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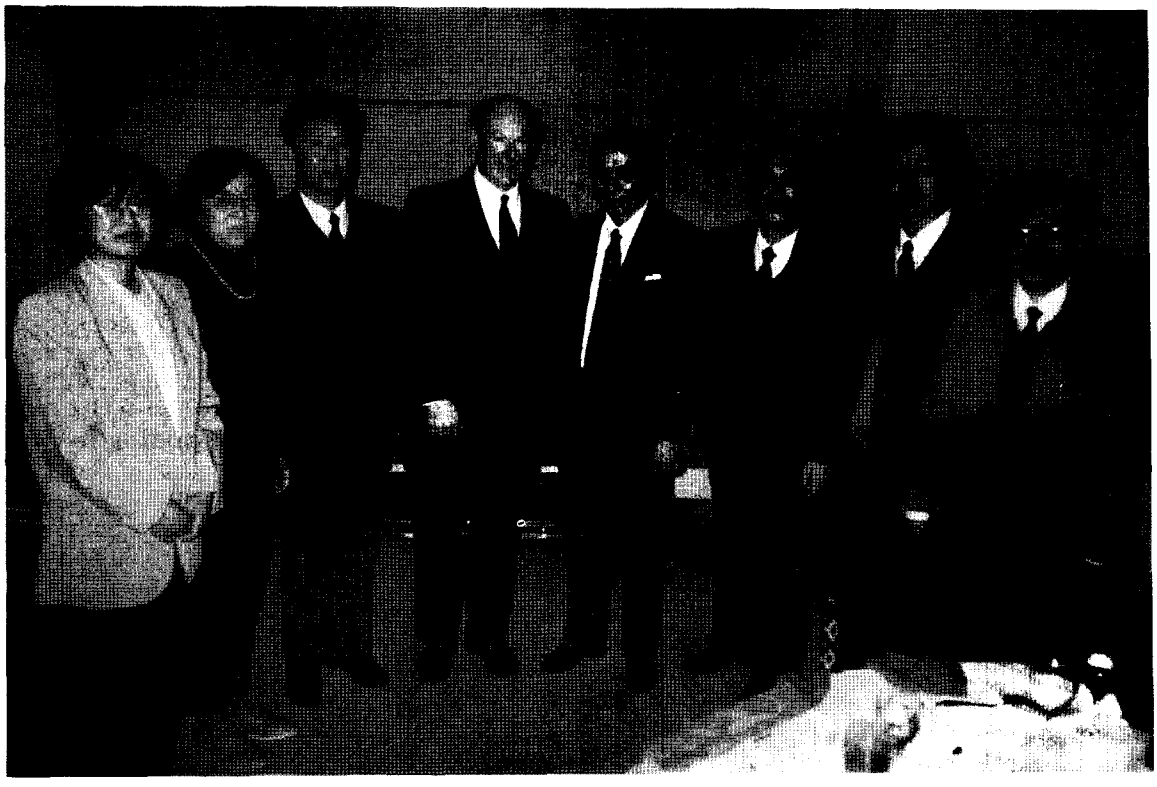
China Visit (II)

In last month's issue [1993] NZLJ 233, I wrote about my visit to China in April, and more particularly of meetings with practising lawyers in Shanghai. In addition I met with members of the Shanghai Law Society and the Law Institute and then I went on to Beijing where I met representatives of the China Law Society. These organisations are closely related. Their distinctive feature is that membership is voluntary and includes practising lawyers, judges, government lawyers, police, sociologists, and academics. Admission is by acceptance or selection and is not as of right. The Society's view of itself is, understandably, that it has a higher status than a Law Association of practising lawyers. The China Law Society is the body approved by the State as a member of LAWASIA and other international legal organisations.

In Shanghai I met with Professor Qi Naikuan, the Director of the Law Institute and President of the Shanghai Law Society, and with Li Hong An the Office Director. Professor Qi is a Councillor of the China Law Society. The Law Institute in Shanghai is one of the biggest in China with over 1700 members. Some 600 members of the Institute are practising lawyers, out of a total membership of the Bar Association of over 3,000. Those admitted to membership have to have five years' working experience in their field and to have shown some special research ability.

Interestingly, the Institute has its own legal office in Shanghai. This is the No 7 Law Office. The Director of this office, Tao Huai Long, told me that the office deals with all kinds of legal work, civil, criminal and economic. It was this last category of economic work that was the principal work of the office. As far as I could ascertain this would be mainly what we would class as commerical work. He said that in Shanghai over 300 enterprises had lawyers advising them.

In Beijing I was entertained to a dinner meeting with representatives of the China Law Society at the Liang Ma He (Landmark) Hotel. This hotel is one of the many luxury standard, international style hotels that are spread around Beijing. Those present at the meeting were Zou Yu (President, China Law Society), Zhang Yanling (Director, International Liaison Division), Chen Yiwen (Chief of International Liaison Division), Yuan Shou Qi (Vice-Director of the Department of Policy and Legislation of the Ministry of Labour and an Associate Professor), Li Zhangqi (Deputy Secretary-General of the China Law Society), and Li Shi Wei (Director, All China Federation of Trade Unions and a Councillor of the China Law Society). The President Zou Yu, I had been told in Shanghai, had been in the Law Bureau and the judiciary. It was a most interesting group in its composition. There was in addition a translator Zhang Aili who was as



China Law Society meeting in Beijing
Zhang Aili (translator), Zhang Yanling, Li Shi Wei, P J Downey, Zou Yu, Li Zhangqi, Yuan Shou Qi, Chen Yi Wen

China Law Society: Shanghai branch meeting
Jaio Lu, P J Downey, Qi Naikuan, Li Hong An

charming as she was competent, and had a warm sense of humour. She was quite prepared to make fun of me, and of the others from time to time and thus helped to turn the meeting into a pleasantly relaxed and enjoyable dinner party.

Much of the conversation covered topics that I had discussed in Shanghai, and in particular the roles and relationships of the China Law Society, the Lawyers (or Bar) Association, the Law Institute and the Legal Bureau. It was interesting that while Zou as the President replied to most of the questions I asked, there was often a general discussion around the table obviously adding to or qualifying what he had said. Again it became apparent that the Legal Bureau is the dominant body. It is the government agency in the legal field while the other three are thought of as non-government organisations. It seems quite clear however that government policy is a paramount consideration for all these organisations.

The main topics they wished to discuss with me concerned two proposed LAWASIA conferences to be held in Beijing. In 1994 it is proposed to hold a Conference on Labour Law. Judge Finnigan of our Employment Court is largely responsible for this and we discussed it before I went to China. The planning for that is well advanced and Madame Zhang Yanling is very involved in organising it. There were a number of specific organisational matters that we discussed and that I have subsequently reported back to Judge Finnigan. From the Chinese point of view this could be a most interesting conference in that it could introduce a wide Chinese audience to foreign industrial relations legal concepts and practices. On the other hand it may turn out to be largely a Chinese conference with a relatively small foreign flavouring. In either event it should be a most interesting conference to be at. I was assured there would be a multi-lingual instantaneous translation system in operation, although for smaller discussion sessions there would be a separate interpreter.

In addition to the Labour Law Conference it is expected that the 1995 Biennial General Conference of LAWASIA will be held in Beijing. In regard to this possibility Mr Zou stressed four points. The first was that China's new "open policy" meant that Chinese lawyers were encouraged to learn more about foreign legal systems. As a large poster I saw in Shanghai proclaimed "The open policy means Shanghai is open to the world, and the world is open to Shanghai".

The following three points were all aimed at boosting Beijing as a city. Mr Zou said that Beijing was developing as an international city with excellent facilities to host such a conference. I could not resist saying that the hotel in which we were having dinner was itself proof of this. He then went on to say that the city generally and the China Law Society in particular has now had considerable experience in hosting and organising a great variety of international meetings. Finally he made the point that Beijing is a city with a great cultural past and with many cultural treasures that make the city worth a visit in its own right.

From my own experience these points are certainly all true. Beijing is becoming a beautiful and a more cosmopolitan city than it was. In commercial terms Shanghai appears to be the more open city, indeed aggressively so; but like all capital cities, Beijing is where the power lies and indeed has lain for centuries, and thus it has many advantages over other places. The 1995 LAWASIA Conference in Beijing should be a particularly interesting and rewarding one to attend.

The next day I had a separate meeting with Chen Yiwen. He was anxious to tell me that the "open policy" would mean that there would be even greater changes occurring in China than had happened up to now. He assured me that the political and economic situation was stable. That assurance must of course be accepted at its face value, but with the earlier comment of the expectation of greater changes there will obviously be occasional difficulties and tensions in both the political and economic spheres.

Mr Chen said that the China Law Society has held several successful legal conferences in recent years. Thus the Society had accumulated experience in holding international conferences. He then went on to ask if I could help to arrange an exchange between the China Law Society and the New Zealand Law Society. Just what sort of exchange was envisaged seems a little vague, but he did refer when pressed to possible exchange visits or the holding of common seminars. I explained that New Zealand is a small country, which he knew from having been here, and that accordingly we tended to work through international organisations like LAWASIA, the International Bar Association, the International Commission of Jurists and others. I told him that there were already some contacts like a recent visit of some Judges from Guangzhou, but they seemed to be more at the official level.

China is a great power. The consciousness of this affects Chinese lawyers in their attitude to the rest of the world. But they struck me as ambivalent about what to relate to and what to accept of foreign legal concepts. Some of those I met were more concerned to tell me about China than to learn about New Zealand. One of them admitted that before meeting me she had had to look up an atlas to find out where New Zealand was, and was astonished to find us as two islands at the bottom of the world instead of being land-locked in some continent! The Communist Revolution, and even the "open policy", have not stopped the Chinese from having the traditional view that China is the centre of the world it seems. The rest is still on the outer.

P J Downey

Correspondence

Dear Sir,

Should arbitrators validate illegal contracts? [1993] NZLJ 194

I write to respond to Mr Dugdale's letter about the Law Commission's *Contract Statutes Review* NZLCR 25. He objects to our recommendation about the powers of arbitrators to make orders under the Illegal Contracts Act.

Mr Dugdale was, of course, a valued contributor to the Commission's work in this area, and in particular investigated the legislative changes which will enable the law of sales of goods to be brought within the general law of cancellation found in the Contractual Remedies Act. This reform (though modesty would no doubt compel him to disclaim it) will be a significant improvement in the present law. What he says on any matter to do with contract law reform deserves serious attention.

On this occasion, however, Mr Dugdale's comments have not fully grasped the matters in issue, which relate as much to the nature of arbitration, as they do to the law of contract. The Commission's views about the powers of arbitrators are set out in our Report on *Arbitration* NZLC R20 (1991). This policy was not concocted as an after-thought in the *Contract Statutes Review*, as Mr Dugdale's letter implies, though it would be fair to say that it was not specifically raised at any of the meetings called to discuss the papers on the contract statutes.

Mr Dugdale's criticisms may be tested against a very basic example. Suppose a builder agrees to instal a kitchen in an owner's house, and (having received a down payment) fails to carry out the work. It is then discovered that the work will be contrary to local building ordinances. The contract is unlawful and of no effect (Illegal Contracts Act 1970, s 6). The parties could go to Court to sort the matter out. Instead, however, they agree to submit the matter to arbitration.

The Commission says that the arbitrators should, in such a case, have the same powers as the Court. That is to say, the arbitrators may order that the builder repay the money; or that the plan of the new kitchen be changed so it complies with the ordinance, and the contract then be performed. The arbitrators cannot, of course, order that the contract be carried out unlawfully, because that is not one of the things the parties could agree to do, or to submit to. That is inherent in the arbitration relationship, and nothing said in either of our Reports is intended to alter that. But all other matters of compensation and remedy should be able to be dealt with by the arbitrators.

Mr Dugdale argues, to the contrary, that arbitrators should not have these powers. Why is that? Because, says Mr Dugdale, the Courts may in some cases wish to decline to give such relief in the public interest. That function should not be evaded by giving the matter to arbitrators to decide, since they may be less solicitous about the public interest and more inclined to consider the fair result between the parties.

This argument fails to take into account what the parties may do by agreement. In the above example, they might together decide to start afresh and build a kitchen which complies with the ordinances. And they might also agree to apply the money paid to the builder for that purpose. Should the council refuse to recognise this new arrangement because of its unlawful origin? If not, how else is the earlier "public interest" going to be enforced, as the matter proceeds amicably to a

happy conclusion?

Now, if the parties can achieve all this by agreement, they should also be able to submit the matter to an arbitrator and then abide by the arbitrator's decision. Arbitrators' powers are conferred by agreement between the disputing parties, sanctioned by s 3 of the Arbitration Act 1908. Even where the dispute arises out of an unlawful contract the parties should be able to instruct arbitrators to determine what the Court would have decided, and to agree in advance to abide by the arbitrators' decision. They are agreeing on a new course of conduct which recognises what has happened, and settles the legal liability of each.

This does not mean that the parties, by resort to arbitration, can achieve something they could not have obtained by Court proceedings. In the example given above, the arbitrators have been asked to decide the matter according to law. If they do not take into account the existing law and judicial practice concerning observance of the public interest, then any party who objects to the arbitrator's decision can have it overturned. The arbitrators' decision is erroneous in law.

The restrictions imposed by the agreement to submit to arbitration are not the only ones which apply. If the parties cannot lawfully agree on a particular solution to their differences because that solution is prohibited by law, then they cannot lawfully agree to the same unlawful solution being imposed by arbitrators. As already pointed out, the builder and kitchen-owner could not agree to give the arbitrators power to declare the unlawful kitchen design lawful. Nor could two bank robbers lawfully agree to appoint an arbitrator to settle how the proceeds of their robbery should be disbursed.

Whether an award is ultimately enforceable should depend upon whether the arbitration agreement legally empowers the arbitrators to confer that particular remedy. That is to say, the matter must be one which "falls to be determined" by the arbitrator. If the arbitration agreement is itself unlawful (because, for example, it envisages the arbitrator ordering the parties to perform an unlawful act) then the arbitrator's action has no sufficient contractual base; the arbitration has been improperly procured and may be set aside (Arbitration Act 1908, s 12). But if the arbitration agreement is not unlawful, then there is no reason to decline to enforce the award, merely because the dispute originally arose out of an unlawful contract. (This is the principle which underlies the existing law; it is discussed in Mustill, *Law and Practice of Commercial Arbitration* (2nd ed 1989) ch 10).

So (contrary to what Mr Dugdale suggests in the last paragraph of his letter) the validity of the submission to arbitration should be the decisive consideration. The Commission recommends that, as long as the arbitration agreement is lawful, it will be perfectly lawful and proper for the parties to confer on arbitrators all the remedial powers of the High Court; and equally proper for the legislature, in s 2 of the Illegal Contracts Act and in the Schedule to the Arbitration Act 1908, to presume that they intend to do so.

Mr Dugdale proposes that, instead of determining the legality of the arbitration in that way, the law should provide that arbitrators cannot exercise any of the powers conferred on Courts by the Illegal Contracts Act. That would make it impossible for disputes arising out of illegal contracts to be settled adequately by arbitration. Such a limitation on the process of arbitration requires, however, a much clearer policy justification than appears from his letter. In the Commission's view, there is no basis for that policy.

R J Sutton
Commissioner

Understanding *Mabo* and native title

The High Court held that the Crown's status as ultimate owner gives the Crown the power to extinguish native title. Any Crown grant or alienation that is clearly inconsistent with the continued exercise of native title over the land extinguishes the title to the extent of the inconsistency. And so a grant in fee simple extinguishes native title to the land in the grant; so does a lease (unless perhaps the lease purports to preserve native rights to enjoy the land); so does an appropriation of land for a road, railway, or any other purpose that necessarily precludes continued enjoyment of native title to the land (ibid, at 432-435, 443, 452, 454, 489-490). But other, more limited, actions by the Crown do not extinguish native title, if the actions remain consistent with the continued exercise of native title. And so dedicating a reserve for the native inhabitants does not extinguish native title to the area concerned; nor (probably) does dedicating land as a national park or granting an authority to prospect for minerals (ibid, at 432, 434, 454-455).

The majority of the Court held that the Crown's activities since 1788 in extinguishing native title by inconsistent grant or alienation was not "wrongful", in the sense of giving rise to a legal redress or compensation (Brennan J (Mason CJ and McHugh J agreeing) and Dawson J; contra Deane, Gaudron and Toohey JJ).

Peter Butt
Australian Law Journal
p 444, June 1993

Case and Comment

Actions for money had and received and other mumbo jumbo — or what is enrichment in the Law of Restitution?

Martin v Pont (unreported, Court of Appeal, CA 325/92, 26 March 1993)

This case was discussed in an earlier Case and Comment piece at [1993] NZLJ 154 in respect of the High Court judgment, while this piece by Professor Rickett is concerned with one aspect of the decision in the Court of Appeal.

This note is concerned with one small, but nevertheless very important, point in the law of restitution. It arises from reflection on a recent decision in the Court of Appeal where Tipping J delivered the only judgment. In *Martin v Pont* (unreported, CA 325/92, 26 March 1993), Mr Martin was an accountant, to whom Mr and Mrs Pont entrusted $600,000, to be invested with a finance company on the Ponts' behalf. Most of the money was misappropriated by Mr Martin's daughter, who "was employed by [Mr Martin's] firm to deal with the Ponts and to deal with the investment of their money". The exact process by which the daughter misappropriated the funds is unimportant. In the High Court, summary judgment had been entered in favour of the Ponts for the full amount, on two causes of action – breach of fiduciary duty, and "on the concept of money had and received to the [Ponts'] use". In the Court of Appeal, the focus was on the latter cause of action.

First, Tipping J surveyed a number of 19th century English decisions cited in *Bowstead on Agency* (15 ed, 1985) to support a proposition stated therein as article 53:

> If the principal has entrusted money to his agent for a particular purpose which the agent has not carried out, the principal can recover that money as had and received to his use.

His Honour then applied the proposition of law, thus:

> The proposition . . . seems to us to fit the present case exactly. The Ponts, as principal, entrusted their money to Mr Martin's firm for their use and benefit, and for a particular purpose, namely the purpose of investing the funds with [the finance company]. Mr Martin and his firm did not carry out that purpose. Thus the Ponts, as principal, may recover the money as had and received by Mr Martin and his firm to their use

Secondly, however, Tipping J provided an alternative explanation of the reason for the Ponts' valid claim in money had and received. In doing this, his Honour used concepts central to the law of restitution. However, he then went on to deny that the case could properly be explained by the principle which has come to be regarded as central in the law of restitution. That principle is that a plaintiff can claim a restitutionary remedy when a defendant has been unjustly enriched at his [the plaintiff's] expense. Does *Martin v Pont* fall within this principle?

It is now rather trite learning that the principle requires three separate inquiries. First, has the defendant been enriched? Secondly, is that enrichment at the plaintiff's expense? Thirdly, why is the enrichment unjust?

