and more likely to have the advantage of legal advice and representation![11] Bank customers are no exception. The Court system has been adapted to reflect this reality by the establishment of Dispute Tribunals. These Tribunals answer many of the criticisms aimed at the traditional Court system in a large number of consumer disputes by providing a cheap, speedy and relatively informal system of dispute resolution. They are however open to criticism in a number of respects. The monetary limit on claims is very low. In relation to disputes involving banks and their customers, another obvious drawback is the lack of specialist referees acquainted with the intricacies of banking law and practice. Arguably the Banking Ombudsman scheme provides scope for the development of such specialist knowledge.

Increasingly, methods of resolving disputes outside the Court system are being sought and adopted. Private systems of dispute resolution are commonly characterised by their independence from formal institutional structures and from an overly rigid adherence to rules. Dispute settlement is usually initiated by the disputants themselves and is confidential in nature. Typically, techniques such as negotiation, conciliation and mediation are used. However not all private systems lack a formal institutional structure. Indeed there is a current trend in New Zealand towards statutory based schemes of private justice, a feature of which is the provision of such a structure. Examples are the dispute resolution mechanisms set up by enactments such as as the Residential Tenancies Act, the Resource Management Act, the Family Courts Act and the Criminal Justice Amendment Act. The Banking Ombudsman scheme is of course voluntary rather than statutory based. Complainants have their disputes dealt with outside the Court system primarily by means of techniques within the discretion of the Banking Ombudsman, including negotiation and mediation. The Ombudsman nevertheless operates within a carefully planned institutional structure designed to safeguard her independence.

The functions of the Banking Ombudsman extend from a primary responsibility to attempt to achieve an agreed settlement between the parties, to the making of recommendations and ultimately awards binding on the banks. It is not possible therefore to limit a description of her role to being solely that of facilitator, conciliator or mediator. In exercising her primary function she may adopt any or all of these options. If no agreed settlement is reached, then the Banking Ombudsman's role undergoes a change and becomes that of an adjudicator. Her role becomes more akin to that of an arbitrator, although it is not strictly accurate to describe her as an arbitrator as an award is binding in advance on the bank only by virtue of an undertaking to be bound as part of their membership in the scheme.

A further trend illustrated by the Banking Ombudsman scheme is the adoption of alternative dispute resolution techniques in core areas such as banking law. It is no longer possible to dismiss such techniques as being relevant to neighbourhood-type disputes only. Furthermore, as the voluntary adoption of the Banking Ombudsman scheme illustrates, the impetus for their adoption frequently comes from industry itself. As mediation techniques are used in core areas, it is arguable that the mediation process itself may come to rely increasingly on established bodies of precedent as well as creating precedent of its own. In deciding what is fair in all the circumstances the Banking Ombudsman is to have regard to the law and to good banking practice, defined in New Zealand by a code of banking practice. Formalisation of the mediation process therefore seems inevitable, despite the fact that theoretically the Ombudsman is not bound by precedent.

The above developments raise the question of whether it is a misnomer to describe negotiation and mediation as "alternative" techniques. Perhaps a better view is to regard our legal system as encompassing a spectrum of dispute

resolution options, with adjudication by the Courts at one end and informal mediation at the other. A Banking Ombudsman simply adds a further element to this spectrum.

Conclusion

The establishment of a Banking Ombudsman scheme in New Zealand is to be welcomed as an alternative method of resolving disputes between banks and their customers. The scheme marks a further development in the range of available options for consumer dispute resolution and reflects the trend towards use of alternative dispute resolution procedures in New Zealand. The operation of the scheme will be noted with interest. Its success will be dependent largely on the extent to which the Ombudsman's independence is protected by the institutional structure of the scheme and the personality of those involved. Much also depends as how the present Ombudsman interprets her Terms of Reference and how the banks respond. □

1 For discussion of these schemes see PE Morris "The Banking Ombudsman" Pts 1 and 2 [1987] JBL 131, 191; PE Morris "The Banking Ombudsman Five Years On" [1992] Lloyd's Maritime and Commercial Law Quarterly 227; J Birds and C Graham "Complaints Mechanisms in the Financial Services Industry" (1988) 7 CJQ 312; R Thomas "Alternative Dispute Resolution – Consumer Disputes" (1988) 7 CJQ 200; RL Hodgin "Ombudsman and Other Complaints Procedures in the Financial Services Sector in the United Kingdom" (1992) 21 Anglo-American Law Review 1; G Burton "A Banking Ombudsman for Australia" (1990) 1 JBFLP 29.

2 Discussion of the involvement of the Bankers' Association is derived from an interview on 24 July 1992 with Mr Simon Carlaw, Executive Director of the New Zealand Bankers' Association.

3 Discussion of the structure of the Banking Ombudsman Scheme and the powers of the Banking Ombudsman and the Banking Ombudsman Commission is sourced in The Rules of the Banking Ombudsman Commission and the Terms of Reference for the Banking Ombudsman, March 1992.

4 *The Australian Financial Review*, 30 July 1992, 44; 31 July 1992, 55. *The Evening Post*, Wellington, 17 August 1992, 9.

5 Interview with Mrs Nadia Tollemache on 21 July 1992.

6 Discussed by G Burton, above n 1, 39.

7 G Palmer *Unbridled Power — An Interpretation of New Zealand's Constitution and Government* (2nd edn, Oxford University Press, Auckland, 1987) 204.

