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The living dead

There are two basic facts about New Zealand past and present. The first is where we are in terms of distance from other more populous parts of the world. The second is related to it in that we are, as a people, of mixed origins, but significantly all sea-borne adventurers of relatively recent arrival in terms of the whole span of mankind's existence. For all the emphasis on the point, particularly in this year of indigenous people, it is salutary to bear the relatively recent settlement of New Zealand by Polynesians and Europeans in our minds. The tangata whenua are truly that, but only fairly recently so.

In the well-known, and typically flippant, clerihew E C Bentley reminded us of the importance of the two factors I have mentioned and the difference between them. As he wrote:

> Geography is about maps,
> History is about chaps.

Certainly *The Dictionary of New Zealand Biography*, of which volume two has just been published, is about chaps, or, as the now neutered contemporary slang expression would say, about guys. As an aside what is one expected now to make of the title of that excellent stage musical "Guys and Dolls"? The title is rapidly losing its very significant point; and anyway to be politically correct it should perhaps be retitled as "Humans"! That should effectively, I would have thought, destroy its commercial value.

This point of the difference of the sexes is actually quite relevant to any consideration of *The Dictionary of New Zealand Biography* volume two, as it was in respect of volume one. In reviewing volume one, [1990] NZLJ 221, I questioned, but accepted, the selection process. This included an arbitrary percentage of entries for women as well as for Maoris. Not a particularly good *historical* attitude surely. The criteria laid down by W H Oliver, the original editor of the work, have continued to be applied in volume two. In rather more cautiously measured terms, but still with a concept of "balance" in contemporary and not historical terms, the present General Editor, Claudia Orange, states in her introduction:

> The *Dictionary's* goal is not only to produce reliable reference texts but also to provide readers with an insight into the scope of New Zealand society. Selection of subjects for this volume, therefore, continues to reflect a modification of the conventions by which individuals have traditionally been given a place in national biographical dictionaries; national eminence remains a criterion but as well the people in this dictionary have been chosen for their standing within less extensive milieux, for their representativeness and for the balance their presence gives to the volume as a whole.

This approach of course reflects a general shift in the whole concept of history, most obviously illustrated in the great series of works by Philip Aries on private life from classical Greece to the present day. The "Annales" school, best illustrated by the works of Braudel and Le Roy Ledurie, is also an indicator of this paradigmatic shift in historiography. This shift away from a concentration on the political, the kings and queens, and wars and treaties, emphasis is relevant to this *Dictionary*. One incidental effect is that it means that its value as a work of reference is restricted. For all its virtues, and they are many and great, the work does not replace but complements the two great works of G H Scholefield and A H McLintock, *A Dictionary of New Zealand Biography* and *An Encyclopaedia of New Zealand*. It is indicative of the attitude (prejudice?) of the selection process for instance that only three of the nine Governors of the colony in the period covered, 1870 to 1900, are given their own entries. This indicates a surprising historical misunderstanding. For all our democratic pretence New Zealand was a colony, even if a self-governing one, during this period and the office of Governor (which only became Governor-General in 1917), was of some political importance, and certainly of great constitutional significance. As I noted at the end of my review of volume one many of the judgments reflect the attitudes of the 1980s and will all too soon become outdated. The same is probably true of the selection criteria. But then every selection is affected by historical attitudes. It is interesting that the great 63-volume English publication *The Dictionary of National Biography* (1885-1900) has just recently been updated by a supplementary volume that allows for those who were overlooked by the original and subsequent editors. No doubt a similar supplement will need to be published when this present great work *The Dictionary of New Zealand Biography* is completed according to the present plan.

It is not at all inappropriate, despite the reservations expressed, to refer to this publication as a great work. It is invaluable, and it makes fascinating reading. One of its delights is wandering through the pages and being led from one biography to another. One of the great virtues of this work is the indexing system, particularly the Categories Index and the Regional Index. The Categories Index divides into 25 separate topics starting with Armed Forces and going through to Visual Arts and Crafts, and including Health, Law and Law Enforcement, Public Administration, Reform, and Tribal Affiliations as well as the inevitable Politics and Commercial Activities. Many of the biographies are listed under more than one category with Sir Robert Stout for instance being included under Education as well as both Politics and Law.

The Law and Law Enforcement category is itself subdivided into ten separate topics being Assessor, (9 entries), Bailiff (1), Criminal (10), Judge (8), Land claimant (6), Lawyer (17), Litigant (2), Magistrate (3), Police (5), and Prison administrator (1).

Inevitably the criminals are more interesting to read about than the Judges. There was for instance Amy Maud Bock (1859-1943) who is described as a celebrated and energetic confidence trickster. She used many names and disguised herself on occasion as a man, even pretending at one time she was the son of a wealthy widow and the nephew of the then Roman Catholic Archbishop of Wellington, using the name Percy Redwood. (There is incidentally a good biography of Archbishop Redwood which notes that on his election in 1874, when only 35 years old, he was reputed to be the youngest Catholic bishop in the world, and when he died in 1935, aged 95, he was said to be the oldest.) Then there is the notorious Minnie Dean (1844-1895), the only woman ever hanged in New Zealand. Her counsel Alfred Charles Hanlon (1866-1944) also features as one of the biographees. Another interesting entry is that of a highwayman Robert Herman Wallath (1874-1960). In keeping with the law category it is ironic that Wallath was finally captured in a hotel scuffle in which his gun was accidentally fired and the person wounded was Harold Thomson who was a law clerk and the son of the local police inspector.

Inevitably the biography of Sir Robert Stout is a most substantial one. But many lawyers will find the one by Judith Bassett on Sir Joshua Strange Williams of even greater interest. There is a nice quotation in that biography, the last part of which is likely to appeal to many counsel even today. Speaking of a witness whom a restive Assessor wanted to stop, Williams J is reported as saying

> He is a layman, and if I cut him short, he will be puzzled and hurt. If he were a lawyer I could tell him we have heard it all before. And in any case . . . is not this what we are paid for – to sit and listen to arguments?