If we progress through these basic questions in the reverse order from that in which we stated them, we find, in my view, that *Martin v Pont* is a very clear case of the operation of the principle. This is, as will be seen, a position contrary to that taken by Tipping J. I respectfully suggest that his Honour's analysis is incorrect.

What would be the legal factor allowing the Ponts to say that (assuming an enrichment by Mr Martin at their expense) Mr Martin's enrichment was *unjust*? A classic "unjust factor" is "total failure of consideration". This factor was correctly identified by Tipping J (emphasis added):

> One of the classic circumstances in which money can be claimed as had and received to the plaintiff's use is *when it has been paid pursuant to a transaction in which there has been a total failure of consideration.*

The consideration upon which the Ponts had paid over the funds to Mr Martin had failed. There had been no investment of the funds. "[T]here is now nothing to show for the [Ponts'] payment", said Tipping J.

Did the Ponts satisfy the requirement of "at the plaintiff's expense"? Clearly, yes. Their complaint was that their wealth had suffered a subtraction. They had had, before the transaction, $600,000. Now they did not!

However, what of the issue whether Mr Martin had been enriched? Tipping J cited the decision of the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10, where a personal claim for restitution in the form of an action for money had and received had succeeded. His Honour correctly, and importantly, pointed out that where a restitutionary claim is personal (in personam) – as in an action for money had and received – "it is not necessary that the money still be held by the defendant". So far, so good. Unfortunately, his Honour then referred to the discussion in *Lipkin Gorman* by Lord Goff of the ambit at common law of a defence of change of position, and appears at this point to have misinterpreted the proper place of and rationale for that defence. His Honour said (emphasis added):

> Although . . . unjust enrichment can be regarded as the rationale of (albeit not necessarily the test for) a number of restitutionary claims, it is not a prerequisite of the action for money had and

> received. In some of the earlier cases cited . . ., it could not reasonably be said that the defendant was unjustly enriched at the expense of the plaintiff. *We say this because it could hardly be said in the present case that Mr Martin and his firm have been unjustly enriched at the expense of the Ponts.* Nevertheless as the authorities demonstrate, the Ponts are clearly entitled to restitutionary relief by the action for money had and received. This is not a case where change of position is relied on by Mr Martin and his firm and rightly so. As Lord Goff said, a claim to recover money by way of an action at law for money had and received is made as a matter of right.

Several observations need to be made about this paragraph. His Honour clearly regarded the Pont's relief as "restitutionary" and "as a matter of right". Is this not simply the same as saying that a restitutionary response is called for, in this instance the action for money had and received, and that such response is available to the Ponts because it can be established by and thereby justified by a principle of law? The response could not be proprietary, by way, for example, of a trust of lien, because the money was no longer in the firm's possession. Compare, however, the probable restitutionary response if the firm was not insolvent, but some of the money at least could be identified in a bank account. Would not a proprietary restitutionary response be more appropriate in this context than a personal restitutionary response? In either case, however, proprietary or personal, why is the response "restitutionary"? The answer must surely be – because there has been an unjust enrichment at the expense of the plaintiff. This is not, however, the view of Tipping J. His Honour seems to believe that the existence of old case law authority is an adequate reason in itself.

Why did Tipping J reject an unjust enrichment explanation and so force himself to take refuge in a concept of "established authority"? There seem to be two possible explanations. First, in discussing the basis of a change of position defence (as his Honour did immediately before making his more general observations as cited above), where the essence could be that it would be unjust or unfair to grant restitution, it should be recognised clearly (as perhaps his Honour did not do) that the unjustness referred to is *not* the same as the unjustness necessary to establish the cause of action. There was unjustness in this latter sense in the present case because of the total failure of consideration. It was *not* correct to suggest, by implication at least, that Mr Martin was not *unjustly* enriched simply because he no longer had the money in his possession. This reasoning would seriously threaten most if not all personal restitutionary remedies. It is also itself quite inconsistent with the learned Judge's earlier observation that personal restitutionary remedies could lie where the money in issue was no longer in the possession of the defendant. The fact that a defendant no longer possesses the money may, in some circumstances, give rise to the measure of unjustness needed to found a defence, but that does not remove the cause of action ab initio from the law of unjust enrichment.

Secondly, the issue of *enrichment* appears to have caused some difficulty. The implication in Tipping J's comments is that Mr Martin and his firm were not enriched. I cannot agree with this. The Ponts' argument was that the enrichment was by *receipt* of the relevant value ($600,000) by Mr Martin and his firm. As Professor Birks so memorably states (*An Introduction to the Law of Restitution,* 1985, at 76):

> . . . a plaintiff who claims the value received is not interested in what happened after the receipt. The defendant may have spent, lost, eaten or destroyed the enrichment. Or he may have invested it with huge success or otherwise caused it to increase. Either way, from the plaintiff's point of view the story after the receipt is irrelevant. But that is not to say that the rest of the story will never have any bearing on a claim in this measure [value received]. Some part of it may serve to found a defence.

There was value received. Mr Martin was enriched. What happened to the money after its receipt was not a matter which affected the issue of Mr Martin's enrichment. What happened might well have been relevant in providing a defence, such as change of position, which might have defeated the cause of action or limited the quantum recoverable by the plaintiff. But the plaintiff's claim was undoubtedly in unjust enrichment.

Thus an action for money had and received must be restitutionary and can only be explained by the principle that the common law will remedy the unjust enrichment of a defendant at the plaintiff's expense. Even *Parry v Roberts* (1835) 3 Ad & E 118, as discussed by Tipping J and suggested by him to be a case in which the defendant could not reasonably be said to be unjustly enriched at the expense of the plaintiff, turns out in fact to be just such a case. Parry gave Roberts £45 to be carried by him to a person in Liverpool. Roberts failed to deliver the money, saying it had been lost in a brothel. Parry succeeded in an action for money had and received. There was no defence to the action. Surely the basis of Parry's claim was that Roberts had been unjustly enriched at Parry's expense? Why should the fact (which was not indeed substantiated) that the money had been lost after receipt turn the case away from being one of unjust enrichment?

Martin v Pont is, in my view, a paradigm example of the unnecessary proliferation of confusing verbal apparatus in the common law, explicable only by an historical exposition (why, for instance, is the Court of Appeal relying on 19th century cases, rather than promoting an analysis of principle for the 21st century?), to which, as Professor Birks has eloquently, energetically and consistently argued, Occam's Razor should be applied. Professor Birks suggests that there is only one surviving purpose in mastering the old language of the different counts within the action of *assumpsit*, of which money had and received is one, and that is to understand the old cases (at 78). He continues (at 78):

> And it is important that they [the old cases] should be understood.

> But to go on using their language is merely perverse. If [for example] a mistaken payment gives rise to an obligation to repay and the words "obligation to repay" are capable of being understood by everyone, nothing is gained by substituting for them "an action for money had and received". The day is not far off when only specialists in legal history will have a clear idea of the meaning in this context either of the word "action" or of the phrase "money had and received". The rest of us use them as a kind of ancient mumbo jumbo, both excusing and at the same time perpetuating the absence of any clear modern analysis of what we mean.

It is certainly to be hoped that as restitution cases continue to make their way to the Court of Appeal, that Court will take heed of Professor Birks' clarion call. Unfortunately, in *Martin v Pont* the Court failed to seize the opportunity to make more rapid progress towards modernisation.

C E F Rickett
Massey University

Liability in contract and tort?

Kavanagh & Hutt City Council v Continental Shelf Company (No 46) Limited [1993] BCL 512.

The judgment of the Court of Appeal, comprising Richardson, Hardie Boys and McKay JJ, is of special interest because it highlights the vexed issue of whether a duty of care can lie in tort where the parties are governed by a contractual relationship.

In this case, a written agreement was drawn up in terms of which Continental Shelf Company (the respondent) agreed to sell their business and their interest under a lease to the Hutt City Council (the second appellant). The agreement was signed on behalf of the City Council by Mr Kavanagh (the first appellant), who added the words "Property Manager". When the Council failed to settle, Continental sued for breach of contract. The Council contended that Kavanagh had signed without the authority of the Council, and that the agreement was therefore unenforceable under the Public Bodies Contracts Act 1959. This Act provides that local and other authorities (who operate through staff) are not to be contractually bound by their staff unless with authority duly conferred. Continental brought a claim against Kavanagh pleading breach of warranty of authority and negligence, and against the Council pleading vicarious liability for the negligence of their employee Kavanagh.

Greig J dismissed applications by the Council and Kavanagh to strike out these causes of action. On the negligence claim, Greig J adopted the customary approach to the duty of care issue (still adopted in New Zealand) of establishing whether or not there was proximity between the parties and whether there were any policy reasons for negativing or reducing the scope fo the duty. Greig J was satisfied that Continental and Kavanagh were neighbours in the transaction and that it was reasonable to assume that Continental was likely to place some reliance upon Kavanagh as an officer of the Council apparently acting on its behalf. Regarding policy considerations, Greig J concluded that to allow the negligence action "did not cut across or conflict with the claim for breach of warranty of authority". Leaving aside the application of the Public Bodies Contracts Act, *"he could see no other policy reason which should deprive a contracting party in the position of Continental from a cause of action and from a remedy for the negligent acts or conduct of an employee of the public body acting in the course of his office and negligently so"* (my italics). Greig J went on to reject the view that to allow the cause of action in negligence against the Council would defeat the purposes of the statute.

On appeal against the dismissal by Greig J of the applications to strike out the causes of action, the Court of Appeal unanimously upheld Greig J's decision to allow the claim for breach of warranty of authority but rejected his decision to allow the negligence claim. Richardson J accepted

> for the purposes of argument that the relationship between Kavanagh and Continental was of appropriate proximity and in a reliance situation where there was a likelihood that a careless representation of authority to act on behalf of the Council could cause harm to Continental.

However, Richardson J held that there were two "substantial policy reasons" for denying a duty of care in this case. The first was that *"to do so would provide liability in tort in circumstances where liability exists in contract . . . the Courts are reluctant to allow new liabilities in negligence in circumstances where adequate remedies already exist in contract or equity"* (my italics). Richardson J noted that it had not been "suggested that there were any limitations or deficiencies in the contractual cause of action against an agent acting without authority which could properly in the public interest be remedied by imposing a new liability in tort". The second and (to Richardson J) more important policy consideration in this case was that "to allow a claim in negligence as a vehicle for recovery of damages against the Council would undermine the policies underlying the Public Bodies Contracts Act". Richardson J acknowledged that

> while without further consideration I would not rule finally against any claim in negligence solely on the first public policy ground, I am satisfied that weighing both policy considerations together they clearly tell against a duty of care in tort which carries these consequences.

The judgments of Hardie Boys and McKay JJ followed the same lines as the judgment of Richardson J.

The case of *Kavanagh & Hutt City Council v Continental Shelf Company Limited* is significant in three respects. First, it illustrates the continued importance of the distinction between contract and tort. It is true that the differences between these two areas of law have narrowed, as seen for example in the extension of the Contributory Negligence Act to the apportionment of damages in contract (cf *Mouat v Clark Boyce* [1992] 2 NZLR 559). Recently, Cooke P noted that "the inculcated belief of many present-day lawyers that there is a clear and water-tight division between contract and tort

can be a simplistic belief" (*Trevor Ivory v Anderson* [1992] 2 NZLR 517, 524). Nevertheless, in the *Kavanagh* case, the decision of the Court on whether to allow the tort action as well as the contractual action had vital consequences for the respondent company. The respondent company pleaded Kavanagh's liability in tort as "the gateway" to establishing vicarious liability on Hutt City Council for the negligence of its employee. As Hardie Boys J noted: "plainly enough resort to the alternative of tort is largely if not entirely prompted by the ability to target the Council under the principle of vicarious liability". Following the Court of Appeal's decision to strike out the tortious cause of action, the respondent company was left with a contractual cause of action only against Kavanagh.

The second point of significance is that Greig J's decision to allow the negligence cause of action may be seen to support the tendency of some modern New Zealand Judges to move beyond the traditional distinctions between contract and tort and to allow the plaintiff access to both contract and tort remedies. An instance of this more flexible, less doctrinaire attitude is Cooke P's statement that "what is important is the substance of the duty falling on the particular defendant in the particular circumstances, to ascertain which it may be necessary to consider various possible sources – tort, contract, equity, statute" (*Mouat v Clark Boyce* [1992] 2 NZLR 559, 565). The most outspoken recent call for the recognition of concurrent liability in contract and tort was that of Thomas J in *Rowlands v Collow* [1992] 1 NZLR 178, 190-1:

> The broad view developed that where persons have entered into a contractual relationship their liability is to be governed by the terms of the contract and nothing else. Such a view was based on the notion that the parties intended, or must be presumed to have intended, that the contractual terms which they agreed to would be definitive of their liability one against the other. Yet without the in-built predisposition in favour of the primacy of contract this notion is unconvincing. . . . When [the overlap of causes of action] happens and a plea in both contract and tort is entered plaintiffs should not be treated differently; and they should be entitled to elect that cause of action which is most favourable to them. If this is done it does not mean that the rights and duties of the parties to the contract, their "bargain" as it is put, will have been rewritten. Rather, this approach recognises that the contract has been entered into in the context to the general law, and that includes the law of negligence. Thus, unless the common law duty of care has been negated by the contract, it exists, and as a matter of public policy, is to be observed.

However, the third significant message to be drawn from the *Kavanagh* case is that, at the end of the day, the Court of Appeal reaffirmed the more traditional view that a duty of care in negligence ought not to be introduced where there are already adequate contractual remedies. This approach was evident in the judgments of Richardson J and other members of the Court of Appeal in *Mortensen v Laing* [1992] 2 NZLR 282. Here Richardson J declared that the contractual remedies available in that case were an appropriate sanction against want of care, and he referred with approval to the judgment of the English Court of Appeal in *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758, to like effect. Richardson J stated (at 308-9):

> Those were the respective bargains the present parties made. Tort theory should remain consistent with contract policies. In public policy terms I consider that where, as here, contracts cover the two relationships, those contracts should ordinarily control the allocation of risk unless special reasons are established to warrant a direct suit in tort. A plaintiff who has had the opportunity under her or his primary contract to obtain full contractual protection against . . . loss cannot expect society to provide further protection through tort law.

In conclusion, it is respectfully submitted that, in the context of the Public Bodies Contracts Act, the decision of the Court of Appeal to strike out the cause of action in negligence in the *Kavanagh* case is correct. To have allowed such an action would have opened the way for an action in negligence based on vicarious liability against the Council, which in turn would have run counter to the purpose of the relevant Act. In the absence of such an Act, however, the case for an action in negligence, alongside the contractual remedy, would have been stronger, and could have tested the limits of the Courts' traditional reluctance to allow the tort action where adequate contractual remedies are seen to exist.

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Section 23(1)(b) Bill of Rights Act: Retrial of *Mallinson*

In the retrial of *Mallinson* T (No 5-6/92 High Court, Wanganui Registry 15.12.92, hereinafter *Mallinson* 2), McGechan J addressed, inter alia, two issues concerning s 23(1)(b) of the New Zealand Bill of Rights Act 1990 (the right to consult and instruct a lawyer without delay and to be informed of that right). The first concerned the meaning "to be informed" of the right to a lawyer, and the second, the issue of onus of proof.

The meaning of "to be informed" of the right to a lawyer: a subjective or objective test?

Cullen [1992] 3 NZLR 577 seemed to propose an objective test when the Court said:

> . . . . when considering whether there has been a breach of the Bill of Rights, what must govern is the substance of what the suspect can *reasonably* be supposed to have understood, rather than the formalism of the precise words used. If on the facts, it is reasonable to infer that the suspect understood that he had been told,

the Police are not required to go further.

However, in *Mallinson* (1992) 8 CRNZ 707 (hereinafter *Mallinson* 1), the Court of Appeal favoured a subjective test. Richardson J giving the judgment of the Court said at 709:

> (3) To be "informed" of the right to a lawyer is to be made aware of it . . . . .

and later:

> (6) . . . The crucial question is whether it was brought home to the arrested person that he or she had those rights. That is not the same question as whether the police were justified in assuming that he or she did understand them. To look at it simply from the perspective of the police officer would mean that the person arrested who did not in fact understand the position would not be able to make an informed choice with respect to the waiver of the guaranteed right.

In *Mallinson* 2, McGechan J discussed the subjective/objective test issue. His Honour preferred a subjective test on principle, as it "better serves Bill of Rights ends" (p 6). He then turned to the authorities. He concluded, following the Court of Appeal in *Mallinson* 1 that a subjective test should be applied. Thus the onus is on the Crown, if a breach of s 23(1)(b) is raised on the evidence, to show that the defendant actually understood that she or he had a right to a lawyer. But proof that the advice of rights had been given would normally lead to the inference of comprehension, unless there was some evidential basis to justify a contrary conclusion. The Court of Appeal in *Mallinson* 1 said:

> (5) . . . if following advice as to the right to a lawyer the accused responds affirmatively to the question whether he or she understands the position, unless there are circumstances calling for obvious care and further enquiry, there is no reason for not taking the accused's answer at face value.

If for example the defendant was under the influence of drink or drugs or had some other disability affecting comprehension, (as in *Dobler* (1992) 8 CRNZ 604, where the accused's command of English was poor, although it was clear that he did understand his rights in that case), the Crown would have to show more than a bare acknowledgement of the right having been given: *Mallinson* 1.

It is submitted that the words of the section do not necessarily import a subjective test – "to inform" does not always mean to make sure the information is understood. But if the purpose of the s 23(1)(b) advice is to ensure the arrested person can make an informed choice, as the Court of Appeal said in *Mallinson* 1, the test must be subjective. However, proof of subjective understanding is difficult and it seems realistic to say as McGechan J does, that comprehension should be inferred, assuming the advice of rights is given, unless evidence is adduced which throws doubt on the defendant's ability to understand.

The onus of proof

The term "onus of proof" really refers to the persuasive (or legal) burden of proving the elements of the offence (in a criminal case, beyond reasonable doubts) or establishing the facts of a cause of action (in a civil case, on the balance of probabilities).

There is another use of the term which refers to the burden of producing evidence or as Cross puts it "the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue." (4th NZ ed by D L Mathieson, 100). This evidential burden falls initially on the defendant in Bill of Rights cases.

In *Latta* (1992) 8 CRNZ 520, 522, the Court of Appeal said that if a breach of the Bill of Rights was to be raised by the defendant "it should be raised squarely if it is to be raised at all and if it is to be pursued must be supported by substantial evidence." This was reaffirmed in *Goodwin* (CA 460/91, 26.3.93, p 3). *Mallinson* 1 also confirmed that "a complaint must be invested with an air of reality," 710, (8).

Once there is satisfactory evidence of a breach, the onus reverts to the Crown, in s 23(1)(b) situations, it seems, to prove:

(a) that the advice of rights was given, and
(b) that the accused understood this advice; further,
(c) that the rights were given in time to be exercisable before the legitimate interests of the person arrested were jeopardised – before police questioning for example (see *Mallinson* 1, 709, (2), (3) and (4)).