8 Discussed by P E Morris "The Banking Ombudsman" Pt 1 [1987] JBL 131, 132.

9 P E Morris "The Banking Ombudsman Five Years On" [1992] Lloyd's Maritime and Commercial Law Quarterly 227, 229-30.

10 G Laking "The Ombudsman in Transition" (1987) 17 VUWLR 307, 311.

11 Galanter "Why the 'Haves' come out ahead – Speculation on the Limits of Legal Change" (1974) 9 Law and Society Review 95.

Planning Tribunal

Practice Notices

(These notes are a guide to practice in the Planning Tribunal generall not be seen as inflexible rules.)

Appeals Lodged Out of Time

1 On receiving a notice of appeal, if it appears to the Registrar that the appeal is out of time, the Registrar will:
   (a) record it as having been received subject to the Tribunal having jurisdiction to hear and determine it; and
   (b) notify the parties of the date of the receipt of the notice of appeal by him, and say that it appears to have been lodged out of time, and that it has been received subject to the Tribunal having jurisdiction to hear and determine it.

2 If a waiver is required under s 281(3) of the Resource Management Act 1991, an application should be made in accordance with regulation 33 of the Resource Management (Forms) Regulations 1991 (SR 1991/170). If written consents of the respondent and the applicant (if any) are lodged with the Registrar, an extension of time for lodging and/or serving the appeal will normally be granted as of course.

3 Until a waiver is granted, any party may apply for an order that the appeal be dismissed on the ground that it has been lodged or served out of time.

Multiple Consents Required

4 Where a development proposal requires resource consent under more than one enactment in respect of which the Tribunal has jurisdiction, for example, a land use consent and a discharge permit, the Tribunal will normally postpone hearing an appeal under one of the enactments until after the first-instance decision under the other enactment has been given.

5 If appeals are lodged under more than one enactment which relate to the same proposal, the Tribunal would normally hear all those appeals together.

6 Where circumstances referred to in paragraphs 4 or 5 arise, the applicant for the consents should inform the Registrar without delay.

Setting Down Appeals for Hearing

7 The Tribunal has a statutory duty to hear and determine every appeal as soon as practicable after it is lodged. Consequently, the Registrar will, without prior reference to the parties, issue a

notice of hearing as soon as an opportunity presents itself for an appeal to be heard. Therefore, if there are reasons in any particular case why the hearing of an appeal should be deferred, the Registrar should be informed by one of the parties as soon as those circumstances arise. Subject to paragraph 4 hereof, the Tribunal will not usually defer the hearing of an appeal against the grant of a resource consent if the successful applicant for that consent opposes the deferment.

Adjournments

8 If after notice of hearing of an appeal has been given, an adjournment by consent is desired, the parties should communicate with the Registrar immediately, stating the grounds for the adjournment. However, such an adjournment request, though by consent, may not necessarily be granted. If an adjournment is sought at a late stage, the Tribunal may direct payment of costs to the Crown under s 285 of the Resource Management Act.

Withdrawals and Consent Orders

9 If any matter is proposed to be withdrawn, or disposed of by consent order, the parties are to notify the Registrar as soon as that course of action is reasonably certain. If the text of a proposed consent order is submitted in writing signed by or on behalf of all parties, with a sufficient explanation of what is proposed and why, appearances may be dispensed with. Otherwise, when seeking a consent order a copy of the proposed order and supporting explanation is to be made available for each member of the Tribunal.

Witness Summonses

10 To avoid the late summoning of a witness being oppressive, the Tribunal prefers that witness summonses be served no later than 10 working days (as defined in s 2 of the Resource Management Act) before the date of hearing. Except where the witness would attend willingly, and the issue of a summons is a matter of form, the Tribunal will not normally issue a witness summons less than 5 working days before the date of hearing.

Evidence

11 The Tribunal requires that each party have available and exchange with all other parties not less than five working days prior to the hearing, sufficient copies of the statements of evidence (including photographs and other visual presentations except models), of all witnesses whom that party proposes to call. If these are not so made available to other parties, the party in default may be ordered to pay costs on an adjournment. All exhibits, including photographs and other visual presentations, are expected to be presented in a practical and manageable form. By way of example, photographs should be separately mounted and identified. A bundle of documents, or a series of photographs, should be presented in booklet form. If a photograph, or other visual presentation, is of a size or kind that it is not practical to provide copies to other parties, it will suffice for the party intended to produce it at the hearing to notify the other parties not less than 5 working days prior to the hearing where it may conveniently be inspected.

Planning Schemes, Maps, etc

12 On a reference under clause 14 of the First Schedule to the Resource Management Act 1991, or on an appeal under s 120 of that Act arising from an application for resource consent, the respondent should bring to the hearing sufficient copies of the relevant regional and district plan(s) for the use of members of the Tribunal during the hearing. The Tribunal may need to retain a copy for reference in its deliberations and in the preparation of its decision.

13 In the case of appeals lodged under other enactments too, the Tribunal expects to be provided with copies of the relevant instruments or subordinant legislation.

14 The respondent should also bring to the Tribunal hearing all documents, maps, plans, and other exhibits relating to the proceedings that are in its custody.