The Dictionary of New Zealand Biography is already a major work. Volume two is edited with the same meticulous care that marked volume one. To disclose an interest I wrote one of the non-legal biographies, and consequently I can attest that the editorial work, the checking and the attention to detail deserve the highest commendation. Whatever minor reservations one might have, they are as nothing to the positive qualities of this great work. It is truly monumental; and Claudia Orange (following Bill Oliver), and her staff, deserve the gratitude of all of us. In an interview in the *Listener* of August 28 Claudia Orange refers wryly to the book as being unusual for its type in that "it also works as a coffee table book." The other side of the coin is that its size and weight do not make it a very satisfactory bedside book. *The Dictionary of New Zealand Biography* is full of a great variety of characters, some 650 in all, drawn from many social strata. That makes it an entertaining book to read as well as one to refer to for information. Claudia Orange emphasised in her interview a feeling that certainly comes through in sampling the book. The period covered 1870-1900, was, she said, one when New Zealand was forming itself into "the country we knew up till recently". *The Dictionary of New Zealand Biography* itself will help to shape our understanding of who we are and how we came to be where we are after 150 years of involvement with the world at large, because that involvement is after all, for better or for worse, the true significance of the Treaty of Waitangi and the British settlement of these southernmost islands.

P J Downey

Correspondence

Dear Sir,

I confess to reaching for John McDermott's article on contingency fees [1993] NZLJ 253, with the expectation that at last some sensible Kiwi lawyer was going to unmask the comparison between the British proposal and the US system for the simulacrum it most certainly is. In the same issue, Pat Downey, in his customarily beguiling manner, hints that he may have acquired his knowledge of China "merely by stepping off a bus". He silently challenges me to confess that my knowledge of contingencies comes from casual conversations with American practitioners at 34,000 feet.

However, as those of your readers with long memories and even longer patience may recall, I have never let such doubtless less-than academic acquaintances interfere with a good argument.

I, for one, could not see how in the context of UK litigation introducing a contingency fee could make any real difference. One just has to look at the huge orders for costs that can be made against unsuccessful non-state funded litigants to realise that no law firm is going to risk picking up that kind of liability. So all we are talking about is the question of additional professional costs in the event of a loss that is generally already sufficiently cataclysmic as to deter even many of those with deep pockets.

What distinguishes the US system are two separate characteristics: first, most of the litigation is against insurance companies and this category of defendant does *not* receive costs against an unsuccessful litigant, thus making the waiver of lawyer-client fees manageable. Second, the multiple damages awards in the field of consumer-regulated commerce (whether the potential rewards are so outrageous as to attract the high risk takers).

True, in New Zealand the levels of costs awarded against unsuccessful litigants are more manageable – but I wonder whether law firms are going to be prepared to accept them as part of the contingency? If not, then perhaps we should forget the contingency fee (as a symptom) and focus instead on the heart of the problem.

For surely it must be the case that were we to start to design a dispute resolution scheme on a clean sheet of paper, we may not know what we *would* come up with, but we *do* know that the present system would be dismissed out of hand as slow, inefficient, often unjust and monumentally overly expensive.

Jeremy Pope
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Commonwealth Secretariat

Case and Comment

Disputes Tribunals: Commonsense Tribunals

NZI Insurance New Zealand Limited v District Court at Auckland and von Battenburg [1993] BCL 842.

The judgment of the High Court in the above case provides an informative analysis of the nature, history and policy of the Disputes Tribunals Act. In particular, the judgment focuses on the issue of appeal from decision of the Disputes Tribunals to the District Court, which has been the subject of divergent views in the District Court.

In this case, von Battenburg had wanted to insure his car and so paid $585 premium to his insurance broker. The broker arranged cover with NZI but went into receivership before paying the premium money to NZI. NZI gave notice of cancellation of the policy for non-payment of premium. Battenburg, not wishing to be uninsured, paid the same premium again for a new policy. He then lodged a claim with the Disputes Tribunal for a refund of the balance of the original premium on the cancelled policy or of the new premium. The referee found that Battenburg was entitled to a year's insurance cover for the premium paid or a refund of $535, and that the recovery of the premium paid to the broker was a matter between NZI and the broker. NZI appealed on the basis that the broker in this case was legally the agent of the insured not the insurer, and that the referee had failed to comprehend and apply the relevant legal authorities. The District Court Judge acknowledged the legal merit of NZI's submission and accepted that the referee's decision may have been based on a misconception of the law. The Judge noted that some previous District Court decisions had concluded that appeal was available to correct errors of law whereas others had concluded that appeal was available only in cases of procedural unfairness. The Judge preferred the latter view, and held that procedural unfairness had not been established in this case as the referee had decided the dispute according to the substantial merits and justice of the case, after hearing both parties and viewing the relevant evidence. The Judge held that the loss of right to complain about errors of law by a lay referee was the price to be paid for speed, simplicity and finality in the Disputes Tribunal system.

NZI took the matter on review to the High Court, under the Judicature Amendment Act 1972. NZI argued that the decision of the District Court contained an error of law, being based on an erroneous interpretation of the appeal provisions of the Disputes Tribunals Act. NZI stated that it was bringing the matter to the High Court as a test case, in view of the divergent views in the District Court on the issue of appeal on alleged errors of law by a referee. Thorp J, in his reserved judgment, took as his starting point s 50 of the Disputes Tribunals Act 1988. This states that appeal lies to the District Court against an order of the Disputes Tribunal on the grounds that the proceedings were conducted by the referee in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings. Thorp J held that the limitation of the right of appeal in this section to procedural unfairness

> is in such plain terms that only compelling indications from other provisions that such a result was intended would justify expanding that right into the grant of a general appeal for error of law.

Thorp J turned to other provisions in the Act, and in particular s 18 which outlines the functions of the Tribunal. He noted that s 18(1), which states that it is appropriate for Tribunals to encourage negotiated settlements of claims, "places them in a different category from the conventional Courts, with their reliance upon adversarial procedures". He then noted s 18(6) which provides that (failing settlement) the Tribunal

> shall 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.

Thorp J acknowledged that this section was "not an easy provision to construe" and conceded the "awkwardness of marrying the provisions of s 18(6) to an interpretation which accepts that errors of law on the part of referees will, in the ordinary event, remain uncorrected". Nevertheless, Thorp J noted the qualified nature of the requirement that the Tribunal was to have regard to the law, and "the clear intention of the Act [notably ss 7, 8 and 38] that referees need not have legal training and should not be assisted by professional advocates". He therefore concluded that s 18 provided a "less than compelling argument" for expanding the right of appeal into a general appeal for error of law.