As discussed above, normally proof that the advice was given will lead to the inference that the accused understood, but because the comprehension test is subjective, the inference is rebuttable and the accused may raise evidence which justifies a finding that he or she did not understand his or her rights – or the evidence generally adduced may lead to such a finding. (See *Mallinson* 1 and *Mallinson* 2 above).

Standard of proof

There has been discussion in the High Court of whether the standard is "beyond reasonable doubt" or "on the balance of probabilities". It is only in exceptional cases that proof beyond reasonable doubt has been considered necessary for matters other than the elements of the offence : see *R v McCuin* [1982] 1 NZLR 13, voluntariness of a confession to be proved beyond reasonable doubt, and *Gallagher* (1991) 7 CRNZ 283, which emphasised the distinction between questions of fact incidental or even necessary to the procedure of the prosecution, and the ingredients of the crime, which latter must be proved beyond reasonable doubt; (*Anderson* [1972] 2 NZLR 233).

In *Dobler* (1992) 8 CRNZ 604, Smellie J thought that the onus was on the accused to raise evidence that the advice of rights was not given, following *Latta*, then on the Crown to refute this on the balance of probabilities, though, because of the gravity of the subject matter the Judge would not be satisfied lightly. In *Mallinson* 2 McGechan J favoured the burden being on the Crown to prove beyond reasonable doubt that the rights were given (and understood). With respect this

seems unnecessarily strict for an evidential burden and not in accordance with *Gallagher*, the advice of rights being a question of fact necessary to the procedure of the prosecution, not an element of the offence. Unfortunately, the Court of Appeal did not find it necessary to address the issue in *Goodwin* CA 460/91 (supra). So there will be conflicting High Court judgments on the standard of proof until a decision reaches the Court of Appeal for decision on this issue.

Janet November
Judges' Research Counsel

POSTSCRIPT

Standard of proof

Since this note was written the Court of Appeal has decided *Te Kira* (CA 280/92, 14 May 1993). A main question of law in *Te Kira* was whether, once it was established that there was a breach of the Bill of Rights, the prima facie exclusion of evidence rule should apply to s 23(3) as to s 23(1). In dealing with this issue four members of the Court also discussed to some extent the stage before establishment of a violation of a right. Cooke P said:

> Where the facts are such that the onus falls on the prosecution to negative a breach, satisfaction of the Judge on the balance of probabilities, the gravity of the issue being borne in mind, should be enough for the purposes of any of these provisions. (p 17)

Hardie Boys J agreed "with other members of the Court that once there is an evidential foundation for an allegation of breach of rights, it is for the prosecution to prove there was no breach, the standard being on the balance of probabilities, as with any other issue arising incidentally during a trial".

His Honour continued:

> In most cases, it will then be for the prosecution to satisfy the Court that the prima facie rule of exclusion should not apply. To the same standard, the prosecution must prove any facts relevant to that question. (p 5)

Richardson J preferred to see the decision to exclude admissible evidence as a matter of judgment for the Court, not an evidentiary matter of onus. (pp 17-18)

But as Thomas J (who thought there was no place for the prima facie exclusion rule where evidence was obtained as a consequence of s 23(3) breach) said:

> What does a prima facie rule or presumption do other than raise an onus which the opposing party must meet?

In conclusion it can be said that there was majority agreement that the standard of proving there was no breach of a right embodied in the Bill of Rights is "on the balance of probabilities". If the Court accepts that a breach did occur the prima facie exclusion rule applies in s 23(1) and in s 23(3) violations. Thus in practice (if not in strict principle) the onus is on the Crown to prove any facts (on the balance of probabilities) which would be relevant to the Court judging it fair and right to depart from the prima facie exclusion rule.

Correspondence

Dear Sir,

World Court Project on Nuclear Weapons & International Law

In the July issue of the *Journal* [1993] NZLJ 249, in which my above-described article appeared there are references on p 250 to the World Health Organisation (WHO) which need to be updated. On 14 May 1993, at the annual meeting at Geneva of the World Health Assembly (the governing body of the WHO), there was passed, by a substantial majority, a resolution calling for an advisory opinion from the International Court of Justice on the question of the legal status of nuclear weapons. The resolution formulated the question as follows:

> In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

The resolution was passed with 73 nations in favour, 40 nations against, and 10 abstentions. The New Zealand Government re-presented by a delegation headed by the Associate Minister of Health, Mr Williamson, was among the abstentions. So also was the Australian Government.

The WHA resolution is very helpful to the whole Project, the main thrust of which continues to be an attempt to obtain a request to the Court – regarding the use or threat of the use of nuclear weapons – from a substantial majority vote in the forthcoming UN General Assembly.

Harold Evans

New Formal Title for Judges of the High Court and Court of Appeal

Judges of the High Court and Court of Appeal have decided to dispense with the term "Mr" in their formal titles.

The Chief Justice, Sir Thomas Eichelbaum, said today that following the appointment of Dame Silvia Cartwright as a High Court Judge, colleagues considered the title "The Honourable Mr Justice" to be inappropriate.

He said that in future Judges of either gender will be formally addressed as "the Honourable Justice (surname)" or, in the case of Privy Councillors, "the Right Honourable Justice (surname)".

As before Christian names would not be used.

22 July 1993

The quasi-contractual jurisdiction of the Disputes Tribunals

By Peter Watts, Senior Lecturer in Law, University of Auckland

The proliferation of Tribunals and Authorities and Commissions continues. That there is a place and indeed a need for specialist agencies is now hardly even discussed much less disputed. Issues between citizens, and between citizens and the government have to be resolved, and resources, human, physical and economic have to be apportioned in some orderly fashion. Disputes Tribunals are bodies that have these functions in their own particular way. They also have the intended function of reducing the pressure of work on the Courts. Because however they are not bound by legal rights or obligations lawyers cannot truly advise clients on the likely outcome in respect of a particular set of facts. This, in effect, encourages litigation, because it turns dispute resolution into a formal lottery. There was, and is, always an inevitable element of this in any legal system, but it might be said that this element has now been raised to the status of a statutory principle. This article considers the legal meaning of the relevant section of the Disputes Tribunals Act 1988 in relation to the legal categories of "quasi-contract", "restitution" and "unjust enrichment".

A General matters

The source of jurisdiction

Section 10(1)(a) of the Disputes Tribunals Act 1988, confers jurisdiction on Referees in respect of claims in quasi-contract. Broadly speaking their other jurisdiction covers claims in contract, in tort involving recovery of and damage to property, and the jurisdiction conferred by the statutory regimes listed in the First Schedule to the Act, some of which overlap with or replace parts of the law of quasi-contract.

Determining disputes according to the substantial merits

As is well known, if not notorious,[1] s 18(6) of the 1988 Act enjoins Tribunals to:

> determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

It is my view that this provision enables Tribunals only to decline to give effect to the jurisdiction which is conferred on them by s 10, and cannot be used to enlarge their jurisdiction. Thus, if an applicant was the beneficiary of a promise but no consideration was provided to the promisor, the applicant would not be able to prove any contractual obligation on the part of the promisor, and s 18(6) could not be used to give them a remedy. Equally, if there is no common law jurisdiction in quasi-contract to reward a person who intervenes in the interests of another in an emergency (as to which, see para 18 below) or to reward a person who does domestic work in the course of a de facto relationship, then s 18(6) will not improve the litigant's position. Were it otherwise, it would be difficult to define the Tribunals' jurisdiction. There is nothing in the wording of s 18(6) which necessitates a different conclusion to that taken here, and the use of the words "strict legal rights" is consistent only with the Tribunals not being required to make an order in favour of someone who has a common law right, not also with their conferring on someone a right which they would not have at common law (there is no right not to be sued at common law, unless the promoter of the litigation is acting out of malice). This is not to say that s 18(6) avails only respondents. It may be that s 18(6) can be invoked by applicants as a defence to a defence; such as to enable a Referee not to give effect to a limitation defence which the respondent would otherwise have had to the applicant's cause of action in contract or quasi-contract,[2] or to deny an accord and satisfaction defence to an applicant's contract claim.[3]

The relationship between quasi-contract and unjust enrichment

The label "quasi-contract" for the relevant body of law has become a rather unfashionable one. More specialists in the field prefer nowadays to talk of "Restitution" or "Unjust Enrichment". One cannot say with confidence what the precise meaning of the older phrase is; in the words of the late Lord Justice Gibson, giving judgment in the Queen's Bench Division of the Supreme Court of Northern Ireland:

> The conception of quasi-contract is one which invites mental reservation. Its origin and history are pragmatic and illogical; it lies somewhere in the cloudy realms between tort and contract; its nature is a matter of uncertainty and debate, and its boundaries lack clear definition.[4]

I think it can be said with confidence that the purview of "quasi-contract" is narrower than that of "restitution" and "unjust enrichment"; in other words, quasi-contract is a sub-set of unjust enrichment. (See, generally, S J Stoljar, *The Law of Quasi-contract*, 2nd ed, 1989). So, modern restitution lawyers usually include within their concerns, profit-stripping remedies for causes of action not tied to quasi-contract, and certain instances of jurisdiction which have their origins in rules developed by Courts of Equity. I do not think that either of these concerns falls within the jurisdiction of Disputes Tribunals, although, in relation to profit-stripping remedies, it is arguable that there is scope for the use of such remedies for breaches of contract, and, rather less likely (given the wording of s 10(1)(c)) for torts against property, and, in relation to the Equitable jurisdiction, there ought to be jurisdiction in Equitable rescission pursuant to s 10(1)(b) in respect of contracts (cognate statutory powers of rescission are also available to Referees under some of the statutes referred to in the First Schedule, principally the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, and the Fair Trading Act 1986).

So much for what the concept of quasi-contract does not cover. Of the things which it does cover, the most important are the following:

(a) Recovery of money paid where there was no contractual duty to make the payment, the payment having been either (i) induced by some error, threat or impairment of judgment or (ii) made on conditions which have not occurred or been observed;
(b) Recovery for services performed for the respondent and for time and effort spent working on the assets of the respondent in circumstances where there was no contract, or no enforceable contract;
(c) Recovery of money by a principal which has been misapplied, or otherwise not accounted for, by an agent;
(d) Recovery of bribes or secret commissions received by an agent;
(e) Recovery of money which has been stolen; and
(f) Recovery of the proceeds received by a thief upon selling stolen goods.

Observe that the references in the above list to the recovery of money do not mean that the Court should order the return of the very money received by the respondent, but only an equivalent sum; it is not necessary in a quasi-contractual claim that the applicant be able to identify the very moneys received, and indeed it is doubtful whether a Court *can* order the delivery up of such moneys as a remedy to a quasi-contractual claim.

Liquidated demands in quasi-contract (s 11 of the 1988 Act)

One thing which strikes one about the above list, is that most are claims to recover a liquidated sum, if not a debt; namely the sum of money obtained by the respondent. Yet s 11(1) of the 1988 Act excludes from the Tribunals' jurisdiction claims in contract and quasi-contract for the recovery of liquidated demands unless the applicant satisfies the Registrar of the relevant District Court that the demand is disputed. It seems evident that the legislature did not want the Tribunals being used as debt collection agencies. Cases of debt collection have been taken to involve persons who can afford to use the ordinary Courts, and to arise so frequently that the Referees could soon find that they had inadequate time to devote to genuine disputes over small sums. Quasi-contractual claims on the other hand are likely to be brought very much less frequently, even if they are not the preserve of the "little person". It would seem that the legislature ought to have confined its s 11 exclusion to liquidated demands arising out of contract. But, it did not do so, and we do have, therefore, a difficulty. Nonetheless, in many cases there will be a genuine dispute as to whether the law would allow quasi-contractual recovery or as to whether the relevant facts are made out, such that the proviso found in s 11(1)(a) applies.

Money due under an enactment

Section 11(7) excludes from the Tribunals' quasi-contractual jurisdiction claims in respect of money due under an enactment. The writer understands from the comments of Referees made to him, that local authorities and other governmental agencies have on occasion used this subsection in order to resist claims made before Tribunals by ratepayers or other citizens that they have overpaid their rates or other statutory dues. This view is plainly mistaken on the part of the governmental bodies. The sub-section is designed to stop *statutory bodies* suing for sums due to them under enactments, not to stop citizens from suing statutory authorities which have been overpaid. Historically, the action in indebitatus assumpsit or quasi-contract appears to have encompassed claims by officeholders and statutory and governmental bodies for moneys owed to them as fees and dues[5]. It has clearly been thought undesirable that Disputes Tribunals be used as debt collection agencies for statutory bodies, hence s 11(7). On the other hand, an overpayment of a statutory body lies in the heartland of quasi-contract, being a claim based on unjust enrichment, and there is no reason why the Tribunals should not have jurisdiction in such cases. The House of Lords has recently held that the citizen who has overpaid the Crown or a statutory body has an action in quasi-contract, without needing to show that the payment was made as a result of a mistake or duress. (See *Woolwich Equitable Building Society v IRC* [1992] 3 WLR 366.)

B Substantive grounds of recovery[6]

It is proposed here to treat only the first two of the above categories of quasi-contractual claim; the first of which involves money and the second, time and effort. As to the first there is a further divide; that between vitiated payments and conditional payments. Broadly speaking, vitiation refers to the fact that the applicant knew that she was paying money to the respondent, but now complains that her decision was an unsound one because of some weakness in the decision-making process. In the case of conditional payments, on the other hand, there was nothing wrong with the process of decision, but the payment was not one which, usually to the knowledge of the respondent, the respondent was to keep in all

events, but only if certain things occurred or, alternatively, a state of affairs remained in existence. It is helpful to take each situation separately.

Payments under vitiated intent

Vitiation is commonly divided into four categories, each involving a slightly different ground of weakness. The categories are mistake, duress, impaired judgment, and ignorance. The last we can dispense with here, because it really refers to situations where a complainant's money (or other asset) is taken without their[7] knowledge; say, they were away at the time, or their agent misapplied their money. These situations are outside our present compass. With mistake, an applicant is complaining that they would not have made the payment were it not for some unknown or forgotten fact or because they misunderstood their legal liability to pay. With duress, the applicant complains that, even if they knew all the facts, they made the payment only because of some threat made or carried out by the respondent. With impaired judgment, again the applicant may have known all the facts, but complains that because of some matter personal to them they could not exercise normal judgment in their own interests. The most common instances involve disabilities such as senility, infancy (in part dealt with now by the Minors' Contracts Act 1969), illiteracy, and drunkenness, or undue deference to the respondent resulting from the position of dominance which the respondent has over the applicant (such as being their professional adviser, or spiritual or religious adviser, or otherwise their emotional guardian, to put it loosely).

As far as the law of quasi-contract is concerned, the category of impaired judgment is difficult. It is doubtful whether the Judges who evolved the law of quasi-contract recognized it, except where the impairment was so great as to undermine the plaintiff's ability to comprehend at all what they were doing. The jurisdiction, therefore, is principally the creation of Equity, in respect of which the Tribunals have not been given jurisdiction. However, in many instances the impairment will have nonetheless led to the formation of a contract allowing Referees to exercise jurisdiction under s 10(1)(b) (and as to remedies available to Tribunals in such cases, see s 19). In the result, the two situations of vitiation with which Referees are most likely to be confronted are mistake and duress.

Mistaken payments

In respect of mistaken payments, the overpayment of an obligation is the most frequent occurrence; perhaps someone has paid a bill again when they have received an "overdue" notice. Observe that, despite the contractual context, the applicant's action is not in contract. It will usually be clear that there was no contractual obligation to pay; they have simply given more than the contract required. It is the action in unjust enrichment, quasi-contract, which enables recovery, not contract. Contrast the position where the applicant is not complaining of having made a mistake in the performance of the contract, but that they made a mistake in entering into the contract in the first place. In the latter situation, the payment made is exactly what the contract required, so that the payment cannot be said to have been mistaken. It is the promise which the applicant made which is mistaken, not the payment. In such circumstances, such jurisdiction as the Tribunal has will be derived from the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979. (See further C E F Rickett and D W McLauchlan, "Contractual Mistakes and the Law of Restitution" [1989] NZ Recent LR 277.)

Once the difference between mistake in the formation of a contract and mistake in the performance of a contract has been grasped, there are few difficulties to be encountered with rules relating to the recovery of a mistaken payment. The basic requirement is that the mistake caused the payment; in other words, the applicant would not have made the payment were it not for their mistake. The mistake can be as to a matter of fact or law. There will not be a mistake, however, if the applicant chooses to make the payment in order to settle a clear and bona fide demand made by the respondent. So long as the demand was not accompanied by improper threats or actions (that is to say, duress), a payment in such circumstances is not mistaken but deliberate; the applicant is making the payment to obtain peace, and (unless there was some vitiating mistake in the settlement itself – see, for example, *Phillips v Phillips*, CA 369/91, 26 February 1993) the law would deny recovery. Tribunals will not be able to go beyond this position,[8] but each case will turn on its facts.

The only other matter on which Referees are likely to encounter difficulty in respect of mistake is where a respondent wishes to raise a defence that, although she was enriched, her position has so changed since the payment such that it would be inequitable to require her now to repay the money. The law of quasi-contract now recognises that defence (see *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548) and in New Zealand the defence is also found in s 94B of the Judicature Act 1908.[9] The law is, however, that the defence is established only where: (a) the respondent, at the time they spent the money, or otherwise changed position, (reasonably it seems) did not realise that the applicant had made a mistaken (over)payment; and (b) the expenditure (or other change of position) is one they would not have made but for the receipt of the payment. Thus, it is not a sufficient defence at law to spend the money on household expenses or on everyday business purchases. Having a holiday which one would not otherwise have done, may, however, qualify (assuming the respondent can satisfy the Tribunal that she was ignorant of the payer's mistake).

Duress

Duress involves the obtaining of a benefit, most commonly money, by the making of (and the execution of, if this occurs) a threat to harm the person or other interests of the payer. At law, not all threats are improper, however. In order to obtain quasi-contractual recovery the threat accompanying the demand must be "illegitimate". So, except where the threatening party is the Crown or a public agency (see *Woolwich Equitable Building Society v IRC* [1992] 3 WLR 366, HL) it is not illegitimate to threaten without malice to sue someone unless they pay a sum of money. As indicated above, a payment made in such circumstances is treated as a

voluntary settlement and irrecoverable. The principal categories of illegitimate pressure at law involve threats:

(a) to assault or imprison a person (note that the threat need not be directed at the payer but can be directed at some other person, most commonly the payer's domestic partner or other relative);
(b) to seize, fail to return, or damage another's property (again, the threat need not be directed at the payer, but can be directed at the property of, say, a relative);
(c) to damage a person's reputation by reporting or publicising damaging facts, whether the facts are true or false (commonly referred to as blackmail);
(d) to interfere with a person's economic rights (most commonly by refusing to perform a contractual duty owed to the payer or by procuring someone else to break their contract with the payer).