Procedure at Appeal Hearings

15 The Tribunal usually conducts an appeal against a decision on an application for a consent, approval or permit as a complete rehearing afresh. When hearing such an appeal the Tribunal will normally call first upon the person who applied for the consent, approval or permit to state his or her case and then to adduce the evidence in support of it. Next it will call upon the body whose decision is appealed against to present its case. Then it will call upon those parties who oppose the grant of the consent, approval or right to present their cases.

16 On a reference under clause 14 of the First Schedule to the Resource Management Act, the Tribunal will normally call first upon the party who is proposing to alter the status quo, to state his or her case and adduce evidence. (This practice does not imply that there is a burden of proof on that party.) If in respect of a particular reference or group of references it appears that it will be helpful for the Tribunal to call first upon the council to outline the background circumstances (but reserving its other submissions and its evidence) before calling upon the applicants or other parties who would ordinarily commence, the Tribunal may so direct, either of its own motion or on the application of any party. (This may apply even when references in a group are not to be heard together.)

17 Where there is indeed a burden of proof upon a particular party, the Tribunal will call first upon that party to state his or her case and adduce evidence.

18 The Tribunal expects that when parties state their case in opening, they will outline the circumstances of the case and the nature of the evidence to be called, state the resource management factors relevant to

their case, and state the legal principles upon which they rely. A party generally has only one opportunity to address the Tribunal.

19 Evidence-in-chief will normally be given by the witness reading a typed statement of evidence, of which 4 copies are to be made available for the use of the Tribunal, and additional copies for the other parties. Four copies of exhibits and graphic presentations, such as documents or photographs, should be produced where practicable. But where matters of primary fact are in issue, the Tribunal may require evidence-in-chief to be given in viva voce examination by question and answer, avoiding leading questions.

20 The Tribunal does not normally allow an opportunity to address in reply to parties who have, before opening their cases, heard all the evidence to be given by the parties in opposition to them. After all the evidence has been taken, the parties who stated their cases and adduced their evidence before hearing the cases and evidence of those parties opposed to them, may have a separate opportunity to address the Tribunal in reply to the opposing cases. That opportunity will be confined strictly to replying to those cases, and is not an opportunity to reiterate that party's case as such. Persons who appear solely in support of a principal party are not normally allowed a separate opportunity to reply.

21 The foregoing paragraphs 15-20 outline the Tribunal's general practices. However the Tribunal has power to regulate its procedure in such manner as it sees fit. It may therefore modify its procedure in particular cases if the interests of justice and the orderly and logical presentation of evidence so require.

Costs

22 Where an appeal is withdrawn after having been set down for hearing the Tribunal will normally award costs against the appellant in favour of the other parties in respect of their preparation for hearing. Particulars of the claim should be given by the party applying for costs.

23 If a request for withdrawal of an appeal or other matter is made by letter, an application for costs may be made by letter, with a copy being sent to the appellant so that he may have an opportunity to reply.

24 Where a reference under clause 14(1) of the First Schedule to the Resource Management Act 1991 has proceeded to a hearing, costs will not normally be awarded to any party. But if the action appealed against would impose an unusual restriction upon the applicant's rights, and the restriction is not upheld, costs may be awarded against the respondent.

On other appeals the Tribunal will not normally award costs against the public body whose decision is the subject of the appeal.

25 One factor which will be relevant in considering whether to order payment of costs, and in fixing the amount of an award, will be whether any party has been required to prove undisputed facts which, in the Tribunal's opinion, should have been admitted by other parties. In particular, a party may avoid liability for the costs of other parties proving undisputed facts by lodging and serving a statement specifying which of the statements or findings of fact contained or referred to in the respondent's decision the party admits, and which of them the party requires to be proved at the appeal hearing. Any such statement should be made within 15 working days of receipt of the respondent's reply.

26 Where, in giving the decision on an appeal, the Tribunal considers that costs should be awarded, it will either fix a specific sum in its decision, or will indicate its willingness to make an order concerning costs, and reserve its decision on the amount of the award. The Tribunal may also simply reserve costs without indicating whether or not an award will be made. In the latter two instances, those claiming entitlement to costs should make their claims by letter, supported by particulars.

Once a final determination has been made on particular proceedings, the Tribunal's function is at an end. Consequently, if any party wishes costs to be reserved, the matter is to be raised before the conclusion of the hearing, so that the question of costs may be considered when the Tribunal comes to deliberate upon the outcome of the case.

Replacement of Practice Notes

These practice notes replace previous practice notes issued by the Tribunal and by the former Town and Country Planning Appeal Boards, which are hereby revoked.

29 July 1992 □

Ins and outs of plain language

Laws of Cricket
(as drafted by a modern legal draftsman)

You have two sides, one out in the field and one in.

Each man that's in the side that's in goes out and when he's out he comes in and the next man goes in until he's out.

When they are all out the side that's out comes in and the side that's been in goes out and tries to get those coming in out.

Sometimes you get players still in and not out.

When both sides have been in and out including the not outs

That's the end of the game.

Howzat? Eh!

Anon

Urgent dispute resolution: The international commercial context, without recourse to the Courts

By Arthur Tompkins, Barrister, of Auckland

This article is complementary to Mr Tompkins' article "A Practical Guide to International Commercial Arbitration" published at [1991] NZLJ 274. In this article Mr Tompkins describes the procedure that has been established by the International Chamber of Commerce in order to deal with urgent solutions to commercial disputes without having to go through a Court system. He suggests that as New Zealand businesses and exporters become more involved in international trade in a variety of foreign markets this procedure would be a helpful one to have included in the original contract between the trading partners.