Thorp J then examined the legislative and parliamentary history of the Disputes Tribunals Act, by reference to the preceding Small Claims Act 1976 and the *Hansard* record of the second reading of the Disputes Tribunals Bill. He held that this history pointed "towards a right of appeal restricted to procedural unfairness and against any intention to provide an appeal on the merits". Finally, Thorp J reviewed overseas studies of small claims jurisdictions, notably the comparative study published by the Oxford Centre for Socio-Legal Studies. He concluded from this that "in their search for practical means of solving small claims disputes the architects of alternative proposals have to balance the perceived need for such

alternatives in their particular societies, and the benefits likely to flow from meeting that need, against the inevitability that resolution of disputes by reference to common sense fairness will result in a lesser consistency than that derived from the application of settled legal principle to the proven facts of particular cases".

In the light of all these considerations, Thorp J held that the right of appeal to the District Court was limited to cases of procedural unfairness and did not extend to the correction of errors of law. He acknowledged that this conclusion necessarily restricted the effect of the requirement that the referee, in making decisions, had to "have regard to the law". Thorp J's view was that the referee had the obligation "to consider any legal principles of which he or she is or may be made aware in a fair and unbiased manner, and to apply the law as he or she understands it in an impartial manner to the facts as the referee finds them save only when strict observance of those rules would, in the referee's view, prevent determination of the dispute according to the substantial merits and justice of the case". Thorp J concluded by noting that the High Court retained the right to review and strike down the decision of the Tribunal (or any other statutory body) made outside the boundaries of the jurisdiction given by statute. Thorp J duly dismissed the NZI's application for review.

The judgment of Thorp J is significant for several reasons. First, it highlights the fact that the New Zealand Disputes Tribunal is a hybrid institution, with characteristics of both a lay forum and a Court of law. The *Small Claims Tribunal Evaluation,* conducted by the Department of Justice in 1986, conceded that the tension between an informal "commonsense" model of the Tribunal and a "legal" model "is manifest in the Act, and will probably always remain" (*Evaluation* (1986) 90). On the one hand, the Tribunal is presided over usually by a lay referee, who has a mediatory role and who decides essentially according to substantial merits and justice. Non-legal referees continue to outnumber legally-qualified referees in the ratio of three to one, and many referees are appointed primarily because of their perceived strengths in mediation.

On the other hand, the Tribunal is part of the legal hierarchy, its settlements and decisions become orders of the District Court, the referee is required to decide having regard to the law, and there is appeal to a District Court Judge. The New Zealand model is in fact more "legal" than some of its counterparts overseas: for example, the equivalent Tribunals in New South Wales and Queensland do not require decisions to have regard to the law and do not provide for appeal. In the light of its dual nature, the New Zealand Disputes Tribunal is bound to raise questions about its decision-making process and the nature and scope of appeal.

Secondly, the judgment of Thorp J provides authoritative and welcome support for the view that the Tribunals are *fundamentally* commonsense rather than legal institutions, and for the concomitant view that appeal lies for procedural unfairness and not for errors of law. This endorsement is welcome because, as the writer has earlier argued, there can be little doubt that this view accords with the intention of the legislators of the Small Claims and Disputes Tribunals Acts ("The Disputes Tribunal: Commonsense or legal tribunals" [1992] NZLJ 95, 98). The judgment is also welcome in the sense that it should end the differences of approach which have been evident over the past six years amongst District Court Judges hearing Tribunal appeals. It is to be hoped that the doctrine of binding judicial precedent will ensure that Thorp J's judgment will cause the District Court Judges to adopt a more consistent line.

Thirdly, the judgment is important because of its potential effect on decision-making in the Disputes Tribunals. The actual number of appeals lodged is relatively small: of the 22,195 applications lodged in 1992, only 737 matters were taken to the District Court on appeal. Further, the great majority of appeals are dismissed. Nevertheless (like appeal to the Privy Council) appeal to the District Court has an effect far beyond the actual cases decided. Particularly in those centres where District Court Judges adopted a more interventionist stance, the effect of appeal tended to make some decision-making in the Tribunal more cautious and legally-based than it might otherwise have been. The authoritative statement of Thorp J, that Tribunal decisions may not be appealed against simply because they do not accurately fit within currently accepted legal principles, may make referees less inhibited, and readier to focus on the justice and merits of the particular case in hand. This would accord well with current legal developments (not least in the law of contract and torts, the main areas of Tribunal jurisdiction) which herald a greater emphasis on fairness, flexibility and pragmatism. Recently, McGechan J stated in the context of a causation issue in tort that the object of the law was "to resolve human disputes", that "the law readily imposes limitations on logic for reasons founded in policy and pragmatism" and that "the approach to be adopted should be that which leads to the most sensible solution in a particular case" (*Deloitte Haskins & Sells v National Mutual Life Nominees* (1991) 5 NZCLC 67,447/8).

Finally, Thorp J's judgment is of significance because it comes at a time when authoritative calls are being made for the Disputes Tribunals to assume an even greater role in disputes resolution. In his recent *Harkness Henry Lecture*, delivered at the University of Waikato in June 1993, Eichelbaum CJ stated:

> The problem of the litigant with the small contested claim remains. The legal fees make the exercise prohibitively expensive. I am unaware of the minimum level at which it may be thought worthwhile to litigate in the District Court which in any event I imagine varies between practitioners and very likely geographically as well. What is clear is that the fixture is much beyond the $5000 maximum up to which Disputes Tribunals may have jurisdiction. It is uncomfortable to have to admit that in this respect, one affecting the rights of ordinary citizens, our legal system provides no remedy. So far as the cost factor is concerned, being realistic I do not see that one can expect it to

change. An examination of the problem and its possible solutions is overdue. Finding the additional resources to enhance the Disputes Tribunal system so as to enable it to cope with a substantially increased jurisdiction will not be palatable to Governments, but I am unable to offer an alternative.

Should such an increase in jurisdiction eventuate, the mode of decision-making and the scope of appeal will once again come under scrutiny, at least in the upper band of cases. Once again, in the words of Thorp J, our legislators will have to make "a political decision about the balance between the benefits likely to be derived from providing [practical access to means of resolving small claims] and the loss of consistency and accountability in decision making likely to result from giving jurisdiction to determine disputes on principles of common sense or 'substantial merits and justice of the case' and without any provision for the review or correction of such decisions".