It is submitted that the civil, if not the criminal, concept of blackmail would extend to circumstances where traders place in their windows lists of alleged bad debtors. While it is not illegitimate to sue someone who does not owe one money, so long as there is a genuine belief that money is owed, it is being suggested here that adverse publicity made for its own sake would be illegitimate and would not justify the retention of money not owed. Note that there would be quasi-contractual recovery only where the applicant who had paid to get their name removed from the list, did not in fact owe the trader the money paid.

Of the above categories of duress, economic duress, is likely to be the greatest source of perplexity to Referees. The chief error to be avoided is the assumption that economic duress can be used as a weapon to adjust bargaining power between parties.Duress involves a threat to *worsen* another's existing position. It does not involve a refusal to improve another's position. Thus, it is not economic duress to charge a huge sum to repair a person's car when he is stranded deep in the countryside![10] The driver put himself in that position, and there is no duty on anyone to get him out of it. In contrast, however, there will be economic duress where a contractor promises to transport the applicant's goods to retailers for $1,000, but then, just on Christmas when there is heavy demand for transporting vehicles, demands $1,500 in order to to do the job. The respondent has threatened to worsen the applicant's position, because the applicant had an existing right to the transportation at $1,000. So, for most purposes it can be assumed that duress will not occur unless the conduct threatened is per se unlawful (for instance, the publication of a list of bad debtors would be defamatory of those who did not owe money). It has to be acknowledged that the Courts have left the door open to the possibility that duress can occur through conduct that is not independently unlawful, but such instances are likely to be rare, and will involve special features such as bad faith or malice on the part of the respondent.

The other hitch with economic duress is the degree of seriousness the threat has to carry for the payer, before quasi-contract (or Equity, which has a parallel jurisdiction) will step in. There has been a view that the threat has to carry very serious consequences for the payer, but the better view, and that which is coming to prevail in the Courts, is that there will be economic duress whenever the threat not to perform, or to interfere with, the payer's contract *causes* the payer to make the payment (See *Crescendo Management Pty Ltd v Westpac Banking Corp* (1990) 19 NSWLR 40.) Finally, it can be remarked that the same test of economic duress to recover a payment in quasi-contract is used to rescind a contract so obtained (as to which, the Tribunals have jurisdiction under s 10(1)(b)).

Qualified and conditional payments

Just as the law considers it unjust that a payee keep payments when made under circumstances of vitiated consent (at least where no return benefit has been given for them), so too it is considered unjust for a payee to retain money when the conditions set for its retention have ceased to be met. A theoretical complexity has been added to this area by the Contractual Remedies Act 1979. It seems (see *Brown v Doherty Ltd v Whangarei CC* [1990] 2 NZLR 663) that where the condition that has not been met is a contractual one then, except in the case of contracts for the sale of goods, the quasi-contractual jurisdiction has now been replaced by the remedies provided in the 1979 Act. In particular, if one wants to get one's money back for non-performance of a binding promise, one now has to ask the Court to order so pursuant to its discretion under s 9 of the Act. However, the 1979 Act does not in this respect apply to contracts for the sale of goods, so that where an applicant is complaining, for example, that the goods they paid for are duds, their right to recover the price paid remains quasi-contractual. The result is untidy: the divide between sales of goods and other contracts is not logical, and nor is there is much of a case for dividing off non-contractual conditions from contractual ones. This fact should not, however, cause practical difficulties for Tribunals, because as well as their quasi-contractual jurisdiction, they have jurisdiction under the 1979 Act. Apart from the sale of goods cases, situations of quasi-contractual recovery include those: (a) where the conditions which have not been met are non-contractual ones, such as a gift made on condition that that the donee not commence smoking, or a "loan" of money without provision for interest made as an act of kindness; and (b) where, while the conditions are contractual, the contract if unenforceable, because, for example, the contract was not in writing as the law required;[11] or was made by an agent of the payee who lacked authority to bind the payee[12] (often in these cases, it may be possible also to base quasi-contractual recovery under the heading of mistake).

Recovery for services rendered and work performed

The cases looked at so far have involved applicants seeking the recovery of money paid to the respondent. Cases where the applicant has provided services for the defendant (including paying money to a third party on the respondent's behalf) could also readily occur before Disputes

Tribunals. In the great majority of disputes involving the performance of services, the respondent, having requested the services, is likely to be liable in contract, without the need for recourse to quasi-contract. Where no price for the services has been agreed between the parties, the law of contract requires the requesting party to pay a reasonable (market) sum for the services. However, in some cases there has been quasi-contractual recovery for time, effort and money spent which benefits the defendant in circumstances where there is no room for contractual recovery, and in other cases the law of quasi-contract has been used, when, admittedly, contract might also have been used if the point had been pushed.

Where the law of quasi-contract rewards the performance of services the remedy given is called the "quantum meruit"; that which the applicant deserves. Among the situations where a quasi-contractual award may be available are:

(a) where the applicant provides necessaries to an insane or unconscious person;[13] or services are performed for the respondent in respect of the latter's land or chattels when an emergency arises which threatens to damage the assets, and the respondent is absent (for example, putting a fire out in a neighbour's house when the neighbour is away).[14] The respondent, being ignorant of the services, cannot be said to have contracted for them;

(b) where the applicant, mistakenly thinking that an asset belongs to him or her, or mistakenly thinking that the respondent or their agent has requested or consented to the work, performs work on the respondent's assets to the knowledge of the respondent (there being no contract because although the respondent knew of the services, she did not request them). (See, eg, *Van den Berg v Giles* [1979] 2 NZLR 111.)

(c) where an applicant, mistakenly thinking that a chattel belonging to the respondent belongs to them, performs work on the chattel in ways which increase the market value of the asset, but the respondent is ignorant of the work. (See *Greenwood v Bennett* [1973] 1 QB 195; *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662.) It is thought that this example of the quantum meruit, which in all events is just emerging, is unlikely to be available in relation to improvements to land, at least unless the respondent considers the land a mere investment;

(d) where the applicant mistakenly assumes that it has been appointed an agent of the respondent, and while assuming that position spends time, or money, or both, doing things which the respondent would necessarily have done for itself anyway. (See *Craven-Ellis v Canons Ltd* [1936] 2 KB 403; and *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662.)

(e) where the respondent requested the services intending to contract for them, but the contract itself is unenforceable for some reason, such as lack of writing, or lack of sufficient certainty of terms. (See, eg, *Way v Latilla* [1939] 3 All ER 759; *Perrott v Perrott* (1912) 31 NZLR 6.) Where the cause of the unenforceability is a statutory provision, then there will be a quasi-contractual claim only so long as the policy behind the statutory provision is not taken to bar the quasi-contractual claim as well. (See, eg, *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.)

(f) where the respondent requested that the applicant carry out work on the applicant's land, not expecting directly to pay for it, but doing so in anticipation that the parties would reach agreement in respect of the sale of the land and the negotiations have irretrievably broken down. (See, eg, *Dickson Elliott Lonergan Ltd v Plumbing World Ltd* [1988] 2 NZLR 608.)

Failed domestic relationships

One area of some difficulty not covered in the above examples concerns disputes between parties to failed domestic relationships, particularly de facto relationships. The law of quasi-contract has not, so far, been used to settle such disputes. This is perhaps for two reasons. Firstly, the ground of restitution would in most cases be qualification not vitiation, and the law of quasi-contract has been dogged by a rule which provides that recovery on the basis of qualification or failed conditions is available only where there has been a total failure of conditions. With domestic work, one of the conditions will usually be that the other party provide the house in which the parties are living or contribute financially to the needs of the household, and in most cases these conditions will have been met, such that there will not have been a total failure of conditions. Against this, it must be said that it is not clear that the total failure rule has ever been applied where the plaintiff is seeking recovery for services as opposed to recovery of money. Secondly, and more significantly, until recently, the Courts assumed that work done by one party for the other or for both of them during a domestic relationship was, as a rule, done out of love and affection. (See *Pettitt v Pettitt* [1970] AC 777.)

In the result, the recent legal recognition of claims based on work performed during a domestic relationship has been effected using the Court's Equitable jurisdiction rather than its common law or quasi-contractual jurisdiction. However, assuming the total failure rule is not a problem, it would seem possible, in principle, for the law of quasi-contract to play a role, once it is shown that the work was not done without any expectation of gain. Evidently, any quasi-contractual award that could be given would be limited to the market value of the work done (which with domestic services may not be great) and could not include consideration of opportunities in life which the applicant may have forgone, would be subject to any counter-benefits the applicant had received from the respondent, and would lead only to an order for the payment of a sum of money (in any event, the Disputes Tribunals do not have jurisdiction to hear claims to an interest in land – see s 11(5)).

The measure of the quantum meruit
The measure of the quantum meruit may differ, depending on whether or not the respondent requested the things done by the applicant. Where there was a request, the quantum meruit will normally be measured by the reasonable or "market" value of the effort expended (but where the parties have set the value, then that value may prevail, at least where it is less than the market value). Where there was no request, then, assuming there can be recovery at all, the applicant will usually recover only the lesser of: (i) the market value of the services and; (ii) the market increase in the value of any assets of the respondent on which the time and effort was expended.

C The Statutory Regimes in the First Schedule

Many of the Acts listed in the First Schedule to the 1988 Act enable the Tribunals to order the return of money by a recipient to the payer applicant. Such orders are restitutionary. Thus restitution forms an important part of the purposes of the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, the Fair Trading Act 1986, the Illegal Contracts Act 1970, and the Minors' Contracts Act 1969. All but the Fair Trading Act are either expressed to be or have been found by Courts to be codes, as far as each goes, leaving no scope for the continued operation of parallel common law remedies. That is not to say that the restitutionary jurisdiction conferred by the Acts has in each case replaced a part of the law of quasi-contract; quasi-contract has always formed only one source of restitutionary jurisdiction. Nonetheless, I have already indicated above how the Contractual Remedies Act appears to have replaced the old quasi-contractual jurisdiction where there has been such non-performance of a contractual condition that it is unjust that the benefit concerned for that performance be retained. And the Illegal Contracts Act and the Minors' Contracts Act have also replaced part of the law of quasi-contract. It is beyond the scope of this paper to give an account of how these statutes operate, but a little should be said about how some of them have antecedents in the law of quasi-contract.

Illegal Contracts Act 1970
Where the law forbids the making or performance of a contract (such as a contract by a company to lend money to a person in order enable that person to buy shares in the company), but the parties, often innocent of their transgression of the law, forge ahead with such a contract, it has in some cases been thought unjust that the law give no remedies to one or more of the parties, particularly where one has received a benefit from the other. In certain (rather limited) cases, the law of quasi-contract enabled one or more of the parties to recover money paid or other benefits conferred under an illegal contract where the relationship had broken down before the contract had been completely performed. The contract itself could not, of course, be enforced, but that is different to attempting to put one or more parties in the position they would have been had they never contracted. This quasi-contractual jurisdiction has now been replaced by the 1970 Act, conferring many more powers, and not only restitutionary ones, on the Courts. In a reversal of the general position at common law, it is now provided that, prima facie, no property (ie ownership) passes in money or other assets transferred under an illegal contract (s 6 of the Illegal Contracts Act 1970); thereby conferring restitutionary rights unless cut down by discretionary order.

Minors' Contracts Act 1969
Just as with illegal contracts, contracts with or between minors could not, generally, be enforced at common law. But, again, in certain cases, restitution could be obtained in quasi-contract where, despite the unenforceability of the contract, benefits had been conferred on the minor. This jurisdiction too has been replaced, in this case by the 1969 Act.

Jurisdiction where contract results from mistake or misrepresentation
The Contractual Mistakes Act, the Contractual Remedies Act and the Fair Trading Act each enables, in certain circumstances, the Courts to give restitutionary remedies where a contract has been formed as a result of mistake made by one or more of the parties. In the case of the latter two statutes, the mistake must have been induced by the words or conduct of the other party to the contract or of their agent. In fact, the law of quasi-contract allowed a claim to recover money or other property very rarely in these cases; usually the mistake had to be a fundamental one shared by both parties, or otherwise the contract had to have been induced by the fraud of the defendant. These jurisdictions have now been replaced by these statutes, and in common with the other "contract" statutes, the Courts have been given much broader powers (not merely restitutionary ones) than the law of quasi-contract gave them.[15] □

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1 See the umbrage taken to the section by the plaintiff in *McGrath v Minister of Justice* (High Court, Greymouth, CP 11/92, 4 December 1992, Williamson J).

2 The Limitations Act 1950, prima facie at least, applies to claims before the Disputes Tribunals – see s 10(5) of the 1988 Act.

3 See P Spiller, "The Disputes Tribunals: Commonsense or legal tribunals" [1992] NZLJ 95. Just what is a defence and what is an essential part of a claim might be a difficult issue on occasion – see fn 8 below.

4 *Carlingford Harbour Commissioners v F J Everard & Sons Ltd* [1985] NI 50. In fact, there may on occasion be concurrent jurisdiction in contract and quasi-contract, and in tort and quasi-contract.

5 See for this point, the *Carlingford* case, above fn 4, where, however, the term quasi-contract as it appeared in a statute was construed as excluding claims to statutory dues.

6 For a more detailed account of the New Zealand law, see J Kos and P G Watts, *Unjust Enrichment — The New Cause of Action*, NZ Law Society Seminar, 1990.

7 The plural pronoun, here and elsewhere is deliberate.

8 See text to fn 3 above. It is just arguable that the claimant's cause of action in quasi-contract arises merely from the making of the payment, to which the response of settlement of a disputed claim is a defence, which might then be denied under s 18(6) of the Act. The better view, it is submitted, is that, no matter on which party the onus of proving the intent to make a settlement lies, the plea of settlement goes to the heart of the cause of action and is not simply a defence.

9 As to the relationship between s 94B and the common law, see P G Watts, "Judicature Amendment Act 1958 – Mistaken Payments" in forthcoming Law Commission publication on the New Zealand Contract Statutes.

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Opening of new Law Building, University of Canterbury

On Friday, 2 July 1993, Sir Ivor Richardson officially opened the new building of the Law School at Canterbury University. His speech and extracts from that of Professor Gerald Orchard, Dean of Law, are published below.

Sir Ivor Richardson

It is a great privilege to be invited to open this magnificent Law School Building.

When reflecting on today's event I thought back to my own time as a student at Canterbury and the immense changes affecting legal education, the work of lawyers and our society over the last 40 years.

At that time in the early 1950s there were around 80 law students at Canterbury. The facilities were modest and the Law Library almost non-existent. Not that it mattered all that much. It was possible to complete a law degree without actually reading an original Law Report. Some students did. Given that all the law teachers of the day, or rather of the early morning and the evening, were busy and able practitioners, most of whom were used to sparring in the Courts, it is surprising that the method of instruction was straight lecturing drawing on text books with the examination papers all set by external examiners providing a generous range of essay type questions.

The system had its unusual features. I remember three experiences in particular.

The law of real and personal property was a two-paper subject but because of the enthusiasm of the lecturer for indefeasibility of title, he always ran out of time. The year I took it we had a whirlwind last 30 minutes of the final lecture which covered the whole of personal property. It was barely sufficient to draw our notice to topics likely to appear in the second exam paper.

The other unusual exam was in constitutional law. After lectures had officially ended and a few days before the exam date, the 10 or 12 of us were summoned back for a special lecture. We surmised that the lecturer had seen the exam paper and had realised there was a gap to be bridged. In the event the examiner must have been surprised at our familiarity with all the recondite nuances of the different judgments in *Bardolph v State of New South Wales* and of *Rederiaktiebolajet Amphitrite v The King*.

The third was the part time nature of the course and the insistence that it be treated as part time. It was a very ordered legal world where the students worked in offices during the ordinary daytime hours performing modest tasks for trifling wages. The Dean at the time supported the semi-apprenticeship system by insisting, at least in my case, that students could take no more units whether full time or part time. Understandably they went part time.

That had been the pattern since the LLB course was introduced at Canterbury in 1877. In the early years the course requirements were undemanding. One lecturer could and did teach the whole syllabus. The seven subjects could be completed part-time in two years. Commenting in 1925 on the state of legal education in New Zealand the Reichel-Tate Royal Commission said that unless there was a marked change the customary allusion to a legal practitioner as "my learned friend" ran the risk of being regarded as a delicate sarcasm (AJHR E 7A p 44).

The Royal Commission considered it essential for those entering a profession that:

(1) they have undergone a sound and liberal course of general education:
(2) they have received an intensive training of high quality in the

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10 Quaere whether there might not be jurisdiction under s 10(1)(b) based on Equity's jurisdiction in unconscionable bargains.

11 See, eg, *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; and *North Central Wagon Finance Co v Brailsford* [1962] 1 WLR 1288.

12 See, eg, *Re Phoenix Life Assurance Co* (1862) 2 J & H 441; 70 ER 1131; *Barclays Bank Plc v London Borough of Hammersmith & Fulham* LEXIS, 21 November 1991; *Westdeutsche Landesbank Girozentrale v London Borough of Islington*, LEXIS, 12 February 1993.

13 The applicant may have to show that the services were not performed gratuitiously – see *Re Rhodes* (1890) 44 ChD 94. See also *Deskovick v Porzio* 187 A 2d 610 (1963).

14 It is not yet clear whether the common law will develop quasi-contract this far. See, however, *Craven-Ellis v Canons Ltd* [1936] 2 KB 403; and *Re National Pacific Securities Ltd* (1991) 5 NZCLC 67,332.

15 For an expansive view of the Courts' discretionary powers under s 9 of the Contractual Remedies Act 1979, see *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68, affirmed on appeal, sub nom *Coxhead v Newmans Tours Ltd*, CA 341/91, 7 April 1993.

principles and in the practice of their special work: and
(3) they have accepted a body of ethical standards as a guide to professional conduct.

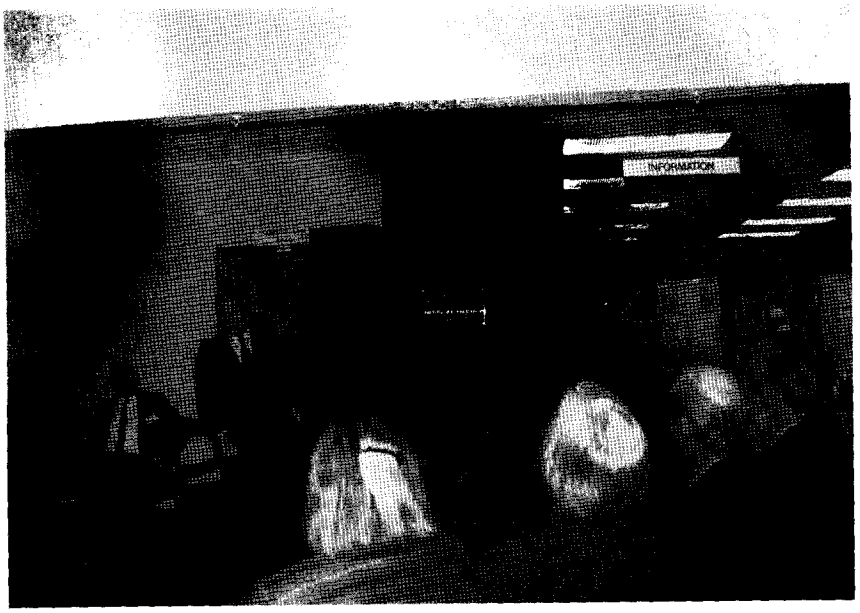
It considered the New Zealand law degree deficient on the first two counts. The university colleges and the profession responded and by the 1950s law students had to complete 19 subjects in all including something more than half of an arts or science degree.