Introduction

On 31 December 1992 a single market of some 320 million people will be created in Europe. The 12 member states of the European Community[1] started this process in June 1985 with the promulgating of a "White Paper",[2] gave added impetus to it with the Single European Act of 1987,[3] and member states are now putting the finishing touches to the myriad of legislative changes required.[4]

In addition to the huge population of the single market, involvement in it by New Zealand businesses will provide a valuable gateway to the changing economies of Central and Eastern Europe, as well as preparatory access to the enlarged "European Economic Area" being promoted by the European Free Trade Association.

In this exciting commercial context, New Zealand businesses will be entering this market with enthusiasm. No doubt some will encounter no problems in their trading activities there.

But what do you, the New Zealand lawyer, do when contacted by your worried client, who, (for example), has had a new improved, revolutionary New Zealand-developed software package rejected the previous day by its European customer in some far flung European city. Your client's customer is refusing to pay, which is directly threatening the liquidity of your client here in New Zealand. In addition, the customer has a vast computer system sitting in enforced idleness whilst customers disappear, and staff, maintenance and financing costs escalate daily. Your client needs the foreign funds quickly, and the customer needs to get its computer up and running with the specially developed software.

In no circumstances does either side wish to jeopardise their until now friendly and productive business relationship. But they need to resolve the dispute. Not only do they need to do that in the short term, but they will also need to work closely with each other over the coming years.

So they both need a workable solution quickly, cheaply, and smoothly, but their own early attempts at working one out by themselves have stalled.

Litigation is probably the last option which either would want. In the international commercial context, in particular, litigation in any Court, anywhere, is expensive, complex, time-wasting, antagonistic and almost certainly destructive of any future commercial relationship.

There are a number of possible alternatives, other than litigation, available to achieve an urgent solution to the kind of problem sketched above. They range, with suitable modifications, through most of the spectrum of Alternative Dispute Resolution options, such as arbitration, mediation, submission to an expert, and conciliation.[5] This article describes one alternative which is particularly suited to the provision of urgent dispute resolution in an international commercial context, namely the 1990 International Chamber of Commerce Rules for a Pre-Trial Referee Procedure.[6]

These rules ("the Rules"), which came into effect on 1 January 1990, are specially designed to resolve contractual disputes where the often unavoidable delays inherent in any international dispute resolution process would be intolerable to all parties involved. They create a contract-based structure where, by agreement, the parties submit their dispute to a Referee, who can make a temporary order (which is binding on the parties as a contract) relating to the dispute, to be enforced until the dispute can be settled by agreement, arbitration, or otherwise.

Background

The International Chamber of Commerce is a non-governmental organisation serving the international commercial world.[7] Based in France, one of its primary functions is the provision of international arbitral facilities through the long-established ICC International Court of Arbitration. Acknowledging, however, that the structures and techniques of international arbitration are sometimes inadequate when called upon to provide an urgent response, these new Rules provide for an individual called a Referee, at very short notice, to order provisional measures as a matter of urgency.

As with most international commercial dispute resolution procedures short of litigation, an agreement between the parties is required before recourse to the Referee can occur. Reference to the

Referee can be provided for in the initial contract, like an ordinary arbitration clause, or in an ad hoc fashion by the parties once the dispute arises. The ICC suggests the following Model Clause as being suitable for insertion in contracts:

> Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-arbitral Referee Procedure of the International Chamber of Commerce in accordance with its Rules.[8]

The Introduction to the Rules states the underlying purpose of the Rules:

> . . to enable parties which have so agreed to have rapid recourse to a person (called a "Referee") empowered to make an order designed to meet the urgent problem in issue, including the power to order the preservation or recording of evidence. The order should therefore provide a temporary resolution of the dispute and may lay the foundations for its final settlement by agreement or otherwise.

The Procedure

Once the dispute arises, (to adopt the earlier example, when, say, the software package is rejected by the customer), the party seeking the relief transmits two copies of a written request and accompanying documents to the ICC Secretariat (the ICC's facsimile number in Paris is (00 33 1) 49 53 29 33). This *must* be accompanied by the fee as required by the Rules – US$4,000, of which US$1,500 is an administrative charge and US$2,500 is a pre-payment of the fees and expenses of the Referee and any expert. No request will be entertained in the absence of the fee. The requesting party is also required to notify the request to the other party or parties by the quickest possible method.

The request must contain:

(i) Names and addresses of the parties
(ii) A brief description of the legal relationship between the parties
(iii) A copy of the agreement on which the Request is based.
(iv) The order or orders requested, and a statement as to how the orders sought fall within the jurisdiction of the Referee (see below)
(v) (if applicable) the name of the Referee chosen by the parties
(vi) any technical, professional, language or nationality qualifications desired in the Referee
(vii) Proof of notification of the Request to the other parties (a facsimile receipt, courier receipt etc.)

From the moment of receipt of the Request, the clock begins to run. Within *8 days* of receiving a copy of the Request, the other party or parties must send to the Secretariat of the ICC, and the other parties, a written Answer, including any orders sought by the answering parties. Failure to comply with this time limit can have dire consequences for a defaulting party.