Peter Spiller
University of Waikato

What do Paul McCartney, Metallica and bootlegging have in common? "The Metallica Order"

Anderson J in *Tony Blain Pty Limited T/A Acme Merchandising v Andrew Matthew Splain* [1993] BCL 801 showed great perception in attempting to create a new term of art for the legal community when he granted an order unique in New Zealand legal history which he named "The Metallica Order".

This order arose out of proceedings for ex parte orders commenced by the licence-holder for New Zealand and Australia to protect the goodwill in respect of merchandise such as names, likenesses, trademarks, logos, etc for certain artists (which in this case happened to be the group Metallica and Paul McCartney who were both to perform in March in New Zealand).

The main concern of the licence-holder was that "freelance operators" usually set up temporary stalls outside concert venues and sold "unlicensed" merchandise to the patrons of the concerts. So to protect its position the licence-holder had commenced a successful action for an ex parte order in Australia, on 16 March 1993 against persons who might turn up to the venues and attempt to sell unlicensed merchandise to the concert patrons. When the artists arrived in New Zealand the licence-holder, bolstered by its success in Australia, applied for a similar order from Anderson J.

Anderson J noted that there were practical difficulties litigating alleged breaches of proprietary and other interests. His starting point was that the Courts were developing a practice based upon its equitable jurisdiction, analogous to Anton Piller orders. The bases he considered relevant in determining the application were:

(1) Both Anton Piller orders and the order sought in this case involved an intrusion of privacy which was justified on the basis that the Court's equitable jurisdiction can properly be extended to meet the realities of modern commercial situations (p 4 of the judgment).

(2) That "[I]t is an ancient maxim of law that where there is a right there is a remedy" and where it was plain that persons were infringing proprietary rights or were deceiving the public which indirectly affected the commercial interests of others "the law should provide remedy" (p 4 of the judgment).

(3) That preservation orders and interrogatories "are common in litigation where the parties are known at the outset" and he felt that there was little difference between such orders (when the parties are identified before the proceedings, "and on the other hand, after they have been identified for the purposes of the proceedings") (p 5).

Accordingly Anderson J granted the orders sought – the orders enabled the solicitors (recognised as officers of the Court) to "accost bootleggers at the concert venues and require them to provide their current address, evidence of identity, and to surrender up to the named solicitors all merchandise including t-shirts, headbands, badges or programmes in their possession or control" and to serve such persons with an injunction preventing them from selling such merchandise (p 4).

Anderson J was aware of the potential for mistakes and as no person had appeared on behalf of the defendants he made ancillary orders to protect such persons including:

(1) A right to apply to the Court within 24 hours for a review of orders and a right to damages "not merely on the basis of the usual undertakings to be given by the plaintiffs, but also on the basis of the ancient but still extant tort of misfeasance of public office" (p 4);

(2) The plaintiffs were to file a full report in Court as soon as reasonably practicable after the concerts relating to the process of execution of the particular orders (p 5);

(3) The plaintiffs were required to undertake to pay reasonable costs on a solicitor/client basis for persons "against whom the orders may have been wrongly executed" (p 5).

(4) Any person served with a sealed copy of the orders should, at the time, be served "with a clear and succinct statement of rights in connection with the relief granted to the plaintiff" (including the right to damages and for the recovery of reasonable legal cost and the right to apply to the Court). This last right was required to "be spelled out in language easily understood by a lay person of average intelligence" (p 7).

Several comments can be made about this judgment:

(1) It clearly shows the flexibility of equity – if Anton Piller orders had been codified in a statute would Anderson J have been prepared to grant such a wide ranging order?

(2) The term "officer of the Court" has taken on new meaning for solicitors but their new power under such an order also exposes them to potential liability. When such orders are executed they are executed by the named solicitors, not by their clients, and consequently the solicitors are the ones who may face a claim for misfeasance of public office. Solicitors contemplating such an application for such orders may

be prudent to obtain from their clients an indemnity against the eventuality of such a claim. However the giving of an indemnity against a successful claim for the tort of misfeasance of public office would appear to be against public policy and therefore there is always the risk that such an indemnity, even if given, could be unenforceable.

(3) The plaintiffs also alleged breach of the Fair Trading Act and Anderson J was prepared to accept that a claim for misleading and deceptive conduct under that Act could lie (p 6). Importantly he found that this claim also justified a "Metallica Order", which increases the effectiveness of that Act as a commercial weapon (p 6).

(4) After obtaining such an order, the solicitors for the plaintiff (where there is sufficient time) may prefer to merely advertise the fact that such orders have been obtained. Alternatively a few, well publicised "executions" of the orders upon "bootleggers" may be sufficient deterrence, particularly if there is to be more than one concert at the same or alternative venues.

(5) The hearing was held on 25 March 1993 and as the concerts were to be held within the next two days after the hearing Anderson J heard the application as a matter of urgency and consequently no-one was present to appear on behalf of the "defendants" (p 4). The plaintiff may not have applied earlier as it may have felt it had little hope of success and it only made a late application after its Australian success. While Anderson J noted that future cases should be brought sufficiently in advance of the event to allow amicus curiae to be appointed to argue the position for the "defendants" it is arguable that in this case (where the concerts would have been planned some months, if not at least a year, ahead, and the practice of "bootlegging" was a well known occurrence) he should not have exercised his discretion in granting such orders ex parte on an urgency basis. He was considering an important new equitable remedy (which, in this case, would include the power to confiscate property of persons unknown to the Court at the time of the application), which had not been addressed previously in New Zealand and had only been considered overseas very recently. A more considered approach to the whole issue would have been preferable and the plaintiff's position was not, in my view, deserving of such a prompt judgment.

Peter Fitzsimons
University of Waikato

Separation of powers in the United Kingdom

To ask a Law Lord to discuss the separation of powers is a tactful way in which to suggest to him that his dual roles as Judge and legislator are a manifest contradiction of that principle, at least as conceived by Montesquieu. If this suggestion was implicit in the generous invitation from the Legal Research Foundation, then it was happily timed, since I have just finished my first year sitting as a Judge in the Houses of Parliament in Westminster and next door to No 10 in the Privy Council in Downing Street. Although chastened by my limited experiences in the legislative chamber of the Lords, I have come to the conclusion that just as it is possible for an individual to wear two hats – one as a Judge and another as an academic, so it is possible to wear two hats – one as a Judge and another as a legislator (I say nothing of the Lord Chancellor who wears 3½ hats – Judge, legislator and speaker and senior member of the government) as long as you remember to doff one before donning the other and be prepared for the ill-informed to be confused and the ill-intended to exploit that confusion. The invitation is also well timed since it coincides with an apparent sensitivity on the part of Parliament in the United Kingdom for the need to reproclaim the sovereignty of Parliament.