The first job I had when I came back from America was in Invercargill. There was a photograph of the founder of the firm — in every room. He gazed out with Scottish sternness as if he had summed up your work for the day and found it wanting. But in the world of the 1950s the practice provided a range of stimulating work and for an embryonic tax lawyer it indulged an expansive view of legitimate tax deductions for the partners.

Most lawyers spent their careers in the same law firm. As it happened I had five jobs in 22 years before I went on the Court of Appeal in 1977. That was viewed in some quarters as a distinctly unstable work record.

I mention these matters not to retreat into nostalgia but rather to emphasise the immense changes that have taken place in legal education and in the work of law graduates in today's mobile and volatile world. The first, and most significant single factor in the improvement in legal education in the period, is the increase in the number of academic legal positions in New Zealand law schools. In 1953 there were some six full time academics, and none at Canterbury. By 1973 there were 90 overall; and now there are 20 at Canterbury and around 150 nationwide.

Next, and also crucial, law school libraries have improved dramatically. There were probably fewer than 20,000 books in law school libraries in 1953. When I arrived at the University of Michigan at the beginning of 1954 I found that the New Zealand section there contained more New Zealand law books than I had seen in any New Zealand libraries. Now there are close to 300,000 volumes in the libraries of the five law schools.



Sir Ivor Richardson unveiling a plaque to mark the official opening of the Law School Building.

There has been an explosion in the number of law students with nearly all being full time and most doing combined law/arts or law/commerce degrees. And there have been major curriculum developments reflecting changes in focus and the need for increased specialisation. Without a doubt the vast majority of students work far harder and standards are much higher than was the case 40 or even 20 years ago. Honours and masters courses have developed and there is a considerable body of academic research and writing, both staff and student, coming from the law schools. In recent years at Canterbury there has been a remarkable flow of outstanding major books and articles written by senior members of the faculty. With its outstanding faculty and effective leadership over many years this is a first class law school and this fine new facility will provide the setting in which further advances can be made.

If we are concerned with educating lawyers for the 21st century we need to ask what kind of society we want to have and expect to have and what role lawyers should have in that society? How do we set about achieving the social and economic goals we seek? What changes are required in the justice system to ensure that when judged by its accountability, its processes, its standards and its outcomes it meets community goals? What are the irreducible functions of lawyers in society? How do we ensure that adequate legal services are delivered to the full spectrum of society? Is legal education a multi-purpose course equally valuable for those expecting to be engaged in problem solving, negotiating and advising in business and in government as it is for those intending to practise law?

There are four points I suggest for consideration. The first is that we all like to think that rigorous training and the evaluation of legal principles and underlying policies are at the heart of legal education. There is a healthy insistence in much of our legal education on the examination of the social processes which legal rules now serve. Law graduates should be equipped by their training to facilitate the resolution of controversies that call for an evaluation of economic and social values and goals.

The second is the challenge for our society to develop laws and institutions that provide a proper balance between the rights and obligations of individuals, those of minority groups, particularly Maori and other ethnic minorities, and those of the community. In that balancing process we need to value cultural diversity and recognise the unique character of New Zealand's foundation.

The third point for consideration is the public interest in the balanced use of our scarce resources. That requires the efficient use and sustainable management of resources across the board. Legal rules and decisions of the Courts necessarily affect the use of society's resources and efficiency concerns ought to be weighed along with fairness and community values in those assessments. The position of women is an obvious and important example. Recognising and rectifying discrimination against women in the market place and in the corridors of power, not least by making attitudinal and consequent structural changes in law firms and in the public appointments processes, are required on efficiency grounds as well as in equity.

The fourth point is that the essential object of all society policy is to seek policies and structures to reflect the values and goals of the people. Inspired in part by their legal education lawyers can and should play pivotal roles in expanding a national view of a free and just society.

I urge all those students and staff who will benefit from these fine facilities to take up this challenge. It now gives me great pleasure to declare the Law Building officially open and I will shortly unveil a plaque to mark the event.

Professor Gerald Orchard

It is now 120 years since law was first taught at Canterbury, and over the last ten years the need for substantially expanded premises had become pressing. When the University moved to Ilam, Law was one of the Departments which occupied temporary accommodation in the library tower. Eventually we took up two floors for staff rooms, and one for the Law Library, but the space was quite inadequate. With almost 1000 students enrolled in law courses we had library seating for only about 50.

The Law Library is the hub of any Law School and it is the major feature of this building. The University has accepted and acted on a commitment to provide the students with the finest possible library accommodation – to the extent that two entire floors are occupied by the library. With the internal natural light provided by the two atriums, this now provides a pleasant and spacious working environment.

The building also includes a fine Moot Court which is located on the ground floor, along with seminar and tutorial rooms and a modern well-equipped lecture theatre. Staff offices are located on the fourth and fifth floors where there is also a common room, a well appointed staff library and faculty meeting room and a computer laboratory. The fourth floor also accommodates the Canterbury branch of the Institute of Professional Legal Studies, and the Department of American Studies.

The University has built for the present and the future. The building was designed for a long life, of 100 years or more, and has been planned to allow the Law School to expand in a permanent home into the 21st century. □

Correction

[1993] NZLJ 240

Regrettably during the production process a few lines of text were omitted from the article by Mr Donald Dugdale on the question of whether there was a need for the Contracts Enforcement Act 1956. This made that part of the text meaningless. The editor apologises for the error at [1993] NZLJ 240. The author was arguing for the abolition of the need to have contracts for the sale of land (as distinct from the actual instruments of conveyance as required under the Land Transfer Act 1952 and the Property Law Act 1952). Six numbered points were set out, but unfortunately points 3 and 4 were run together. The author first pointed out that present day circumstances are different from those in 1677 where s 4 of the Statute of Frauds was enacted. Secondly he said it was illogical to have one rule for land contracts and another for other contracts which could well be of far greater economic consequence. Points 3 and 4 should then have read:

3 The statute works injustice. A striking New Zealand illustration of this truism is the decision in *New Lynn Borough v Auckland Bus Co* [1964] NZLR 511, affd [1965] NZLR 542, where the absence of authorised writing meant that a plaintiff was refused specific performance of a contract the existence and terms of which were proved to the hilt. *Dellaca* is another.

4 An awareness of such injustices led the Courts at a very early stage in the life of the statute to devise the doctrine of part performance and the doctrine is carefully preserved by subs 2(3)(c) of the 1956 statute. There is no defiance of the statute (it was claimed) if relief is granted not on the basis of the oral contract but on the basis of acts done by the plaintiff in reliance on the contract. The decision of the House of Lords in *Steadman v Steadman* [1976] AC 536 has left the requirements of the doctrine uncertain in important respects. See for example the lengthy examination of the authorities which Tipping J needed to undertake in *Dellaca.*

Books

Judicial Remedies In Public Law

By Clive Lewis

Sweet & Maxwell (1992) 503 pp plus Index, ISBN 0-421-41030-2.

Reviewed by Rodney Harrison, Barrister, Auckland

Judicial Remedies In Public Law, by Clive Lewis, Barrister (Middle Temple) and Cambridge University Fellow, is a well-conceived book of considerable scholarship. It forms part of a growing body of legal literature dealing with specific aspects of public or administrative law. The burgeoning over the last few decades not merely of judicial review but of public law litigation generally has resulted in an explosion of case law, so that such specialist endeavours are increasingly necessary if particular topics are to be comprehensively treated.

In public law as in many areas of law, there is no clear delineation between principles of substantive law and legal remedy. Grounds for review, grounds for relief and the policy considerations relevant to both tend to interrelate, no more so than in relation to the old prerogative writs of certiorari, prohibition and mandamus and their modern counterparts. This lucidly-written text is of necessity therefore by no means limited to a discussion of remedies and procedures alone, although these are certainly its focus. The second chapter contains a concise summary of present-day English law governing the availability of judicial review. This includes detailed and useful discussions on such topics as the division between private and public functions, judicial review of the various categories of prerogative power, and review of bodies deriving their jurisdiction from contract or other private law origins. The English authorities in relation to the public law aspects of powers to contract and powers arising under contract – an area of continuing difficulty there as here – are examined in detail.

While a good deal of substantive English public law remains relevant to New Zealand, the same cannot be said for the adjectival English law governing the procedures of judicial review and, to some extent, the consequent availability of particular remedies. The 1977 reform of the Rules of the Supreme Court (Order 53), as expanded on by Section 31 of the Supreme Court Act 1981 (UK), introduced by a procedure by way of application for judicial review which bears little resemblance to its earlier, 1972 namesake in this country. At the same time, contemporary English law has its gaze turned squarely to the East, in the direction of European community law. It appears that, these days, the Commonwealth scarce rates a backwards glance from the English politician or indeed legal scholar.

Judicial Remedies In Public Law reflects these current English preoccupations. The consequence is that some significant sections of the book will be, for many local readers, of interest only on a comparative law basis. The comprehensive discussions of the English procedure for judicial review and the rule in *O'Reilly v Mackman,* and the chapter on remedies for the enforcement of European Economic Community Law in national Courts, are therefore, one anticipates, of fairly marginal relevance for New Zealand lawyers.

By the same token, the New Zealand legal chauvinist who cleaves to the belief – in the present reviewer's case, inculcated at the late Professor J F Northey's knee – that New Zealand cases and Judges have made a very significant contribution to the development of administrative law this century, will find little if anything in this book to inspire patriotic pride.

During an admittedly quick trawl through the table of cases, I was only able to find two recent New Zealand authorities, *Rowling* [misspelt as Rauling] *v Takaro Properties Limited* [1988] AC 473, cited no doubt in right of its being a Privy Council decision and *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129, dealing with the extent of the jurisdiction of a university visitor. Australian and Canadian cases appear to have fared little better. In a work of considerable scholarship, which cites many hundreds of English authorities, including numbers from *The Times*, the omission of significant Commonwealth authority in areas of difficulty or uncertainty seems to this colonial to be in some contrast to the approach adopted by the majority of modern writers on administrative law, from at least S A De Smith onward. By way of the merest example, it is suggested that the author's detailed discussions of judicial review of private bodies performing public functions and of Standing would have gained at least a little in completeness, had they referred to the decisions of the Court of Appeal and High Court in *Finnigan v NZRFU* [1985] 2 NZLR 159, 181. Likewise, the lengthy treatment of the conception of invalidity would surely have been illuminated by a reference to the decision of Fisher J in *Martin v Ryan* [1990] 2 NZLR 209.

That said, there are substantial chunks of the book which will provide the New Zealand practitioner in the public law field with a very valuable resource. There are separate chapters dealing comprehensively with the

administrative law consequences of invalidity; the prerogative remedies; declaration and injunction in public law; and Standing. Chapter 11 contains an extended discussion of the principles which govern the exercise of the discretion to refuse relief, and deals as well with the topic of exclusion of judicial review (including, but not limited to, privative clauses). The latter topic has some aspects which are peculiar to English law; but the discussion of the principles surrounding the judicial discretion is helpful and comprehensive. (For a recent and interesting extended discourse on this topic in this country, the reader is referred to the judgment of Williams J in *Maddever v Umawera School Board of Trustees* High Court, Whangarei Registry, CP 49/91, 24 September 1992, at pp 34-50.)

There is a chapter dealing with the substantive and procedural law of Habeas Corpus, a topic not always fully treated in the standard texts. There is also an extensive discussion of administrative law damages and the principles governing public authority liability. This latter goes far beyond remedies and contains such useful analysis of specific torts commonly arising in the administrative law context, contractual liability in public law, the applicability to public authorities of the law of restitution, and the law relating to Crown proceedings.

All of these topics are carefully analysed, with a welter of supporting authority. The analysis in these areas and throughout the book is frequently centred around particular problem areas of contemporary relevance, with the cases dealing with a specific subject matter, such as personal liberty, interference with livelihood or police misconduct.

This takes me to the one flaw in an otherwise excellent text: its index, which is somewhat less than adequate. For example, while there are as just stated separate sections dealing with decision-making affecting "personal liberty" and "livelihood", neither topic will be found under that entry in the index. There is a useful discussion on judicial reviewability of "managerial" decisions – but the topic "managerial decisions" is not in the index. There are two separate, quite extensive discussions of what is referred to in the text, and generally known, as "collateral attack" – indirect challenge of administrative decisions other than by way of judicial review. But the reader will not find these in the index under either "collateral attack" or even under "invalidity". Indeed, if the reader lacks persistence, he or she may well not locate them at all – which would be unfortunate, because of their undoubted quality.

These relatively minor criticisms inside, it must be said that Mr Lewis has produced a well-organised work which contains much sound analysis and comment on the enormous volume of cases in this area. it is a work which I am sure will be of great practical utility to English practitioners in the public law field, and which practitioners in this country seeking answers to the more difficult questions will most certainly find beneficial. □

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Trust claimants:
The end of the rainbow for tracing orders

By Penelope S Zohrab, LLM (London), Lecturer in Commercial Law, Victoria University of Wellington

This article considers the decision of the Court of Appeal in the case of Liggett v Kensington *and expresses some reservations about the analysis of the doctrine of tracing in that case following on from the decision of the Privy Council in* Space Investments v Canadian Imperial Bank of Commerce. *The writer considers that the implications of the New Zealand case are profound and may allow preferential recovery in circumstances where none would be available under the traditional theory which, among other matters, requires identifiability of the asset being traced. She concludes that this extension of the right of recovery by abolition of the identifiability norm marks a significant change in the law even if the extent of preferential recovery being available to trust claimants would depend on whether or not the Court considers it to be just in the particular circumstances.*

1 Introduction

More than half a decade after the sharemarket crash, the boundaries of equitable proprietary remedies continue to be tested in unprecedented fashion. Indeed, unorthodox claims to priority in the ensuing scramble for assets may prove to be the crash's most durable legacy. The impact of these claims is heightened further by the doctrinal flexibility and, some would say, at times radical response by the Courts. This is a development which has alarmed many in the business community.

The Court of Appeal decision in *Liggett v Kensington* [1993] 1 NZLR 257 is a case in point. While the Court's analysis in *Liggett* is of general significance to the issue of the availability of proprietary claims in insolvency,[1] it is its analysis of the tracing doctrine that will be the focus of this article.

Relying on the controversial advice of the Privy Council delivered in *Space Investments v Canadian Imperial Bank of Commerce* [1986] 3 All ER 75 the Court of Appeal has effectively dispensed with one of the tracing doctrine's traditional prerequisites – the "identifiability" requirement. In the extreme, there lies within the Court's analysis the possibility of a tracing doctrine freed from the constraints of its proprietary heritage, resulting ultimately in preferential recovery for the victims of equitable wrongs in a variety of circumstances. The implications of this are profound.

2 The identifiability requirement

Orthodox tracing theory insists, inter alia, that the trust claimant "identifies" an asset in an insolvent defendant's estate which represents, in whole or part, the claimant's trust property. As Paciocco explains:

> . . . (t)he remedy of tracing provides a plaintiff with the specific recovery of property. In equity, a plaintiff could traditionally use the remedy only where . . . the property remained identifiable or ascertainable in the defendant's hands. (Paciocco "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" [1989] 68 Can Bar Rev 315, 330.)

A trust claimant's equitable ownership of an "identified" asset, in conjunction with the separate property requirement (Paciocco, supra, 331) is used to distinguish the trust claimant from the insolvent defendant's general creditors and to justify the trust claimant's preferential recovery. (Paciocco, supra, 331.) Professor R M Goode,[2] for example, maintains that the tracing preference is sustainable on the basis that a specifically identified asset, far from being unfairly removed from the pool of assets available for distribution, at no point ever forms part of that pool. Professor Palmer explains the theory as follows:

> Having traced to some specific asset in the insolvent's estate, the claimant has an equitable claim against that asset. To allow that asset to be used to meet the claims of the general creditors would roughly equate with allowing the insolvent's debts to be discharged with the claimant's property. (G E Palmer in *Law of Restitution* (Little Brown & Co, Boston and Toronto, 1978) Vol 1, 183.)

Given that a trust claimant's continuous equitable ownership of an identified asset justifies, in part, the claimant's preferential recovery, any preferential recovery is therefore, generally regarded as disappearing with the disappearance or unascertainability of the claimant's trust property. (Paciocco, supra, 331-337). If a trust claimant cannot "identify" the trust property as subsisting in a separate or mixed fund or in a transactionally linked asset, no preferential recovery is justifiable in terms of orthodox tracing technique.

(Goode, fn 2 at 447.) Strict tracing theory does not permit a trust claimant preferential recovery in respect of causally but non transactionally-linked assets. (See D A Oesterle "Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC 9-306" (1983) 68 Cornell LRev 172.)

3 The identification process

Identification methodology was developed against a relatively controlled and factually simplistic background – the insolvency of an errant trustee. The methodology involves applying certain rules and presumptions developed primarily *"in order to identify"* a beneficiary's trust property and thereby to facilitate his or her preferential recovery to the extent of the loss. (Professor G Jones "Tracing Claims in the Modern World" (1987) *King's Counsel* 15 (emphasis added).)

These fictions and presumptions are artificial, mechanical and, in application, often uncertain and irrational. As such, the rules are arguably inappropriate and inadequate determinates of the availability of proprietary relief in a major corporate insolvency. Strict tracing technique in such complex circumstances is often laborious and complicated – perhaps even impossible. The operation of these rules can also be criticised in even relatively simple factual settings because of their tendency to produce arbitrary and unfairly disparate results between trust claimants. (Jones, supra at 18; Oesterle supra, 203-208.)

4 The "swollen assets" theory of tracing

The difficulties of proof when applying traditional tracing rules, in addition to their capacity to produce arbitrary results, led certain American Courts, when confronted with the bank failure litigation of the 1930s, to develop an alternative, significantly broader, theory of tracing. This theory effectively dispensed with the identifiability requirement and its associated fictions and presumptions. Certain trust depositors were thus excused from tracing to specific assets while others were accorded preferential recovery even if their trust property was dissipated. (Jones supra, at 16; Oesterle supra, 189, n 33.) If the relevant fund was significantly or totally dissipated, or the trust depositor could establish nothing beyond the bank trustee's initial receipt and misappropriation of the trust property, the trust depositor was then awarded an equitable lien on the insolvent bank's entire assets for the full amount of the loss in priority to the bank trustee's general creditors. (Oesterle supra, 189, n 33.) This is generally referred to as the "swollen assets" theory of tracing.