The Referee

The parties can choose their own Referee, before or after the Request is made, either in the contractual document or in an ad hoc fashion once the dispute has arisen. Or they can leave the choice to the Chairman of the ICC. If the nine day time limit expires without an Answer being received, or as soon as s/he becomes aware of an agreed choice of Referee, the Chairman shall appoint the Referee (Rule 4.1). The ICC Secretariat notifies the parties of the appointment, and transmits the case file to the Referee. From this point on all communications and documents from the parties are sent to the Referee, with copies to all other parties and to the ICC.

There is provision for challenging a Referee's appointment (Rule 4.4), although the decision of the ICC Chairman in this regard is final and not liable to appeal or review (Rule 4.6). As a further impediment to challenge, the reasons for any decision concerning the appointment, challenge or replacement of a Referee are not disclosed.

The Procedure itself

The Referee has complete discretion as to the conduct of the proceedings. In Article 5, the Rules specifically provide that the proceedings may include convening the Parties to appear before the Referee "within the shortest time limit possible on a date and at a place fixed by him", the receipt of written submissions, the undertaking of further investigation or inquiry, site visits, the receiving of experts reports, and hearing any person (in the presence or absence of the parties). To facilitate the proceedings, the Parties, by invoking the Procedure, agree that they will provide the Referee with:

> every facility to implement his terms of reference and, in particular, to make available to him all documents which he may consider necessary and also to grant free access to any place for the purposes of any investigation or inquiry. (Rule 5.4)

If a lawyer is the Referee, then it is likely that the proceedings will resemble a traditional Court procedure, although modified to suit both the dispute and the demands of urgency.

The Referee's jurisdiction and powers

The powers of the Referee are set out in Article 2 of the Rules. The basic premise is that the Referee cannot make any order other than one which has been requested by one of the parties,[9] but subject to that, Rule 2.1 sets out the powers of the Referee:

(a) To order any conservatory measures or any measures of restoration that are urgently necessary either to prevent immediate damage or irreparable loss so to safeguard any of the rights or property of one of the parties;
(b) To order a party to make to any other party or to another person any payment which ought to be made;
(c) To order a party to take any step which ought to be taken according to the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;
(d) To order any measures necessary to preserve or establish evidence.

Care must therefore be taken to ensure that the orders sought in the

written Request are within the ambit of these four categories.

The Rules preclude the Referee from in the future acting as an arbitrator (in the absence of express agreement to the contrary) between the parties (Rule 2.5), and if the "competent jurisdiction" (the national Court competent to deal with the case) becomes seized of the case, the Referee is not automatically disempowered, but may become so if the parties agree or the competent jurisdiction so orders (Rule 2.4).

In the event of a dispute, the Referee can, under Rule 2.5, decide his own jurisdiction.

The Order

Rule 6.1 places a strict time limit on the delivery of the order or orders – 30 days from the delivery of the file by the ICC Secretariat to the Referee – and the Referee is required to send the decisions to the Secretariat in the form of "an order giving reasons".

The status of the order is something of a hybrid. It does not pre-judge the case, nor does it bind any later determination of a competent jurisdiction. It can be made conditionally (for example, upon the paying of security or the taking of appropriate proceedings in a Court of competent jurisdiction within a specified period). Rule 6.6 determines the order's status:

> The parties agree to carry out the Referee's order without delay and waive their right to all means of appeal or recourse or opposition to a request to a Court or to any other authority to implement the order, in so far as such waiver can validly be made.

Paulsson describes the nature of the order as follows:

> The term "order" was not used accidentally. Indeed, one of the central issues dealt with by the draftsmen was resolved by not calling the Referee's decision an "award". Unlike "awards", an "order" of a Referee will not be scrutinised and approved by the ICC Court; nor will it be enforceable before national Courts in the same way as an award![10]

In essence, the order represents a contractual obligation assumed by the parties in advance. This is reinforced by the terms of Rule 6.8.1, which equates a breach of the order with a breach of a contractual term:

> The competent jurisdiction may determine whether any party who refuses or fails to carry out an order of the Referee is liable to any other party for loss or damage caused by such failure.

Together with Rule 6.8.2, which provides that the competent jurisdiction can determine that a party who has requested an order without valid grounds be liable to any loss caused to another party, it is this which provides the order with its de facto enforceability. However, the inevitable absence from the Procedure of any coercive force means that, in the absence of co-operation from the party required to act or refrain from a course of conduct, recourse to national Courts is required to enforce the order.

Costs

Article 7 of the Rules states that the Referee "shall" state in the Order which party should bear the costs of the procedure. These are defined as:

(a) the administrative charge (US$1,500.00)
(b) the fees and expenses of the Referee[11]
(c) the costs of any expert.

In the event that the Requesting Party (who will have paid an amount of US$4,000.00 to open the file), is found to be not liable to pay the costs of the procedure, then that party is entitled to recover the amount of the advance payment from the party who ought to have paid.

Conclusion

The above is a short description of the ICC Pre-arbitral Referee Procedure, and its main points. It is recent in its conception, and as yet relatively unused. Questions must inevitably remain regarding its precise relationship with the Court systems of local jurisdictions. Nevertheless, it is a considered and innovative attempt by a body long established and highly respected in the international commercial arena, to fill an obvious gap in the array of dispute resolution techniques available to international traders. New Zealand businesses and exporters, dependent as they are upon smooth, consistent access to a large variety of foreign markets, and their advisers, could gain great benefits by seeking the consent of their trading partners to the inclusion in their business relationship of the ability to have recourse to the ICC's Referee in appropriate cases. □

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1 The original six parties to the 1957 Treaty of Rome were Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. Since then Denmark, Greece, Ireland, Portugal, Spain and the United Kingdom have joined.