On Wednesday, 21 July 1993, at the beginning of business in the House of Commons, Madam Speaker took the unusual course of announcing orally her answer to a complaint from Mr Wedgwood Benn as to a possible breach of privilege alleged to arise from an application of Lord Rees-Mogg for judicial review which is intended to prevent the Government's proposed ratification of the Maastricht Treaty. She said:

> I . . . take with great seriousness any potential questioning of our proceedings in the Courts, which is why I have chosen to deliver my decision on the complaint in this way . . . rather than to write privately to the Right Hon member as would normally be the case.
> . . .

I commenced by drawing attention to the disquiet expressed in Parliament to recent activities of the Courts in the United Kingdom. I followed this with a chronicle of developments as a result of very recent decisions of the Courts. I suggested that it is possible the two are not unrelated, that there may be a sense in some quarters that the Courts are progressing too far too rapidly. If, for this reason there is disquiet, then I trust it will soon be resolved. What I divine has been happening is that after a period during which administrative law has developed at a remarkable rate in England the Courts have now decided that it is time for there to be, to borrow the title to Mr Justice Thomas's excellent monograph, a return to principle in judicial reasoning. This process has involved the identification, without the assistance of a Bill of Rights, of the broad principles which are an inherent part of any developed democratic society governed by the rule of law. Principles which have made it possible for the Courts to give an impetus, I hope with property, to the development of the law which would not have been possible if a purely incremental approach had been adopted.

Lord Woolf of Barnes
Legal Research Foundation Seminar
Auckland, August 1993

Correspondence

Dear Sir,

re Foreign Direct Investment [1993] NZLJ 261

It is significant that the *New Zealand Law Journal* July 1993 contained a 12-page article on an important economic topic (Gordon Walker and Kym McConnell on Foreign Direct Investment [1993] NZLJ 261). A thorough knowledge of economic interactions is more and more required as such subjects as competition law are becoming part of adversarial proceedings before our Courts.

Unfortunately too much of economic thinking is based on "commonsense" approaches to the effects of economic inter-action. J M Keynes (later Lord Keynes) characterised this mode of thinking in his General Theory of Employment Interest and Money in the following words: "Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."

The almost unreserved approval of direct foreign investment in New Zealand which pervades Walker and McConnell's article is an illustration of that proposition. And while the authors attack the Government on their refusal to give special privileges to foreign investors over and above New Zealand investors on the ground that this refusal is based on "rigid adherence to neo-classical economic theory" the average reader of the *New Zealand Law Journal* can be excused not to know either what is "neo-classical economic theory" or why this should lead to such refusal: more, no explanation is given why there could not be good reasons for the Government's attitude and indeed whether the Government's attitude might not be too liberal rather than too restrictive.

Walker and McConnell are fair enough to mention on p 262 that I, when I was a Reader in the Economics Department of the University of Canterbury, was an opponent of foreign investment, as was Dr Sutch, then Secretary of Industries and Commerce. But Dr Sutch's book *Takeover New Zealand* (Reed, 1972) is not mentioned in the Select Bibliography – nor are any of my books.

It is impossible to deal with all the points in favour of foreign investment put forward in the article – and to add to them additional points pro and con left out. In a letter to the editor like the present I can do only two things: warn readers not to accept the simplistic arguments in favour of unrestricted foreign investment in New Zealand without deep and intensive study and to mention two points where the authors have gone off the rails.

(1) The authors say on p 262 "FDI decreases the current account deficit". This is incorrect. Foreign direct investments appears in New Zealand's foreign capital account which explains how the deficit on current account has been financed – it does not appear in the current account.

I have shown in my latest book (*New Zealand Can Be Different* – 1993) that a considerable part of New Zealand's external debt increase from $NZ16 billion in 1984 to $NZ62 billion in 1992 was due to payment of interest and profit on private foreign investment and borrowing. The external current account is thus burdened, not assisted by FDI to a point where we have to borrow externally to transfer profit and interest on overseas owned assets situated in New Zealand.

Because there is at present no relation between foreign investment and foreign exchange earning capacity of the investment, problems are created, not mentioned in Walker and McConnell's article.

(2) The authors say (p 263) "a commonly-cited non-economic cost is loss of sovereignty; in our view there is little in this argument."

One loss of economic sovereignty associated with excessive foreign ownership of New Zealand assets on which interest and profit have to be transferred overseas consists in the need to reduce incomes in New Zealand in order to be able to pay overseas investment income. Since these amounts earned in New Zealand can only be paid over in foreign exchange by using revenue obtained by exports from New Zealand, care must be taken that imports and other out-payments do not reduce our debt-paying capacity beyond what foreign creditors consider prudent.

New Zealanders may wish their Governments to increase incomes of New Zealanders by suitable credit policies, industrial development policies, wage policies and social welfare policies. However, since every increased dollar of private income can also be used to buy imports or to go travelling etc etc, such policies cannot be permitted. Example: if out of every $NZ1,000 $NZ500 are spent on imports etc, and we must save $NZ4,000 million to pay foreign owners of New Zealand assets, incomes must be reduced by $NZ8,000 million.

That Walker and McConnell's advocacy of a "legal services market positioning strategy for East Asia" is quite persuasive is not denied. The present writer's criticism is directed at the economics envelope in which that proposition was wrapped.

Economic argument differs from legal argument in that lawyers have a common law or statutory body of law on which to ground an argument as to the applicability of given facts. Economists deal with a code of "economic laws", which, to put it mildly, is in a state of constant dispute. Walker and McConnell acknowledge this fact without fully arguing either the "neo-classical" approach (which they accuse the Government of holding) or the interventionist position.

W Rosenberg

The Vienna Convention on International Sale of Goods: Obligations under the contract and remedies for breach

By W Mapp and C Nicoll, Department of Commercial Law, University of Auckland

Part I of this paper published last month deals with the formation, the background to the Convention, its principles and formation of contract. Part II of the paper deals first with the obligations of the parties to the contract once it has been formed and secondly the remedies available to parties in the event of breach of contract.