Broadly speaking, the "swollen assets" theory was applied if a trust depositor could establish an equitable wrong on the part of a bank trustee such as a misappropriation, breach of duty or receipt in the knowledge that insolvency was imminent. (Oesterle supra, 189, n 33.) The bank trustee's wrongful dealings with the trust property, combined with the direct or indirect augmentation of its assets, were held to entitle certain depositors to the equitable lien or charge over the bank's entire assets. (Oesterle supra, 189, n 33; Palmer supra, 183.)

Professor Palmer suggests that, in most instances, the practical effect of the theory is to accord preferential status solely on the basis of the nature of source of the trust depositor's claim. Under this "swollen assets theory" the right to preferential recovery does not disappear with the disappearance of the trust property because it is essentially the nature or source of the claim which creates the equitable interest and the preference (Palmer supra, 184) rather than the continued existence of specifically identified trust property. As Professor Palmer also points out:

> . . . [Courts and commentators in general] . . . have not been willing to go this far. The point at which they stop is sometimes arbitrary, particularly in the use of the tracing fictions . . . . (Y)et if account is to be taken of the source of the claim without making that a sufficient basis for preference, any intermediate point selected will often appear arbitrary. (at 185-186.)

Despite being subject to much criticism and now generally rejected by American Courts (Oesterle supra, 189, n 33), the "swollen assets theory" theory is not, in fact, without merit. The theory eliminates the need to apply complicated fictions and presumptions that are traditionally associated with the identifiability requirement. Additionally, the theory overcomes the traditional tracing doctrine's tendency to produce arbitrary and unfairly disparate results.[3] Professor Jones comments:

> These rules and presumptions are designed in *order to identify* the property of the plaintiff in the hands of the defendant. The plaintiff was said to succeed because he could point to an asset which belonged to him and which was now in the possession of the defendant. *But, in reality, the plaintiff, the beneficiaries of the trust, succeeded because equity thought that their claim should succeed.* (Jones, supra at 15, emphasis added.)

The "swollen assets" theory is most commonly criticised as being fallacious in that ". . . the money wrongfully taken does not augment the wrong-doer's assets that are available to the general creditors . . . 'At the time the wrong-doer's assets were swelled by the claimant's funds, he incurred a liability to the claimant in an equal amount' . . ." (Oesterle 189, n 33.)

This criticism is, however, by no means universally accepted. (Oesterle supra, 189, n 33; Taft, fn 3 below, 185.) Oesterle, for example, maintains that:

> Although the wrong-doer's estate is subject to the victim's claim for the wrongfully appropriated funds, the victim, if not granted a priority in distribution, will have his claim diluted by the equivalent claims of other creditors. Thus, the victim does not receive full compensation, and his loss augments the defendant's estate to the benefit of other creditors. (189, 190, n 33.)

Professor Jones (at 19) justifies the theory on the basis that if, for example, a claimant's trust moneys have been used to discharge an insolvent defendant's debt to an unsecured creditor, the contest is

between the trust claimant and the insolvent defendant's general creditors rather than between the insolvent defendant's general creditors. The nature or source of the trust claimant's claim sufficiently distinguishes him or her from general creditors. This is because the trust claimant at no point intended to advance credit to the insolvent defendant. (Jones, at 19, Taft fn 3 below, at 185.)

The implications of the "swollen assets" theory of tracing are profound. As Oesterle (supra, 189, n 33) points out, in dispensing with equitable ownership of identifiable property as the foundation of the tracing preference, the theory liberates the tracing doctrine from the constraints of its property heritage. This potentially entitles victims of equitable wrongs to preferential recovery in a wide variety of circumstances.

5 *Liggett v Kensington*

It is for this reason that the Court of Appeal's analysis of the tracing claim in *Liggett* is significant. The analysis of the tracing doctrine adopted by the Court of appeal echoes the "swollen assets" theory of tracing and opens the way for a reassessment of orthodox tracing technique – with all that entails.

The question of whether tracing is possible notwithstanding a claimant's inability to identify, in an orthodox sense, an asset in the defendant's hands which represents his or her trust property, arose in *Liggett* because the purchase moneys the claimants were attempting to trace had been paid into Goldcorp Exchange Ltd's (Exchange) substantially overdrawn bank account. The claimants' purchase moneys were thus ". . . no longer identifiable . ." (*Liggett v Kensington* [1993] 1 NZLR 257, at 295, McKay J) and were "incapable of being traced to specific assets". (at 272, Cooke P.)

Cooke P and Gault J relied on the advice of the Privy Council in *Space Investments* as authority for allowing the claimants to trace, on a "wider basis", their strictly unidentifiable and apparently dissipated purchase moneys.[4] The Court of Appeal used this "wider basis" to trace the claimant's purchase moneys to the bullion assets of Exchange, and by imposing an equitable charge over the bullion, allowed the claimants to recover in full priority over the unsecured creditors and the Bank of New Zealand as a debenture holder with a floating but subsequently crystallised debenture over stock-in-trade. On the reasoning adopted by the Court (as Cooke P points out in *Liggett*, supra, 275) the claimants' charge should have extended to all free assets of Exchange and not merely the bullion in its vaults. But as the directions sought by the receivers were confined to the bullion, Cooke P considered it inappropriate to grant such a declaration. Cooke P did, however, suggest that interests acquired in good faith and for value in specific assets may override this imposed equitable charge. (*Liggett*, at 275.)

The effective result of recognising a trust claimant's ability to trace on this "wider basis" and the consequent availability of this remedy will be that a trust claimant's preferential recovery is virtually assured, provided, inter alia, there exist unencumbered assets in the insolvency. This is apparently irrespective of the claimant's ability to satisfy the strict identifiability requirement. The corollary of recognising a non-consensual, non-registrable and hence non-visible proprietary remedy of this nature is the need for careful assessment and statement of the circumstances in which imposition of this charge is proper.

6 *Space Investments*

As indicated earlier, the Court of Appeal relied on the advice of the Privy Council in *Space Investments* to support its rather unorthodox interpretation of the prerequisites of an equitable tracing claim.

Space Investments itself concerned trust moneys placed with a Bahaman company, the Mercantile Bank Trust Co Ltd (MBT). MBT received the trust moneys in the capacity of trustee. In accordance with the express terms of the trust instrument and with the express sanction of the settlor, MBT placed the trust moneys on deposit with itself in its capacity as banker. MBT collapsed. It was argued on behalf of the trust creditors that their trust accounts should accord them priority over the claims of MBT's other depositors and unsecured creditors.[5]

The Privy Council ultimately held that the trust claimants ranked *pari passu* with MBT's other depositors and unsecured creditors for the amount standing to their credit at the point of MBT's liquidation. The authorised placement of the trust moneys on deposit with MBT, as banker, transformed the trust deposit account into one among many mere deposit accounts. "Ownership" of the moneys was transferred to MBT in its capacity as banker subject only to a personal obligation on behalf of MBT to repay on request. (Rickett and Zohrab fn 5, below, at 208.)

Lord Templeman, however, noted that the position would be radically different should a bank hold moneys in the capacity of trustee. In such circumstances the "ownership" of the moneys would remain with the beneficiaries. In the absence of an express authorisation in the trust instrument, the bank trustee, like any other trustee, is precluded from using the money as its own or employing it for its own benefit. A failure on the part of the bank trustee to adhere to its obligations as trustee (if, for example, the bank trustee were to treat the trust moneys as on deposit and as comprising part of its general assets) would involve a misappropriation of trust assets by the bank trustee. This would constitute a breach of trust and would place the bank trustee at risk of an action for damages for breach of trust entitling the beneficiaries to a tracing remedy. (*Space Investments v Canadian Imperial Bank of Commerce* [1986] 3 All ER 75, at 77).

In discussing the nature of the tracing remedy, Lord Templeman stated:

> A bank in fact uses all deposit monies for the general purposes of the bank. Whether a bank trustee lawfully receives deposits or wrongly treats trust money as on deposit from trusts, all the monies are in fact dealt with and expended by the bank for the general purposes of the bank. In these circumstances it is impossible for the beneficiaries . . . to trace their money into any particular assets belonging to the trustee bank. (at 76.)

His Lordship infers that the claimant's ability to identify the trust moneys, in an orthodox sense, is therefore at an end. This, of course, seriously jeopardises a successful tracing claim. His Lordship, however, apparently dispensing with the identification requirement and its associated fictions and assumptions, went on to suggest that the claimant's inability to trace misappropriated moneys to any particular bank asset would not preclude a tracing claim. He says:

> . . . equity allows the beneficiaries . . . to trace the trust money to all the assets of the bank and to recover the trust money by the exercise of an equitable charge over all the assets of the bank. Where an insolvent bank goes into liquidation that equitable charge secures for the beneficiaries and the trust priority over the claims of the customers in respect of their deposits and over the claims of all other unsecured creditors. (at 76-77.)

His Lordship appears to justify the availability of this remedy on the basis of trust depositors' "non-acceptance of any of the risks involved in the possible insolvency of the bank trustee". He states:

> This priority is conferred because the customers and other unsecured creditors voluntarily accept the risk that the trustee bank might become insolvent and unable to discharge its obligations in full. On the other hand, the settlor of the trust and the beneficiaries interested under the trust never accept any risks involved in the possible insolvency of the trustee bank. On the contrary, the settlor could be certain that if the trust monies were lawfully administered the trustee bank could never make use of trust money for its own purposes and would always be obliged to segregate trust money and trust property in the manner authorised by law and by the trust instrument free from any risks involved in the possible insolvency of the trustee bank. It is therefore equitable that when the trustee bank has unlawfully misappropriated trust money by treating the trust money as though it belonged to the bank beneficially . . . (that) . . . the claims of the beneficiaries should be paid in full out of the assets of the trustee bank in priority to the claims of the customers and other unsecured creditors of the bank . . .. (at 77.)

If the governing distinction for priority purposes in *Space Investments* is, as His Lordship appears to suggest, ultimately the nature or source of the trust depositor's claim, this represents a significant departure from orthodox tracing theory. The existence of a trust relationship has not generally been regarded as of, and in itself, entitling trust claimants to preferential recovery. This perhaps reflects a lingering concern with the doctrine's tendency to extend an insolvency preference which is neither consensual nor visible. Traditionally, concerns of this nature have manifested themselves, inter alia in the Court's application of the tracing fictions and presumptions. His Lordship's analysis is therefore highly controversial.

Indeed, Professor Jones (supra, at 15) contends that implicit in Lord Templeman's reasoning is a recognition that the nature of the plaintiff's claim is critical in determining whether a tracing claim should succeed. The extent of a claimant's preferential recovery, Professor Jones suggests, depends on whether the Court considers it just, in the particular circumstances, to accord a claimant the additional benefits which flow from the award of a proprietary claim. Professor Jones emphasises that the nature of a plaintiff's claim cannot be considered in isolation from his or her claim for relief. Where a claimant seeks the imposition of an equitable lien over a defendant's unencumbered assets to secure his or her preferential recovery to the extent of the loss, Professor Jones suggests:

> . . . (I)t may not be unjust to impose a lien over the unidentifiable and unencumbered assets of the defendant . . . as Lord Templeman concludes in *Space Investments*. (at 14.)

In view of the controversial nature of the Privy Council's advice, it is interesting to see their Lordships' approach echoed in the approach taken by the Court of Appeal in *Liggett* – in particular the Court's apparent acceptance of a claimant's "non taking of risk of the insolvency" as the governing distinction for priority purposes. Thus Cooke P states:

> The governing distinction in *Space Investments* is between trust beneficiaries not taking the risk of insolvency and lenders taking that risk. So here the unallocated exchange purchasers did not understand that they were taking any risk of insolvency on the part of exchange, whereas the bank, as debenture holder, certainly took some risk in relation to the assets of exchange over which it had no fixed charge . . . (T)he bank on electing to take over the Goldcorp account was in a better position to ascertain particulars of Exchange's trading methods and to assess the risks, than were the unallocated purchasers. It is not inequitable that the latter should have priority over the bank. (*Liggett*, supra, at 274.)

7 Criticisms of the *Space Investments* theory of tracing

As indicated earlier the advice of the Privy Council in *Space Investments* has been subjected to considerable criticism.[6] Much of this criticism also applies to the Court of Appeal's reasoning in *Liggett*. Professor Goode (fn 2, below at 446-447) for example, makes two main criticisms of the Privy Council's advice.

First, even if Lord Templeman is to be interpreted as requiring or assuming the continued existence of the claimant's misappropriated trust moneys (by virtue of his Lordship's reference to case law relating to the co-mingling of trust funds with the trustee's own assets), Professor Goode maintains it is difficult to accept that the claimants' tracing rights extend to all the bank trustee's assets.[7] In the same way, even if the Court of Appeal is to be interpreted as requiring or assuming the continued existence of the claimant's purchase moneys despite the fact that the purchase moneys were paid into Exchange's overdrawn bank account) it is

difficult to see that applying orthodox tracing technique can identify and isolate as the relevant fund the gold bullion held in the vaults of Exchange or, indeed, the entirety of Exchange's assets.[8] It is logically possible to extend the concept of the relevant fund to constitute Exchange's total assets (see Jones supra, 18-19; Townsend, fn 7, below, 201), but it is difficult to see that this is possible if strict tracing methodology is applied. Whether it is desirable to demand the application of strict tracing technique, given, inter-alia, the doctrine's potential to operate capriciously (Jones, at 18) and to arbitrarily discriminate between trust claimants is a different question.

Secondly, Professor Goode (fn 2 below, at 446) describes as "heterodox" any suggestion that where trust moneys are, in terms of orthodox tracing theory, lost, a trust claimant nevertheless has a proprietary claim to all the remaining assets of the trustee. Professor Goode (at 447) comments that if this is what Lord Templeman is to be interpreted as suggesting, this ". . . cannot be countenanced either in principle or policy . . ." as being unfair to the general creditors. Elements of this criticism are applicable to any form of non-consensual, non-registrable and hence non-visible preferential remedy in insolvency. Indeed, in fairness to the general creditors, it may be argued that, in the absence of express statutory provision or explicit security arrangements, there should be no, or, at best, extremely limited recourse to proprietary remedies in insolvencies. Indeed, preferential recovery, even on strict tracing theory, may be regarded as unfair to general creditors.

Conclusion

Liberated from one of the orthodox doctrinal constraints, the wider theory of tracing proposed in *Liggett* and *Space Investments* may allow preferential recovery in circumstances where none would be available under traditional theory. The issue raised by *Liggett* and *Space Investments* is, therefore, whether the identifiability requirement can safely be dispensed with.[9] In *Liggett* and *Space Investments* the trust claimant's preferential recovery is apparently justified on the assumption that the nature or source of the trust claimant's claim (the claimants not having accepted any risks involved in the defendant's insolvency) sufficiently distinguishes the trust claimant from both a defendant's general creditors and a debenture holder who has a floating but subsequently crystallised debenture covering stock-in-trade.

In effectively dispensing with the traditional doctrinal constraint of identifiability, the Court of Appeal has opened the way for a reassessment of the tracing doctrine and perhaps even the development of a tracing theory that enables victims of equitable wrongs to claim preferential status in a variety of circumstances. Concerns of this nature perhaps prompted the following comment from Professor Rickett where he questions whether the *Space Investments* theory of tracing should:

> . . . extend beyond . . . [cases of pre-existing proprietary interest under express trusts] . . . to cases where the proprietary interest arises other than under an express trust, for example, under fiduciary law or a restitutionary analysis? Is there not a *qualitative* difference between express trust beneficiaries, who are, as in *Space Investments*, innocent, non contracting parties, and other types of beneficiaries, who are, as in *Liggett*, at base contracting parties, even if they do argue successfully for an equitable analysis to be superimposed on the contractual relationship? (see fn 1 below, at 67-68.)

The availability of non-consensual and non-visible preferential remedies in insolvency has a deleterious effect on unsecured creditors and the certainty of title necessary for the smooth functioning of commerce![10] The Courts should, therefore, award remedies of this nature in a cautious and controlled manner. The Court of Appeal in *Liggett* questions the need for control of the tracing preference to take the form of a strict application of the identifiability requirement.

The corollary of the availability of a remedy of the nature suggested by the Court of Appeal is the need for a careful assessment and statement of the circumstances in which proprietary remedies are to be available in insolvency. Are we moving towards recognising that remedies of this nature are to be available, as Professor Jones (supra, at 15) suggests, on the basis of the nature or source of a plaintiff's claim? The implications of this are far reaching, even if, as Jones emphasises, the extent of a trust claimant's preferential recovery would depend in part on whether the Court considers it just, in the particular circumstances, to accord the claimant the additional benefits which flow from the granting of a proprietary claim. □

1 See Professor C E F Rickett "Proprietary Rights in Insolvency – Equitable Intervention in the New Zealand Court of Appeal" [1993] NZLJ 60; Dr J K Maxton "Equity" [1992] *NZ Recent Law Review* 123.

2 R M Goode "Ownership and Obligation in Commercial Transactions" (1987) LQR 433, 440.

3 K A Taft "A Defence of a Limited Use of the Swollen Assets Theory where Money has Wrongfully been Mingled With Other Money" (1939) 39 Col L Rev 172, 175-176.

4 It is, perhaps worthy of note that Cooke P sat with the Privy Council in *Space Investments.*

5 C E F Rickett and P S Zohrab "Trusteeship and Proprietary Remedies – Let the Banker Beware" [1991] *NZ Recent Law Review* 202, 208.

6 Goode supra, 446-447; Martin in *Hanbury & Maudsley on Modern Equity* (13th ed, 1989) 630; D Hayton "Developing the Law of Trusts for the Twenty-First Century" (1990) LQR 87, 101.

7 See W L Townsend "Tracing Technique in Bank Preference Cases" (1933) Uni Cin LR 201, 219-220.

8 See McKay J at 295 where he comments that the claimant's moneys ". . . cannot be regarded as being in any way *represented* by the maples held in the vault at the time of receivership . . ."

9 Glover "Bankruptcy and Constructive Trusts" (1991) 19 ABLR 98.

10 W Goodhart and G Jones "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 MLR 489, 512-513.

Ruling classes

The danger is not that a particular class is unfit to govern. Every class is unfit to govern.

Lord Acton

Obituary

The Right Honourable Sir Alexander Kingcome Turner, KBE

Sir Alexander Turner, lawyer, Judge, author and legal publisher died in Auckland on 7 July 1993, in his 92nd year. The funeral service was held in Auckland and subsequently a memorial service was held in Wellington. Both services were attended by a large gathering of Judges, practitioners, publishing colleagues, friends and relations. The eulogies of Mr Donald Dugdale, Hon Justice Barker, and Rt Hon Sir Robin Cooke are published as a mark of respect for the memory of a man of great qualities of mind and personality.