2 European Community Commission White Paper to the Council on "Completing the Internal Market", 14 June 1985.

3 Official Journal of the European Communities, No L 169, 29 June 1987.

4 For a summary of the process involved in the creation of the internal market, and an overview of the major legislative features of the Community itself, see Broderick and Calmann "Introduction to a New Europe: A Primer for 1992" (1992) International Business Lawyer 9, and Kennon "The Single Market – A Legislative Perspective" (1992) 13 The Company Lawyer 25.

5 For example, the UNCITRAL Model Law provides, in theory, for the provision of interim relief (see Article 8(3)), but in practice the need to convene a panel, often composed of different nationalities, and to settle the preliminary steps to arbitration, make the provision of urgent relief extremely problematic at best.

6 The Rules, (ICC Publication No 492) are available free of charge from ICC Publications SA, 38 Cours Albert Ier, 75008, Paris, France. Telephone (00 33 1) 49 53 28 28, Facsimile (00 33 1) 42 25 36 23.

For a detailed discussion of the Rules see Paulsson "A Better Mousetrap: 1990 ICC Rules for a Pre-arbitral Referee Procedure" (1990) International Business Lawyer 214; Davis "The ICC Pre-arbitral Referee Procedure in context with Technical Expertise, Conciliation and Arbitration" [1992] International Construction Law Review 218. The author acknowledges the considerable assistance of both these sources in the preparation of this article.

7 See, in general, Craig, Park and Paulsson *International Chamber of Commerce Arbitration* (2nd Edition, 1990) and Tompkins "A Practical Guide to International Arbitration" [1991] NZLJ 274.

8 "ICC Pre-arbitral Referee Procedure" (ICC, 1990) at p 7. If the parties wish also to provide for arbitration under the auspices of the ICC, then the following term should also be included in the contract: "All

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The age of referenda

By Nigel Jamieson, Senior Lecturer in Law, University of Otago

In 1991 the New Zealand Law Journal *published a number of letters from Mr Nigel Jamieson when he was in the Soviet City of Minsk. In this article he looks at the question of referenda as a source of constitutional change. He points to the total failure of political reality to relate in any way to the results of referenda on constitutional matters that were held in the Soviet Union and that had been held in Scotland. In his view this leaves a substantial question-mark over the end result of the referendum held in New Zealand this month on the method of election of those who make our law.*

The thirteenth century was the age of charters. There was, of course, the Magna Carta in 1215, put on parchment simply because none could trust the word of the king. Indeed, whenever the written word outstrips the spoken, as it did by the plethora of parchment engrossed by thirteenth century lawyers, there is a warning to the populace that the unwritten word of the ruler is unreliable. Besides the multifarious charters of bad King John – of whom history records that he fell into a fit and rolled on the ground after being made to sign Magna Carta – are many others. Feudalism takes longer to die north than south of the Border, so it is no anachronism to include the Declaration of Arbroath (1320) among thirteenth century charters. Delivered by the whole community of Scotland to the Pope "in a strain" as Tytler's History of Scotland records, "different from that servility of address to which the spiritual sovereign had been accustomed" it required much the same relief from political oppression as did its English forerunner. The Declaration of Arbroath differs from Magna Carta in being international. But as far afield from the British scene as Hungary, charters were providing lots of work for thirteenth century lawyers. The Golden Bull of Andrew II (1222) can be seen as yet another attempt to stay the decline of feudal law and order. The thirteenth century, like no time before or since, was most certainly the age of charters.

Now, the nineteenth century, by way of contrast, was the age of revolution. There were of course the famous, if not infamous, French Revolutions of 1848 where women fought for "bread or death" and Louis-Philippe abdicated the French throne. Kings, emperors and Popes all fled their palaces. Thirty-nine German states won independent constitutions. Separate republics were established in Rome, Venice and northern Italy. In 1848 alone, the seminal year of Marx and Engel's Communist Manifesto, there were twenty-three major uprisings in Europe, from Palermo in Sicily, through Rome in the Papal States, conflagrating Venice, Milan, Budapest, Vienna and Prague of the Austro-Hungarian Empire, going west to Frankfurt and Paris, and north through Schleswig-Holstein to Denmark. Republican clubs flourished even in Britain. By 1854, in a little-remembered incident of English constitutional history, Queen Victoria seriously suggested tendering her abdication. Suddenly, just as radically as rebellion had begun, it was all over. The matriarchal cry of "bread or death" was succeeded by Bismarck's one of "blood and iron". The age of revolution was over even though it lingered on for another twenty-seven years with the Maori-New Zealand Wars of Aotearoa.

What of our own age? It seems effete by comparison. It is true that we have just suffered a sudden deluge of school and similar charters. That tells us how far we may rely on what is left unwritten under today's government. And it is also true that we still have and shall continue to have revolutions. But this is the first new age, represented by referenda, of government as you like it. Ours is the populist age of public opinion. Street petitions stop our passage out of doors. Telephone opinion polls catch us unaware when naked in the shower. What we think, or may care not to think, has suddenly acquired enormous political value. Why? No one rightly knows. The myth of the mind has come into its own.