I: Basic obligations of the parties and passing of risk

1 Obligations of the seller

The seller's basic obligations are threefold:

1 to deliver the goods
2 to hand over any documents relating to them
3 to transfer property in the goods.

With the exception of the third obligation which is not dealt with at all by the Convention, the manner by which these obligations are fulfilled depends, in order of priority, first upon the provisions of the contract of sale and, secondly, upon the provisions of the Convention. The Convention merely fills gaps left by the parties.

As far as New Zealand buyers and sellers are concerned, most sales will involve carriage of goods. In many cases, carriage will be international. In these instances delivery consists in the handing over of the goods to the first carrier for transmission to the buyer.

Where carriage is not demanded by the contract, delivery of specific goods, unidentified goods drawn from specific stock or goods to be manufactured consists in putting the goods at the buyer's disposal at their position or at their place of manufacture. This is subject to a proviso, viz that, at the time the contract was made, the parties knew that the goods were at or to be manufactured at that place.

In all other cases, delivery consists in placing the goods at the disposal of the buyer at the place the seller had its place of business at the time the contract was made.

If the contract involves carriage and the seller does not ensure that the goods are clearly identified to the contract by markings on the goods, by the shipping documents or otherwise, the seller must give to the buyer notice of the consignment specifying the goods. Failure to satisfy this obligation will have an effect on the time risk passes.

If the seller is obliged by the contract to arrange shipment, the contract it enters into with the carrier must be one appropriate in the circumstances and according to the "usual terms" for such transport. If insurance is not to be arranged by the seller it must, nevertheless, provide the buyer with the necessary information to enable the buyer to arrange cover.

As with the Convention's delivery provisions, the requirements of conformity of the goods only cover positions not otherwise dealt with by the parties themselves.

Broadly speaking, the goods must come up to sample and be fit for their ordinary purpose. They must also be packaged in a manner usual for such goods, or, if there is no "usual" manner, sufficiently to preserve and protect them.

If the seller is made aware, at the time of the conclusion of the contract, of a particular purpose in store for the goods, the goods must be fit for that purpose unless the buyer did not rely or it was unreasonable for it to rely on the seller's skill and judgement.

In any of the above cases, the seller is not liable for lack of conformity if the buyer, at the time the contract was made, knew or could not have been unaware of such lack of conformity.

2 Obligations of the buyer

The buyer's core obligations are to take delivery and to pay the price as required by the contract. Subsumed into the obligation to pay the price is the satisfaction of procedures under relevant laws and regulations. Exchange control requirements would need to be met for example.

Unless the contract otherwise dictates, the price must be paid at the seller's place of business or, when the goods are exchanged for the documents, where that exchange takes place.

The time of payment, again, is governed by Article 58. Generally, delivery and payment are concurrent obligations although, again, it is the wish of the parties and, hence, the provisions of the contract which are paramount.

Consequently, whether the goods are to be transported or whether they are to be put at the buyer's disposal at, for example, their place

of manufacture, the seller can make payment of the price a precondition to handing over. In the former case "delivery", constituted by handing the goods over to the first carrier, takes place prior to the time the buyer "takes delivery". Notwithstanding this is that the seller may despatch the goods on terms that it retains control over them until payment. As a practical matter such control would often be exercised by retaining the bill of lading.

3 Risk

The provisions of the Convention which govern the transfer of risk are designed, in broad terms, to place the risk of loss of or damage to the goods with the party better able to pursue remedies against responsible third parties such as the carrier and the insurer.

Consequently, risk is closely allied with the time of delivery. For example, the risk of loss or damage in transit will frequently lie with the buyer who will be the first to become aware of damage and often in a better position geographically to seek compensation.

The Convention addresses risk in terms, first, of whether or not the contract imports transportation of the goods, secondly, of whether the goods have been identified to the contract and, thirdly, of whether there has been a supervening breach by one of the parties. Limitations of space demand that, in this paper, emphasis be placed upon the passing of risk where breach is not an issue.

Articles 67 and 68 respectively deal with the passage of risk where the contract of sale "involves" the carriage of goods and where goods are sold in transit. These cases give rise to the majority of problems. Article 69, on the other hand, deals with the miscellany.

(i) Where the contract of sale involves carriage

If the contract of sale "involves" the carriage of goods, risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with that contract. If, however, the contract demands the goods be handed over to the carrier at a particular place, risk does not pass until "handing over" occurs at that place.

There is an important proviso: risk does not pass until the goods are clearly identified to the contract and, as was mentioned above, identification may be achieved by giving notice of the consignment to the buyer.

Five points may be made in this context. The last three concern ambiguities in drafting and, it is submitted, they represent the better way to resolve such difficulties of interpretation.

1 "Handing over" means physical handing over to the carrier with or without the retention of the right of disposal embodied in, for example, the bill of lading. The passage of risk is independent of such retention.

2 The provision that handing over must occur for the purposes of transmission to the buyer under the contract of sale precludes cases where the goods are sold after the contract has been made, ie when the goods are already in transit. This situation is covered in Article 68.

3 The contract of sale must "involve" carriage in the sense that it must require carriage, not just that carriage is a necessary consequence of the contract of sale.

4 The carriage must be other than by the seller itself. The carrier must necessarily be a third party to the contract of sale.

5 Where the contract demands the handing over of the goods to a carrier at a particular place, in a situation for example akin to an FOB contract, such handing over may be achieved through an agent or independent contractor such as a rail or road transporter. Such is tantamount to handing over by the seller itself.

(ii) Goods sold in transit

Article 68 covers cases where the goods are sold while they are already in transit.

The first rule here is that risk passes at the time the contract of sale was made but this primary position is modified to make the passing of risk retrospective to, in most cases, the time of shipment if "the circumstances so indicate". More particularly, the retrospective passage of risk will occur "from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage".

When will circumstances indicate that the risk should pass retrospectively? The most common circumstances would probably be where the contract of sale demands the assignment of insurance cover. In such a case the buyer will be able at law to claim under the policy for the period of transit prior to the conclusion of the contract of sale and, being likely to have had first notice of loss and to be "on the spot", it would be better positioned to pursue the insurer.

The foregoing is subject to the final proviso that if, when the contract was made, the seller knew or ought to have known that the goods had been lost or damaged and did not tell the buyer, risk does not pass to the buyer at all.