Funeral Service at St Mary's, Parnell, Auckland, 10 July 1993

Mr Donald Dugdale

Sir Alexander Turner was born in Auckland on 18 November 1901. His father Joseph, described by his son as "a Christchurch man with a good classics degree" was head of the Classics Department and later Deputy Headmaster of the Auckland Grammar School. In 1913, at the young age of 44, Joseph Turner died suddenly leaving four sons, of whom Alexander, aged 11 when his father died, was the eldest. Joseph's widow Gertrude was left poorly provided for and Sir Alexander was to say in old age that "our young days were passed in conditions which can only be described as poverty". Gertrude Turner was the daughter of a leading Methodist minister and must have been a remarkable woman for there emerged from the brood reared by this solo mother not only Sir Alexander but also Professor Francis John Turner the eminent geologist. In 1963 honorary doctorates were conferred on the two brothers at the same ceremony by the University of Auckland.

But that is to run ahead. Turner attended the Auckland Grammar School where he won a University Entrance scholarship with the aid of which he was able to attend Auckland University. He graduated MA with first class honours in economics in 1922 (that is at age 21) and in the following year completed his LLB and was admitted as a barrister and solicitor. This prowess should not leave you with a picture of a narrowly focused academic. He was Auckland table tennis champion in 1926 and Auckland mixed doubles tennis champion in 1931, achievements of which he was sufficiently proud to ensure that his *Who's Who* entry carefully recorded them.

Sir Alexander qualified as a barrister and solicitor at a period in which the economic climate discouraged the established Auckland firms from admitting new partners. Turner had no alternative but to set up his own shingle. In his own words (spoken in 1953) –

> I left in December 1926 to shiver on my own in a hard cold world starting in a little sideroom in Hornes Building in Vulcan Lane. This is now part of the offices of Messrs Baxter Shrewsbury Milliken and Murdoch; and I think that they use what was my suite of offices as a cupboard in which to put away their files.

Turner was joined in partnership in 1936 by W H G Kensington. At first like any other struggling young lawyer Turner turned his hand to whatever legal work would help bring in an income. But as his reputation as an advocate grew he came to specialise in Court work. In 1942 Turner and Kensington combined their practice with that of a one-man practitioner L B Haynes. This formidable triumvirate of complementary talents endured until Turner left to take silk in 1952; the firm survives as part of the national conglomerate Kensington Swan.

I am not old enough to be able to give you a first hand account of Turner the advocate. His contemporaries remarked on his courage, his industry, his powers of concentration and his ability swiftly to discern the salient points in a complex mass of facts. Despite the demands of establishing a legal practice from scratch Turner found time to serve his alma mater. He was a member of the Auckland University College Council from 1935 until 1951. He was properly proud of that record of service; he was proud too of his service as a member of the Massey Agricultural College Board of Governors from 1944 to 1953. He was, I suspect, proudest of all of the real estate coup by himself and Hollis Cocker which enabled Auckland University to obtain the lease of Stonehurst Private Hotel which became the first O'Rorke Hall. My own friendship with Sir Alexander

dates from occasions when as an insufficiently respectful student leader I was from time to time firmly put in my place by A K Turner QC, Chairman of the College Council's Hostel Committee.

The year following his taking silk Sir Alexander was appointed a Judge of the Supreme Court. He served in that capacity until 1962 when he was appointed a member of the Court of Appeal of which he became president in 1972 retiring in 1973. Of Sir Alexander's qualities as a Judge I wish to refer to two matters. One was his superb command of the English language. One looks back wistfully to the days when shining like jewels in the arid wastes of the *New Zealand Law Reports* one could find the judgments of Mr Justice Turner wirtten with grace and wit and lucidity and that (be it noted of his Supreme Court period) while working under the enormous pressures to which Auckland Judges were then subject. The other aspect of Sir Alexander which lawyers of my generation remember with gratitude and affection is his kindness to the Bar and more particularly to those taking their first faltering steps as barristers. He was blessed with an enormous ability to get the best out of people; he would have made a marvellous teacher and never lost an opportunity to explain to young counsel why what they wanted to do could not be done or how what they were doing could be done better.

The permanent New Zealand Court of Appeal was still a relatively fledgling institution when Sir Alexander joined it. I am, I believe, not alone in looking back to the period when the Court was made up of Sir Alfred North, with his marked acerbity of manner tempered by Sir Alexander Turner's good humour and profound learning and with Sir Thaddeus McCarthy supplying a sort of Irish down-to-earth practicality to the mix as a golden age in the history of that tribunal.

On Sir Alexander's retirement from the presidency of the Court of Appeal there followed a remarkable late flowering. What he did was accept a role with Butterworths of New Zealand, the legal publishers. He described himself as re-entering the practising profession. We were to address him as Alec. In the ensuing years we saw those same abilities at getting the best out of people employed in coaxing from busy practitioners important contributions to New Zealand legal authorship. Nor was Turner's own pen still. It amused him to transform into modern textbooks that are today used and cited with respect throughout the common law world four text-books published between 1907 and 1927 by an English barrister named George Spencer Bower. Their charm for Turner was their wealth of literary allusion, for Bower was a scholar of the old type "knowing the ancient authors through and through by constant daily intercourse".

As to the domestic as distinct from the public Turner, he had the enormous good fortune to be matched with a wife whose abilities were no less than his own. Let me read you his own tribute to Lady Turner delivered at a dinner given by Butterworths to mark his 90th birthday –

> Born Dorothea Mulgan she has walked by my side, though pursuing at the same time an independent course, for the past 57 years. As you will know she is a really eminent Greek scholar with few equals in the country in this regard, and is known equally widely as the author of the standard New Zealand text on the life and works of Jane Mander, and is a leading sociological and literary critic of the New Zealand scene. Her company has constantly inspired me since the earliest stages of my professional career.

Sir Alexander collected his share of glittering prizes – Knight Bachelor in 1963, KBE in 1972, Privy Councillor. One always had the sense that for Turner while these baubles were welcome his real purpose in life was to put to proper use the great talents with which he had been endowed. He was proud of being a New Zealander, doing little in the way of foreign travel and showing no particular interest in exercising his right to sit with the Lords of the Privy Council in Downing Street. His was the generation of New Zealanders in which one saw the first stirrings of a New Zealand nationalism unconnected to British apron strings. Just as the writers and painters of his generation were concerned to create a distinctive New Zealand artistic vision so also was Sir Alexander Turner concerned to build up a New Zealand law derived from but distinct from that of England. The speed at which he pursued this objective in his judicial work was less headlong than has seemed appropriate to some of his successors. His achievements are most clearly observable in his steps to ensure for New Zealand its own distinctive canon of legal writing.

It was a source of great happiness to all his friends that at the end Sir Alexander slipped away peacefully having been spared any significant physical misery or diminution in his faculties. Today is an occasion to rejoice in the life of a great New Zealander and a good and worthy man.

Hon Justice Barker

We gather today to pay tribute to the life of a truly extraordinary New Zealander, Sir Alexander Turner; blessed with a superb intellect, he was a man of great humanity, simple lifestyle, ready wit and unfailing courtesy.

His early life has already been mentioned. Like Mr Dugdale, I cannot speak at first hand of Sir Alexander's career at the Bar. Many of his contemporaries in the profession regarded him as a lawyer's lawyer, who was, nevertheless a fluent and courageous advocate who understood human nature.

He was an intellectual leader in the powerful Auckland Bar of the 1940s and 50s. Some of the members of that close-knit Bar were to become his judicial colleagues. One of his favourite photographs (which he donated to the Auckland Judges' commonroom), shows him and A K North in barrister's garb: "That's the only photograph of Alfred North and me together and in the only case on which we were ever on the same side" quoth Sir Alexander. The case was

one of the many arising out of the waterfront troubles of the post-war period.

Earlier this year, when being driven along the waterfront, he remarked on how the beauty of the Waitemata Harbour had been preserved by the exertions of the late D M Robinson. Sir Alexander's gift of instant recall was triggered. With economy of language, enhanced by humorous aside, he described a cause celebre of its time – a defamation action involving Mr Robinson and the drainage issue. Sir Alexander recalled verbatim his detailed and technical cross-examination of an expert witness some 45 years before. That tour de force demonstrated what a formidable and brilliant advocate he must have been – one able to master abstruse technical subjects and make them comprehensible to a jury.

Sir Alexander took Silk in 1952 along with H P Richmond and L P Leary; the three were said to have been one of the first creations of Silk in the reign of the present Monarch.

His appointment to the Bench in 1953 was inevitable. After some two years' exile, he became a resident Judge in Auckland until his appointment to the Court of Appeal in 1962. As a first instance Judge, he expected high standards from counsel. Whilst always kindly, he could be impatient with the woolly thinker and the unprepared. But for counsel who had made an effort to master the brief, a more helpful Judge could not be found. He was equally at ease in criminal or civil cases, with or without a jury.

He amazed the Bar by his ability during legal argument to state in a succinct and articulate manner the proposition counsel was endeavouring clumsily to make. One would be momentarily grateful that the Judge had absorbed the argument so comprehensively, until Sir Alexander would immediately state the opposing argument with equal clarity. His inauguration of the system of conducting Chambers matters in open Court was an early and devastingly effective form of continuing legal education.

On the Court of Appeal, his amazing capacity for critical analysis accompanied by lucid exposition was seen at its best. His written judgments in that forum still enlighten and delight. His presidency of that Court whilst relatively brief, underpinned his contribution to the institution.

The Right Honourable Sir Alexander Turner, KBE

Mr Dugdale has spoken of Sir Alexander's so-called retirement. Few would have thought that his career in legal publishing would have lasted almost 20 years. He used personally to visit those whom he deemed worthy of candidate status as *Halsbury* contributors or text writers. Many of those will now treasure his letters which courteously pointed out blemishes, corrected style and made constructive suggestions. His literary skill enhanced the manuscripts of many authors, at the cost of hours of his time, willingly given in his quest for excellence.

He was one of the most distinguished jurists in New Zealand's history; jurist is a word of highest praise that should be reserved for the few. He combined greatness as a Judge with greatness as a legal scholar. He told me recently how he would have liked to have produced another edition of *Spencer Bower & Turner on Estoppel*. Although further legal writing had not been dismissed from his agenda, he felt that the time had come for a younger author.

Sir Alexander was an Aucklander at heart. He lived here for almost all the first 60 years of his life. He happily spent his last year in Auckland in the loving care of his daughter and grandson. Despite failing mobility, he remained alert, interested, informed and wise to the end.

He loved the old Auckland High Court building which had witnessed so many of his forensic triumphs and disappointments; he was eager to view the restored No 1 Court. On the occasion of his close inspection of that Courtroom – no other words are appropriate – the memories came flooding back. He stopped at one point between the dock counsel's door and announced: "This is the point at which I was thrown out of this Courtroom by a policeman who refused to acknowledge that I had a right to be present as a member of the Bar during a Court sitting". This incident had occurred during some high profile case in the 1930s. Later, the trial Judge had

acknowledged his right as a barrister to have been present.

Sir Alexander approved of the new Court building and enjoyed meeting what for him was a new team of Judges, now increased to thirteen from the time when four were responsible for all Supreme Court business north of Taupo. How they coped is hard to imagine.

Sir Alexander's love of Auckland found a practical outlet in his years of service to the Council of Auckland University College (as it then was). I speak as Chancellor on behalf of the University of Auckland to pay tribute to his contribution to University education over a period of some 16 years. He was at the time of his death the University's oldest living honorary graduate. He was a President of the Student Association in the 1920s at a time of a golden group of students who later were to make substantial marks worldwide. He retained his interest in the affairs of *his* University – as he saw it – until his death.

It is almost 50 years since he was largely responsible for purchasing the land on which the University's sports complex and its Tamaki Campus now stand. He was thrilled to see the developing Tamaki campus and to know that his purchase would cater for new generations of students. As a former sportsman, he could not credit that superb playing fields at University Park had been created out of the raw land he had been instrumental in acquiring.

He had also been a member of the Council of Massey Agricultural College (as it used to be) and was interested to view Massey University's new campus at Albany.

We shall miss Sir Alexander's informed, considered and incisive comment on a range of topics – legal, international and social. No longer shall we be able to wonder at a mind honed by literature, the classics and general learning.

All, in this Church, are grateful to have had some part in the life of this truly great New Zealander. We thank God for his long and fruitful life which has enriched our nation and ourselves.

Memorial Service at Old St Paul's, Wellington, 16 July 1993

Rt Hon Sir Robin Cooke

He expressed a wish that I should speak, but, contrary to his usual way with authors, left no instructions as to content. It is a matter of selecting from the rich store of achievement that was his life.

Alexander Kingcome Turner was born in Auckland on 18 November 1901, the first of four sons of Joseph Hurst Turner, first assistant and chief classical master at Auckland Grammar School, and Gertrude Kingcome Reid. His maternal grandfather was the Reverend Alexander Reid, a leading figure in the Methodist Church. The biblical and classical influences remained on him throughout life: quotations from Terence and Virgil, the apt use of a parable from the New Testament. Though not formally a religious person, he had, I believe, a deeply personal Christianity. His father died when Alec was aged eleven; the family went through hard times, reflected in Alec's compassion for the underdog. Indeed never, until perhaps the last years, was he well-off financially; and he never owned nor even drove a motor car. His long-time colleague, Sir Thaddeus McCarthy, who because of a speaking engagement elsewhere in New Zealand regrettably cannot be here today, puts humanity as the first of his characteristics.

From the Grammar School Alec went on a University Entrance scholarship to Auckland University College, graduating as Bachelor of Arts, Master of Arts with first-class honours in economics (and he would introduce economic theory into his judgments: see *Wellington City Council v National Bank* [1970] NZLR 660, 678) and finally in 1923 as Bachelor of Laws.

After working for an Auckland firm he began practice on his own account and founded Turner Kensington and Haynes, which may be traced into today's much larger national firm, Kensington Swan. He continued with the firm until 1951, building up as a barrister a reputation extending beyond Auckland. My own first contact with him was when, as an employee of Chapman Tripp & Co in the late nineteen-forties, I was instructed to brief him for a major commercial client of that firm.

In 1928 he accepted a recall to student affairs, becoming President of the Auckland University Students Association at a time when they needed help in financial troubles. That led to membership for 16 years of the University Council and representation of the University as a Governor of Massey Agricultural College. In the latter capacity he had the foresight to play a major role in saving from extinction the Drysdale sheep, to the lasting benefit of the New Zealand carpet industry. His interest in agricultural research led to a Carnegie Travelling Fellowship in the United States in 1949. In 1965 his *alma mater* conferred upon him an honorary doctorate on the same day as it similarly honoured his scarcely less eminent brother Frank, a professor of geology at Berkeley, California.

In 1934 he married Dorothea Mulgan, a member of one of New Zealand's most distinguished literary families. Happily Lady Turner has been able to be here today, together with their children, Nicholas, Frances and Joseph and their grandchildren Alexander and Christine. The association of Alec and Dorothea had begun in university days and theirs was a singularly happy union of interests. Alec was a devoted husband, father and grandfather, rejoicing in

reading to Christine from *Palgrave's Golden Treasury* and the novels of Dickens and Jane Austen, and showing prowess in his own home even on the rather different front of housework.

In the law Turner progressed on the strength of ability and industry and without influential connections. By 1951 he had achieved a standing recognised by his appointment as Queen's Counsel. Three in Auckland, H P Richmond, L P Leary and Turner himself were called to the Inner Bar on the same day, 8 February 1952. Their warrants had been made out in the name of George VI but the King died before their call; so they are reputed to have been both the last such counsel appointed in the old reign and the first in the new; but Turner was to practise as a Queen's Counsel for scarcely more than a year before his appointment as a Judge of the Supreme Court.

After initial sitting experience in Wellington and other places outside his home city, as was considered expedient in those days, Turner became a resident Judge in Auckland and ultimately senior Judge there, although the modern expression Executive Judge would not have had a powerful appeal to him. From time to time he served his turn in the Court of Appeal before its establishment as a Court of permanent Judges in 1958. In 1962 he was appointed a permanent Judge of our Court after the death of Sir Timothy Cleary. He became President in 1972 on the retirement of Sir Alfred North as North approached the retiring age of 72; and he himself retired on approaching that age some 16 months later. He was knighted in 1963 and became a member of the Privy Council in 1968, although an opportunity never arose for him to sit there, so the impact of such an experience on his views about the Privy Council appeal has been denied to us. His KBE came with appointment to the presidency.

Then began the final phase, a long Indian summer, when he served as a director and chief legal editor in New Zealand for the leading law publishers, Butterworths. For Butterworths he had begun and now continued the virtual rewriting, under the description of new editions, of the works of George Spencer Bower, an English King's Counsel, *Estoppel by Representation, Res Judicata, Actionable Misrepresentation,* and *Actionable Non-Disclosure* (the last with Professor Richard Sutton as late as 1990). His work brought an immeasurable increase in the status of those books. For Butterworths he took charge of the New Zealand Commentary on *Halsbury's Laws of England*, indefatigably prodding the selected contributors and ensuring the accuracy of their work; likewise with a line of standard New Zealand textbooks. This was one of the most fruitful periods of his life, seen by him as no less significant than his judicial work. It is gratifying that Mr Christie of Butterworths, who persuaded him to join them, is here today.

Alec expressed a sense that much of his life in the law was under the shadow of the other A K, Alfred Kingsley North, his senior by a year, with a larger and more lucrative practice as an Auckland barrister, his predecessor in appointments to the Supreme Court and Court of Appeal. This was not a perception shared by those of us who admired the contrasting merits of both. Turner was more scholarly, more patient, more serene, less impulsive. Even he may have come to see that the balance was restored by the international reputation which he gained as a textbook writer, sharing a stature with Sir John Salmond.

At the bar he is especially associated with two cases in which confession evidence obtained by the police was ruled out for threats or inducements, *Gardner* in 1932 and *Phillips* in 1949; and on the bench he wrote one of the judgments in *Convery* in 1967 and the sole judgment in *Naniseni* in 1970, leading cases on the same subject, on each occasion reaching a different conclusion from those for which he had argued in the old days. In *Gardner*, after persuading Smith J at the trial, he was led by P B Cooke at the Court of Appeal stage. Under the presidency of Sir Michael Myers the Court called on them to argue limited grounds only, which may have been the origin of Turner's respect for Myers, whom he recently described as "reigning over his Court in majestic but not altogether pleasant fashion".

It came about that Cooke, North and Turner sat together occasionally in the old Court of Appeal. They were a congenial team and their association could well have been renewed on the reconstructed Court of Appeal, but Cooke died in 1956 and his place in Sir John Marshall's permanent Court went to North. Turner and McCarthy joined North before long. For a decade they constituted a strong and formidable Court indeed.

"I have myself more than once said that the law of evidence is Judge-made law . . . and that if it requires modification, that modification is particularly a matter with which the Judges should be entrusted". Thus Turner spoke in *Jorgensen's* case in 1969, one of a well-known number in which the Court of that era introduced with due caution the distinctively New Zealand approach to common law which inevitably prevails today. On the whole, though, he was a conservative Judge and jurist, concerned for instance at what he saw as the undue haste with which the modern matrimonial property legislation had been enacted. Naturally he was not attracted to the approach of Lord Denning, moving as he put it "now in this direction, now in that". He told the rather charming story of dining as Denning's guest when in London he was preparing an edition of the *Estoppel*. Each had the keenest interest in Denning's *High Trees* doctrine: perhaps they were the two most learned persons in the world on the subject; yet the evening passed without either plucking up the courage to broach it. I used to tell Lord Denning, some two years the older, that Alec Turner also was still alive, but on a recent visit to England had not the heart to disclose that this was no longer so.