The hopeful ones say that the purpose of the polls is to have New Zealand the way we want it. The scoffers say it is to subvert that very end, and make sure we don't get it. One way or the other, ours is the age of surveys, opinion polls, and referenda. You don't believe that! Then write and tell me – there is bound to be a survey form for you to fill up somewhere.

Soviet referendum

One of the biggest issues of this century was delivered in the name of democracy for trial by referendum. This issue was, of course, the continuance of the Soviet Union. The fact of its going to referendum, never mind the apparently phantasmagorical presentation of the issue, certainly took western observers by complete surprise. Most observers had been so long brainwashed as to see in it only some surreptitiously subtle

continued from p 333

disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

9 Rule 2.2, although this too can be altered by express written agreement between the parties (Rule 2.1.1).

10 Paulsson, *op cit*, at p 215.

11 Appendix A2 to the Rules states that the fees and expenses of the Referee shall be set by the ICC's Secretary General, and "shall be reasonable taking into consideration the time spent, the complexity of the matter and any other relevant circumstances."

Soviet ploy. It was only if one were there, within the Soviet Union, that one could pick up on the seriousness of the situation, and sense that this was something very different. Indeed, nothing like it had ever happened before, nor had even been imagined. That the cold war has been lost by both sides is made clear by the fact that the CIA doesn't even bother trying to take the credit for the demise of the Soviet Union.

We have written about the Soviet experience with the referendum while we were yet still in Minsk. See Letters from the Law Library in Lenin University ([1991] NZLJ 215, 320, 451). Travellers' tales are a trial when told twice and we have no intention of re-telling them. It is interesting that whenever we have tried to communicate first-hand data of that experience on a less personal and more abstract academic plane we have been rebuffed by the so-called serious avenues of academic thought, but then this a populist age and we must make the best of it we can.

Whatever form the ultimate record of this eyewitness account takes – and it looks more likely to be fiction for as long as the academic world of staid and serious facts refuses to take account of it – we still have the official results of the Soviet referendum, as published in the pages of *Pravda*, the official organ of the Communist Party. But now, despite an overwhelming vote in favour of the Soviet Union's continuance, there is no Communist Party (as such), no newspaper the same or the like of *Pravda*, and the relatively humble town of Minsk (compared with Moscow) in which we witnessed the referendum, has now become the capital city of the new Commonwealth of Independent States. Middle-of-the-road Minsk, half way between the historically opposing factions of Muscovite and Kievian Russia, suddenly assumes a new role as the ham between the upper Russian rye and the white wheaten slice of the lower Ukrainian sandwich. As for the former Soviet Union, it is not defunct. So much for the results of a referendum.

Scotland

From Minsk just after the last ever May-day celebrations, we moved to Aberdeen in the United Kingdom. There a Labour Party strongly opposed the ruling Conservatives with the manifesto of home rule for Scotland. We were there to investigate the consequences of an earlier referendum. This was on exactly the same issue as we had witnessed in the Soviet Union – the extent of home rule for constituent states and the continuance of the existing political union. Only this far west, but still east of the Irish Sea, it was not the pressing practical issue of what to do with Ireland, but the much more academic issue of what to do with Scotland. Just as the Soviet Union had, by extending a referendum to everyone, tried to ignore the obviously fractured relations between herself and the Baltic States, so the Labour Party, as events proved, tried to divert attention from the Irish issue and resurrect a dead horse by promising devolution to Scotland. Coming into Britain to join a party of Russian academics touring Scotland had its own problems. Here was the unexpected one of meeting face to face with yet another manifestation of world politics as you want them. The intellectual when at a loss for words resorts to stuttering. For him the situation was like coming out of, or going into, one can't say which, a state of general anaesthesia. Having just witnessed one referendum on the continuance of the Soviet Union, here was another in the form of a general election on the continuance of the United Kingdom.

Our journey westwards brought us up against a very strange paradox. Whereas everyone we met in the Soviet Union had been prepared to talk about the up and coming referendum on the 17th of March for the continuance of the Soviet Union, hardly anyone we met in Scotland was prepared to talk about the referendum of 1979 on devolution, or about the most recent promise by the Labour Party of home rule for Scotland. This was particularly the case in academic circles where the contrast was most noted: it was as if the Soviets had suddenly gained free speech but the Scots had lost it.

What marked the referendum for Scottish devolution was its specificity. In terms of the Scotland Act 1978, the full constitutional consequences of what would be meant by voting in favour of devolution were worked out in detail. This was the extreme opposite of the Soviet referendum. When Soviet citizens went to the polls on 17th March 1991 they voted in favour of continuing the union because they had not the remotest conception of what could take the place of Soviet government. When Scottish citizens voted on devolution in 1979 it was after months of argument over the constitutional alternatives. Even within Scotland, at the risk of an increasingly disunited kingdom, the ebb and flow of argument became more and more parochial, opening out old areas of conflict – either Edinburgh versus the rest or as between the Highlands and the Lowlands. The Labour Party, as seen by Scottish Nationalists, chose to present devolution as a new idea entirely of its own devising, and Scottish Conservatives became acrimoniously divided which way to go without losing their own identity. Most newspapers, with the exception of the *Scotsman*, chose to sit the issue out. Come the referendum, many Scots folk were so sick of the idea as to avoid the polls. Perhaps surprisingly, therefore, the vote in favour of devolution was carried, but perhaps not so surprisingly in view of so low a turnout, the government refused to be bound by the results. In consequence, Scottish Nationalists reformulated the source of British power from whence she ruled the waves to whether she now waived the rules. That is not strictly true in terms of the Scotland Act (now repealed), but home-rule feelings either still run higher than words or else have been replaced by an all-pervasive apathy.