(iii) Miscellany

If the buyer is bound to take over the goods at a place other than the place of business of the seller, property passes to the buyer when delivery is due and the buyer is aware that the goods have been placed at its disposal. Note, however, that the goods will not be considered placed at the buyer's disposal until they are identified to the contract and the buyer, it would appear, must have *actual* notice of this.

If, on the other hand, the buyer is bound to take over the goods at the seller's place of business, risk passes to the buyer as soon as one of the following events occur:

(a) the goods are taken over by the buyer at that place or

(b) the goods are placed at the disposal of the buyer at that place and it is in breach for failing to take delivery.

As with contracts of sale falling within Article 67, goods must have been identified to the contract before risk passes. So, with respect to the "miscellany", goods will not be deemed placed at the buyer's disposal in terms of (b) above unless they are "clearly identified to the contract".

II: Remedies in the event of breach of contract

1 Introduction

Breach of the obligations of buyer and seller will give rise to the exercise of remedies by the injured party. The Convention, in Part III, sets out a range of available remedies. These remedies are considerably broader than available under the common law and draw heavily on civil law principles. The remedies range from damages to avoidance of the contract. In addition there are other civil law remedies which enable the contract to remain in place. The most notable of these is allowing a defaulting party a reasonable time to perform the contract. These additional remedies are drawn from civil law concepts. The underlying motivation seems to be the preservation of the contract to ensure the fulfilment of the legitimate expectations of the parties.

The Law Commission in its Report on the Convention (1992) notes at p 22:

> The rules emphasise saving the contract, for instance by narrowly defining fundamental breach. An aggrieved party facing non-performance can also fix a final additional reasonable period of time for the party at fault to perform, a borrowing of *Nachfrist* from German Law (paras 63(d), 67(b) and 117). Default beyond that period is a ground for avoidance.

The emphasis on providing adjustments of the contract terms to enable its performance if there has been minor breach necessarily requires a narrow definition of fundamental breach.

2 Fundamental breach and avoidance

The concept of fundamental breach lies at the heart of the nature of remedies provided for by the Convention. The narrow definition of fundamental breach, entitling a party to repudiate a contract, is essential if the remedies that enable buyer and seller to cure defects, rather than bringing the contract to an end, are to have a useful purpose in preserving contracts. Otherwise any breach of the contract no matter how severely disadvantaging an aggrieved party would be able to be remedied at the option of the party committing the breach.

Article 25 defines the concept:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

The consequence of fundamental breach is that the injured party is entitled to avoid the contract. Articles 49(1)(a) and 51(2) entitle the buyer to avoid the contract if the seller's failure to perform its obligations amounts to fundamental breach. Article 64(1)(a) enables the seller to avoid the contract if the buyer has committed a fundamental breach. Article 70 enables buyers to exercise any other remedy as well as avoiding the contract for fundamental breach. The provision for anticipatory breach is common to both buyer and seller. Under Article 72, where it is clear that a party will commit a fundamental breach, the other party may declare the contract avoided. However, where time allows, the party intending to avoid the contract must give the defaulting party the opportunity to provide adequate assurance of his performance. Article 73, applicable to contracts which envisage delivery by instalments has similar provisions to Article 72.

Once a contract has been avoided Articles 81-84 set out the consequences. The immediate effect is set out by Article 81. Both parties are released from their obligations under the contract. However the defaulting party may still be liable for damages. Partly performed contracts may be subject to restitution. In the case of buyers, if it is impossible to make restitution of the goods then the right of avoidance is lost unless the inability to restore the goods is not the fault of the buyer. Article 84 requires sellers to pay interest on the price to be refunded. Likewise the buyer must account to the seller for any benefits derived from the goods.

3 Damages

The rule on damages is primarily contained in Article 74. This article provides for damages equal to the loss, including any loss of profits, suffered as a consequence of the breach. The damages however cannot exceed the loss that could have been reasonably foreseen by the party in breach. The Law Commission notes that this rule accords with the basic rule of damages set out in *Hadley v Baxendale* (1854) 156 ER 45.

Articles 75 and 76 provide special rules for damages when the contract has also been avoided. Under Article 75 if the buyer has bought goods or the seller has sold the goods in substitution the party may claim the difference in price as well as any other damages recoverable under Article 74. Article 76 is a variation on the same principle and provides for damages of the difference between the current price and the contract price, incurred by the party claiming the damages, in addition to any other damages under Article 74.

The final provision, Article 77, requires the party claiming damages to take all reasonable steps to mitigate the costs arising from the breach. Failure to do so may result in a reduction in the damages payable.

4 *Nachfrist*

The concept of *Nachfrist* is drawn from the German Civil Code. Articles 47, 49(1) and 63 contain the concept. Essentially they allow a defaulting party additional time to perform the contract provided the failure to perform has not already been so grave that it has occasioned the injured party to avoid the contract. Once the contract has been avoided the defaulting party loses the opportunity to perform the contract. Although the defaulting party may have the opportunity to remedy a default, this does not exclude the possibility that the injured party may also claim damages. However, once the additional time has been granted the injured party cannot claim any other remedy, such as avoiding the contract. If the additional time has passed and the defaulting party remains in default then the injured party can avoid the contract. Nicholas *(The Vienna Convention*

on International Sales Law, 105, LQR, 201, 225) notes that the right of avoidance arising under these circumstances is available even if the breach was not originally fundamental under Article 25.

Nachfrist is perhaps the most notable concept of the Convention which underpins the principle that contracts should be performed wherever possible, even if the performance takes place in a manner not precisely envisaged by the contract. Under Article 50 buyers can reduce the price of goods if the goods do not conform with the contract. Nicholas (p 225) notes that this is the equivalent to the Roman law principle of *actio quanti minoris*. The remedy is essentially the same as s 54 of the Sale of Goods Act which allows a reduction in price if there is a breach of warranty. Part performance does not necessarily end the contract. Under Article 51 where a seller delivers only part of the goods or only part conforms with the contract the buyer has all the remedies set out in Articles 46-50. These include extension of time *(Nachfrist)* Article 47, delivery of substitute goods, provided for by Article 46 and avoidance as set out in Article 49.