Alec's interests outside the law were longer than one can list. A first-class tennis player and commentator; a radio commentator on international affairs also; a discriminating lover of music – he taught me that Respighi's *Fountains of Rome* was vulgar; a steady golfer until his eighties, often playing with his friend Sir Peter Quilliam, who was also one of his principal chauffeurs. Above all he was steeped in literature; it was a perennial source of strength and happiness to him. He lent me his edition of Proust. Some years of intermittent reading were needed to get through the twelve volumes. When the

operation was at last accomplished I offered to return the set. He said that he would rather not have it back just yet; when the time was right he would ask for it. The time was never to come. Death duty has been abolished but his executors still have the right to get in the estate. Very shortly before his death he returned to me an edition of *Broom's Legal Maxims* which had belonged to my grandfather, then my father and had passed to Alec on my father's death. Perhaps there was some message in this gesture. It is an heirloom which will be passed on as appropriate.

He had physical as well as intellectual stamina, surviving late in life challenges to his health and the effects of being literally carried away and dashed down by a Wellington wind.

This is a memorial, not a funeral service, and it has not seemed right to dwell on the sorrow of his family, to whom our hearts go out, and his host of friends. His friends were legion. The work of lawyers can lead to hard feelings, but if Alec had any enemies they must have been strange people indeed. The older he became, the more widely was he loved. The celebrations of his ninetieth birthday were joyous occasions. Taking him down by car to the judicial dinner I found him nervous, worried whether he would be able to say anything. In the event he spoke with superb accuracy for some 40 minutes, without a note. It was a last triumph. Now the trumpets are sounding for him on the other side. □

Correspondence

Dear Sir,

re [1993] NZLJ 229

I wish to dissociate my article "A new role for the Maori Courts in the resolution of Waitangi claims?" ([1993] *NZLJ* 229) from the accompanying italicised editorial preface. The editor's remarks wholly misdescribed the character of the article. The editor commented that I "strongly support" a "separatist" policy embodied in Te Ture Whenua Maori Act 1993. This gave a misleading impression of the content which, I gather from the information which has been reaching me, has led readers to form an incorrect view of the matters raised by the article.

The thrust of the article is to note the growing involvement of the Maori Land Court in the claims process over the past years. My article suggests that the new Act *possibly* and (probably) inadvertently gives a basis for the Maori Land Court to take a dramatically increased profile in this process. I do not suggest that this is a good or bad thing – the article merely notes the possibility and its implications without drawing any welcoming or hostile conclusion.

If it is "separatist" to note as overdue the legislative provision of a facilitative legal regime by which groups of Maori freehold land owners can construct land management structures sensitive to their socio-cultural situation (as opposed to the imposed and fragmented tenancy in common which presently encumbers their land titles), then this is a novel allegation. The aspects of Te Ture Whenua to which the editor directs his "separatist" comments simply amount to the legislative provision of means by which owners of private property can organise themselves in a way which is both economically and culturally viable. This is a policy which is normally available (by way of contract or trust instrument) to owners of General Land. Te Ture Whenua simply undoes a century of a rather inflexible regime and through the Maori Land Court allows Maori land owners the better opportunity to formulate management structures by means (the trust instrument) which have always been available to other forms of land owning. To colour as "separatist" the fuller extension to owners of Maori freehold land of rights which other group owners of land have always held, is perverse.

But that is to progress into an argument which my article did not address. If that was a debate which the editor wished to take further then a more appropriate location should have been selected than a preface which readers take to encapsulate the thrust of the article. It was an inaccurate portrayal of what the article said.

In consequence, many may have missed the important point: that as a result of what seems to have been legislative inadvertence, the Act possibly allows the Maori Land Court to issue orders affecting *any land* subject to an outstanding Maori claim. This comes at a time when the Government has indicated it will introduce legislation making it plain that the Waitangi Tribunal cannot issue recommendations in relation to privately-held land. At the same moment as saying that, it may be argued that the Government has sponsored legislation which gives the Maori Land Court jurisdiction which may extend to privately-held land subject to a Treaty claim. Even if the Tribunal can make findings regarding such land the status of these is no more than recommendatory, however an order of the Maori Land Court is a different matter altogether in that it can *directly affect privately-owned land.* I am disturbed that the editorial comments have masked discussion of this pressing question: Did Parliament intend the Maori Land Court to be able to intervene in the claims process with binding orders affecting *any land*?

Dr P G McHugh
Sidney Sussex College
Cambridge

Response: Dr McHugh indicates that other readers formed a similar impression of the article to that indicated in the very brief introductory note. Presumably the readers he refers to would not have based their opinion on a short phrase in the introduction, but would have read the whole article. The editorial preface would consequently appear not to have been totally unjustifiable. In any event a short six line introduction cannot hope, or be expected to encapsulate a four page article. Furthermore to describe a legislative provision as "overdue" will certainly read to most people as drawing a welcoming conclusion. Those interested are invited to re-read Dr McHugh's original article to form their own opinion — Editor

The United Nations Convention on Contracts for the International Sale of Goods: The Vienna Sales Convention 1980

By C C Nicoll, Department of Commercial Law, University of Auckland

As New Zealand business interests become more involved in the wider world, the legal profession must become aware of the international legal implications of their work. This article considers the International Convention on the International Sale of Goods which the Law Commission has recommended New Zealand should accede to. The article, in the first part, covers the scope of the Convention and contract formation. This part has been written by Mr C C Nicoll. The second part, which will be published next month, is written by Dr Wayne Mapp and Mr Nicoll and deals with obligations of the parties and remedies.

I Brief history and origins

The Vienna Convention of 1980 sprang from two Uniform Laws adopted by a conference at the Hague on 25 April 1964: The Uniform Law for the International Sale of Goods and The Uniform Law for the Formation of Contracts for the International Sale of Goods ("The Laws").

These progenitors never achieved wide currency, ratified singly or together by only nine states in total: Belgium, Israel, West Germany (as it then was), United Kingdom, Gambia, San Marino, Netherlands, Italy and Luxembourg.

Two reasons may be advanced for their lukewarm reception. First, they were perceived as being the product of essentially Western European scholarship. A bias was detected in favour of the seller amongst countries which are essentially importers of manufactured goods.

Secondly, it was easy to opt out of the Uniform Laws. By United Kingdom law, for example, The Laws are only applicable if chosen by the parties to the contract. As a result, the Laws failed to become familiar either to the international market place or within the domestic setting of some countries which had ratified.

These problems are, to a large extent, resolved in the Vienna Convention which amalgamated the topics covered by its predecessors, provided a sophisticated synthesis of the civil and common law approaches and balanced, to a degree unusual in uniform international laws, the different and competing interests of the First, Second and Third Worlds.

A general level of satisfaction with the new regime is evident from a perusal of statistics gathered together in Law Commission Report No 23 which, it should be emphasised, recommends New Zealand's accession.

Europe (both East and West) is well represented among ratifying or acceding states. Significant non European parties are: Canada, United States, Australia, China and the former USSR. For the year ended June 1989, Contracting States represented just over 61% of world trade and over 50% of New Zealand's trade. These percentages, particularly the latter, will increase if the United Kingdom ratifies. In view of the fact that all of that country's major trading partners have ratified, its accession is probable.

II Scope

Introduction

The question of the Convention's scope may be approached in three ways. First, it is limited by the classification of the contract of sale. Secondly, even with respect to contracts of sale which it covers, its scope is not conterminous with domestic contract law. Thirdly, its scope may be limited by reservations of Contracting States and by the "contracting out" of the parties to the contract.

The Contract of Sale

The Convention applies to contracts for the sale of goods with some significant exceptions, for example, ships and aircraft.

Art 3(2) dictates that contracts for the supply of both goods and services are categorised according to the component, ie goods or services, which predominates. Contracts in which the "preponderant" obligations relate to the supply of goods are inside the Convention; otherwise they lie outside.

Contracts which call for the goods "to be manufactured" form a special class. They are considered by Art 3(1) to be sales unless the person seeking to procure the goods undertakes to supply a "substantial" part of the raw materials. It should be noted that such contracts will fall within the Convention if the supplied raw materials are a "substantial" although not a "preponderant" part of the

total. Given that these adjectives of comparison bear different meanings, Art 3(1) and Art 3(2) must be construed so as to avoid any overlap between the contracts to which they refer.

In addition to being contracts for the sale of goods, contracts to which the Convention applies must have an international character.

The necessary international character is supplied not by reference to movement of the goods themselves in the course of the contract's fulfilment but by the proper law of the contract and by the situation of buyer and seller.

Provided the parties have places of business in *different* states, the Convention will attach if both states are Contracting States or if the proper law of the contract is that of a Contracting State. As a result, a contract between a buyer with its relevant place of business in New Zealand will be subject to the Convention if the law of the contract is Australian. This is because Australia is a Contracting State. New Zealand is not yet, of course, a Contracting State.

"Place of business" does not necessarily mean "registered" or "head" office. If a party has more than one place of business, the relevant place will be that which has "the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract".

So, for example, if an Australian seller with its head office in Sydney but an office in Auckland, contracts through its Auckland office to deliver goods ex Auckland store to a New Zealand company in Wellington, the Convention would be unlikely to apply even if New Zealand had at that time ratified.

If, on the other hand, all the negotiations had been undertaken through the Sydney office, the Auckland store being the mere point of departure of the goods, the Convention would likely apply notwithstanding that the goods would cross no national boundary. This latter example also assumes ratification by New Zealand.

How far is domestic law relevant?
Questions of the validity of the contract are not covered by the Convention; domestic law has residual application. So, for example, contracts which are illegal at common law would not survive simply because they fall within the ambit of the Convention.

The Convention does not cover the contract's effect on property in the goods sold and it does not cover liability for personal injury or death caused by the goods sold.

"Contracting Out" by Contracting States and by parties to the Contract
Contracting States may reduce the Convention's sphere of operation as follows:

1 A State may declare that it will not be bound by either Part II which deals with the contract's formation or by Part III which covers rights, remedies and obligations.
2 A State may, within limits, restrict application to only some of its territorial units.
3 A Contracting State may, as between itself and a non Contracting State, opt out of the Convention if both such states have the same or closely related law on matters otherwise covered by the Convention.
4 A Contracting State may opt out of Art 1 (1)(b) which provides for the application of the Convention to be dictated by the proper law of the contract. The United States, for example, has made this reservation. So, for example, the Convention will only apply to a United States buyer if the seller has its relevant place of business in another Contracting State.
5 If a Contracting State has legislation governing the manner by which a contract must be evidenced, eg in writing, that state may contract out of the Convention's liberal provisions as to form, viz that the contract "need not be concluded in or evidenced by writing and is not subject to any other requirements as to form".

Contracting out by parties may occur actively or passively. The most obvious example of active contracting out to circumvent the Convention entirely would be to make specific provision in the contract or sale that the Convention does not apply, alternatively, one may provide for an inconsistent proper law. It has also been suggested that "implicit" contracting out may be achieved by incorporation of terms and conditions capable of explanation only within the context of the law of a non-Contracting State.

If the intention is to avoid or vary some only of the provisions of the Convention, such may be achieved expressly or implicitly by the parties. A common means of implicit contracting out of aspects of the Convention would be to agree upon an inconsistent "usage".

"Usage" in this sense is a way of operating or doing business which is not personal to the contracting parties. For example, the parties may agree to be bound by certain regulations or rules issued by a trade organisation or, for example, by the International Chamber of Commerce.

The contracting parties may also vary or derogate from the provisions of the Convention in a passive way.

Art 9 provides that the parties are bound by "any practices which they have established between themselves".

The word "practices" used in this context refers to a prior course of dealings between the parties which is personal to them.

Art 9 also binds the parties to a "usage" *by default* provided it satisfies two conditions:

1 It must be a usage of which the parties were aware or ought to have been aware and
2 It must be a usage which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

This provision seeks to avoid injustice through the automatic application of trade customs of which one party is unaware and which it would have had no reasonable opportunity to know; possibly merchants from less developed countries not active in the trade concerned.

III Formation

Introduction
Common law demands an agreement, consideration and the intention to create an enforceable arrangement. The first and last elements are also essential under the Convention.

There is no place in the Convention and no reference to consideration. It may be that a contract valid under the Convention would be unenforceable in New Zealand in the absence of consideration. It will be remembered that the Convention does not extend to questions of validity. This question is likely to be of academic interest only because in the majority of cases it is easy to find consideration in a contract of sale.

The whole thrust of Part II anticipates the diagnosis of agreement by the schematic approach, viz isolating an offer and an acceptance. However, it appears to leave open the possibility of the existence of an agreement where no distinct offer and acceptance is apparent but where common sense dictates that the parties were ad idem.

The third common law requirement, intention to create a legal and enforceable relationship, remains intact. At common law parties' conduct is viewed objectively. The requisite intention is considered from the view point of a reasonable person. This is subject to an important proviso. If, for example, the offeree knows that the offer is not in fact intended by the offeror to be taken literally or to be interpreted as it would be by a reasonable person, an acceptance will not result in a contract.

This mixed subjective/objective test is reflected in Art 8(1) and (2), Art 8(2), however, goes on to provide with respect to the objective part of the test:

> . . . statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person *of the same kind as the other party would have had in the same circumstances.* (emphasis added)

This provision makes it clear that the reasonable person's reaction should be assessed after first putting him or her "in the shoes of" the actual party. To put it in a way expressed by one commentator ". . . the statements of a tractor salesman from a developed country to a Nusquamian peasant are to be interpreted as they would be understood by the reasonable Nusquamian peasant."

Offer

What is an offer?

Generally speaking, an offer under Art 14 of the Convention must be:

1 to one or more specific persons, and
2 "sufficiently definite".

It is clear from Art 14(1) that an offer will meet the second of these criteria if it:

(a) "indicates" the goods and
(b) "expressly or implicitly" fixes the quantity and price or
(c) "expressly or implicitly" makes provision for determining the quantity and price.

At common law an agreement, apparently for the sale of goods, will fail if the subject matter of the agreement, viz the goods, is not identified with sufficient precision. Failure to identify the contract price or failure to provide the necessary machinery or formula to arrive at a price is, on the other hand, not fatal. The Courts will, if necessary, be prepared to imply a term that the price be "reasonable". This is echoed in s 10(2) of the Sale of Goods Act 1908.

Unfortunately, it is not clear under the Convention whether the three criteria mentioned above are necessary prerequisites for a contract or whether they are merely sufficient conditions. This question has been the subject of some academic discussion coverage of which is outside the scope of this paper. Suffice it to say that the uncertainty may well have been deliberate and resolution of the question by local Courts is unlikely to result in world wide uniformity of interpretation.

The criterion that the offer must be addressed to one or more specific persons is subject to qualification. Offers to the public at large or, to use the precise terminology of the Convention, "proposal[s] . . . other than [those] addressed to one or more specific persons" are, by Art 14(2), considered merely as invitations to treat unless the contrary intention is clearly indicated by the offeror.

This is not a substantive departure from the common law. At common law the Courts begin on the assumption that an "offer" to the public at large is merely an invitation to treat otherwise the "offeror" could encounter problems of supply; not knowing, of course, the degree of interest the "offer" may stimulate. However, as can be seen from *Carlill v The Carbolic Smoke Ball Co,* this assumption may be displaced if the terms of the offer indicate an intention to be bound.

Termination of offer

An offer may be terminated in three ways:

(a) by a communicated revocation or withdrawal;
(b) by a communicated rejection;
(c) by lapse of time.

(a) Revocation

At common law, the general rule is that an offer can be revoked at any time prior to its acceptance. It is revoked when revocation is communciated to the offeree. It may not be revoked, however, if the offeror has promised to keep it open for a certain period and *consideration exists* to support that promise. Of course, if the "revocation" reaches the offeree before the offer it will be effective but in such a case there has really been no offer because an offer must be communicated before it has any status.

The Convention uses distinct terminology to recognise the changing status of an offer. Communication of termination of offer is referred to as a "withdrawal" if it reaches the offeree prior to or at the same time as the offer and as a "revocation" if it is communicated after that time but before an acceptance is "*despatched*".

A withdrawal is effective under the Convention whether or not the offer may be taken to be capable of revocation.

A revocation, however, will not be effective if the offer:

(a) "indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable"; or

(b) "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer."

In summary, an offer under the Convention may be made irrevocable in the absence of consideration. In cases where the offer is not irrevocable, it may be revoked by communication of revocation at any time before an acceptance is despatched. Whether the offer is revocable or irrevocable, it may be "withdrawn" or terminated prior to or at the same time as it reaches the offeree.

(b) Rejection and counter-offer
Even if an offer is irrevocable, it is terminated when a rejection reaches the offeror. A rejection will be constituted by a communicated counter-offer.

A counter-offer includes a reply to an offer which purports to be an acceptance but which contains conditions, limitations or other modifications which materially alter the terms of the offer.

(c) Lapse of time
An offer will only remain open for as long as the time fixed for acceptance by the offeror or, if no such time is fixed, for a reasonable time. In the case of an oral offer, such must be accepted immediately. In other cases, a reasonable period for acceptance depends on all the circumstances of the transaction including the rapidity of the means of communication used by the offeror.

Acceptance
Acceptance is an indication of assent to an offer.

At common law a reply to an offer which purported to be an acceptance would, in fact, constitute a counter offer if it sought to alter or add to the terms of the offer. The Convention attempts, by Art 19(2), to temper this rule. That Article provides that if the purported acceptance does not, by its alterations or additions, "materially" alter the terms of the offer, it will be treated as an acceptance unless the offeror objects without undue delay.

Unfortunately, the manner by which the word "materially" is defined in Art 19(3) robs Art 19(2) of much of its apparent force because variations to price, payment, quantity, quality, place and time of delivery, extent of one party's liability to the other and, finally, the settlement of disputes are all "material".

Acceptance can be constituted by conduct but not by silence or inactivity and it becomes effective only when "indication of assent reaches the offeror".

The requisite communication of assent is, however, subject to one important proviso. If the parties have established between themselves a "practice" or they have adopted a "usage" by which indication of assent may be taken from the performance of a positive act, such acceptance will be perfected at the time the act is performed not at the time the offeror becomes aware of it. So, for example, if the parties have consistently despatched goods immediately on receipt of an order and a "practice" may be discerned that such indicates assent to the offer, despatch of the goods may be taken as acceptances and the contract is made at that point.

In all other cases both offers and acceptances must be communicated. This does not require the recipient to have personal knowledge of the message; it merely demands that the message "reaches" the recipient. A message "reaches" its addressee when personally delivered or when delivered to his or her place of business, mailing address or, where there is no place of business or mailing address, to his or her habitual residence.

It will be apparent that the requirement of communication of acceptances does away with the "Postal Rule". □

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