As the jurist de Cervera put to a world conference of legal philosophers, "it is not so much what is said of any issue, but what is left unsaid that tells most". A decade after the referendum of 1979 the canny and uncompromising Scot would not talk about his own country's devolution. We tempted him by referring to the long history of Scottish independence beginning before Arbroath. In the ensuing silence he took us to sight-see some castles. After all, we had just recently arrived from a just-as-recently demised Soviet Union. Not put out, we reminded him in broad Scots of future prospects promised by a change of government.

Meditatively he clasped his hands behind his head, leaned back in his chair, and studied what appeared to be a prison wall. According to de Cervera's formula, this lack of response could mean quite different things. On the one hand, it could mean "don't take us to task for what we've done wrong". On the other hand, it could mean "don't try to find out how we've been hurt". In both cases, however, the conclusion seems to be the same: "we would much prefer to be left alone, to enjoy in peace the last remaining glimmer of our Celtic twilight before being completely overtaken by the EEC".

And so while much of our research on the constitutional future of the Soviet Union had been pursued through the streets of Minsk as well as behind the reading desk of its law library, our research in Scotland was rigorously confined to books and documents. Researching proposals for Scottish devolution in the once prickly land of their origin was, by 1991, like looking up the pages of *Pravda* after that paper had, like the Scottish Thistle, ceased to exist. Once again, one could say, so much for referenda. Their result, judging by the Scottish experience, is to becalm and dampen down public opinion rather than to bestir and encourage it. Whatever next?

That question was answered by our return and re-entry to New Zealand. The return of the native is very different and often far removed in time and place from the point of his re-entry. It is one thing to be a New Zealander, but another and very different thing to come home and feel at home in one's own but intensely changed country. Superficially it was easier to bridge the gap, for here, once again, as practically in Minsk, although more academically in Aberdeen, we were taken by surprise by an up-and-coming referendum. However fin-de-siecle we may feel about it, there is no doubt that this is the age of referenda.

We must in all honesty confess that we don't know what our own domestic referendum for electoral change really means. This confession of awful ignorance is especially true for estimating the likely consequences of each proposed change. Once, coming into a television account of what the various political proposals meant, we mistook it for a weather forecast. And the official *Voter's Guide - he tohutohu mo nga kaipoti* does not dispel this impression by being printed throughout in rainbow hues. The temptation as know-all constitutional lawyers is to pontificate on the proposals. Coincidentally with confessing this inability to predict the consequences of our own home-grown referendum comes a request from a Byelorussian law draftsman in Minsk to provide him with a copy of our electoral legislation in New Zealand as a model for Minchans. And so, together with a copy of New Zealand's Electoral Act 1956, the Electoral Referendum Act 1991 goes winging out to the newly Independent State of Byelorus. After all, this is the age of referenda. But what can we write by way of cautionary explanation to the Minchans? Is it best to say "Hold on until we can find out what is meant by an indicative referendum once that, whatever it means, has been held by us on 19th September 1992"? No, the Minchans already know that, for by the referendum of 17th March 1991 on the continuance of the Soviet Union, they have more experience of referenda than we do. □

Sex and the State; marriage and family law

This is a brief extract from a lengthy review by Tony Honore in "The London Review of Books" for 6 August 1992 of Sex and Reason *by Richard Posner. The author of the book is a Federal Judge in the United States and is described as the leading figure in the American "law and economics" movement, which seeks to analyse legal topics or categories in economic terms. The piece may be of general interest, but more particularly to those who practise in the area of family law.*

In Posner's view, however, the main determinant of sexual behaviour and morality is the status of women. What occupations are open to them and how dependent are they on men? In the West, the status of women is said to have gone through three stages. First, as in ancient Greece, a woman's position was mainly that of a breeder. Apart from occasional copulation, husbands spent little time with their wives; marriage was non-companionate. Substitutes for marital sex such as prostitution, adultery and homosexuality flourished and were tolerated. In a second stage, woman's role expanded to include that of child-rearer, partner and intimate friend of her husband, so that companionate marriage became the norm. The substitutes, previously tolerated, were then rejected, for when marriage is companionate they threaten the stability of the union and yield less benefit as safety valves. According to Posner this expansion of companionate marriage, accompanied by intolerance of alternatives, prevailed in Western society during the period of Roman Catholic hegemony. The Church's sexual morality is explained as the outcome of an attempt to improve the status of women – a generous interpretation. Finally, when most women find well-paid employment outside the family, as in contemporary Sweden, marriage remains companionate so far as it survives, but there are fewer marriages and the alternatives are more readily tolerated. If the state also subsidises one-parent families ("another link between socialism and promiscuity"), men become relatively dispensable, all the more so if artificial insemination spreads. The transition from stage two to stage three can be explained by reduced child and childbirth mortality, improved contraception, the spread of light industry and labour-saving devices in the home. In the first and third stages men enjoy sexual licence, but women do so only in the third. But the third stage prejudices those women who prefer a traditional family role because men have less incentive to look after them if the employment market or the state will do so instead. □