Effectively, the remedy of avoidance can only be applied in two situations. The contract may be avoided so far as it applies to future performance or it may be avoided in its entirety if the non-performance amounts to a fundamental breach. Wherever possible the objective of the Convention is the retention of the contract, although the party in breach may also be required to pay damages for any losses caused to the injured party.

5 Remedies of the seller

In the event that the buyer is in breach of contract the seller has three essential remedies; requiring the buyer to perform the contract, damages, or avoidance of contract. The first of these remedies underscores the essential feature of the Convention, that contract should be performed whenever possible. Thus Article 62 enables the seller to require the buyer to take delivery, pay the price or perform any other of his obligations. Article 63 embodies the *Nachfrist* principle by allowing the seller to give the buyer additional time to perform his obligations. Article 64 sets out the rights of the seller to avoid the contract, although the limits to avoid are strictly circumscribed. Avoidance is permitted if the buyer has committed a fundamental breach or if the buyer has not complied with the additional *Nachfrist* time of performance. The limits are set out in Article 64(2). Sellers cannot avoid the contract if the buyer has paid the price unless the delay in performance is unreasonable. Article 65, applying to contracts where the buyer has set out specifications of goods, enables the seller to make goods to his own specification in accordance with the requirements of the buyer, should the buyer have failed to supply the specification. If the seller wishes to exercise this remedy the seller must inform the buyer of the details of the specification and give the buyer a reasonable time to make different specification.

6 Remedies of the buyer

The remedies of the buyer range from damages to avoidance of the contract. Within this range these are certain remedies which are peculiar to the buyer. Some of these remedies are not available under the common law. Under Article 46(1) the buyer may, in the case of goods which do not conform to the contract, require the seller to repair. In the event the goods are not repairable this would constitute a fundamental breach entitling the buyer to avoid the contract. As an alternative, Article 47(2) entitles the buyer to require the seller to deliver substitute goods.

In both cases the buyer must give reasonable notice pursuant to Article 39, specifying the nature of the lack of conformity. Nicholas (p 224) is of the view that due to inherent difficulties of these remedies, that is whether the repair was unreasonable or whether the request to deliver substitute goods is reasonable, the buyer will prefer the remedy of damages.

In the event that the seller has failed to perform in accordance with the terms of the contract, the seller has the right under Article 48 to "remedy at his own expense any failure to perform his obligations". This remedy might exist even after the agreed date for delivery provided the seller can make remedy without unreasonable delay and without causing the buyer unreasonable inconvenience. The buyer still can claim damages for any loss incurred. This remedy under Article 48 can be exercised if the seller notifies the buyer that he will perform the contract and the buyer has to respond within a reasonable time. In this case the buyer cannot pursue any other remedy which is inconsistent with the seller's performance. However, it must be shown that the buyer did in fact receive the notice.

7 Frustration

The primary rules on frustration or impossibility are contained in Article 79(1), clause 1 of which states:

> A party is not liable for a failure to perform any of his obligations if he provides that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

The concept is a great principle of law common to all legal systems. However, the detailed application does vary between legal systems. Thus under the common law frustration has the effect of terminating the whole contract whereas under the Convention the concept applies to "any of his obligations". Nicholas (p 234) refers to an impediment which causes delay in delivery. Unless the delay is so extensive that it amounts to a fundamental breach the contract remains alive and able to be performed. It should be noted that the rule set out by Article 79(5) of the Convention is only a protection against an action for damages. Thus in Nicholas' example the seller is protected from any action in damages. It does not prevent either party from avoiding the contract. Nicholas (p 235) has criticised the rules for vagueness; they will be subject to different interpretations in various national Courts.

As is common in all legal systems it is now expected that frustration would not apply to a mere uneconomic bargain such as a

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A return to principle in judicial reasoning and an acclamation of judicial autonomy

By A R Galbraith, QC, of Auckland

In this article A R Galbraith, QC analyses the recently published monograph by The Hon Justice E W Thomas. The author concludes that the monograph reflects the Judge's strong philosophical commitment to the common law, and that it will challenge comfortable notions held by some members of the profession. He suggests that it will provide a stimulus for debate and confrontation of many issues.

There is a considerable tradition of writing by Judges concerning the legal process. In the United States, names such as Holmes, Cardozo and, more recently, Posner, come to mind. In England, the tradition extends back before Coke. In recent years in New Zealand, Sir Robin Cooke has obviously accepted a responsibility to write and speak extra-judicially in many areas. Sir Ivor Richardson has done so also.

The growth in the complexity of the modern State, the internationalisation of social, political and economic influences, the necessary openness of an ever-increasing amount of legislation, and the declaration of certain fundamental rights all combine to hugely increase the potential scope of judiciary law.[1] In New Zealand, those latter rights include not only those declared in the New Zealand Bill of Rights but also the Treaty of Waitangi. In both areas, judicial decisions are significantly reflecting and influencing social, political and economic relationships in New Zealand.

The growth and the changing nature of the judicial role necessarily raises issues as to the legitimacy of judicial law-making; not the nonsensical doctrine that Judges only declare law but rather the important issues of the manner, appropriateness, method and influences of judicial law-making and the dynamics of that function vis-a-vis the other determinative institutions of our society.

Any such consideration must include a concern for how Judges decide or should decide and how they justify or should justify their decisions. Central to those issues is the question of rule boundness; ie in lawyer's language the extent to which Judges should be bound by precedent. The relationship between rule boundness and judicial decision-making has long been a topic of debate, particularly in US writings.[2] Given the period of revolutionary change in which we live, it is an issue now brought even more sharply into focus.

In this most recent writing,[3] a well known High Court Judge, Thomas J, takes up cudgels on this issue and provides the valuable insights of an insider to the judicial process. Thomas J, of course, brings to the subject not only his experience as a High Court Judge, but also his experience as a senior barrister of many years standing. He can fairly be said to have had a good view of the judicial process from both sides. From those two sides he can draw on his own experiences as Judge in cases such as *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (which has been approved by Lord Goff in the House of Lords in *Airedale NHS Trust v Bland* (4 Feb 1993)) or as counsel in cases such as *Finnigan v NZ Rugby Union* [1985] 2 NZLR 159 which was of great political and social significance in New Zealand at the time.

His monograph is a critique of the application of precedent in the judicial process. It undoubtedly reflects His Honour's personal as well as intellectual philosophy. Thomas J exhorts greater reliance on principles and less adherence to precedent. Recognising that any such approach must leave Judges with more flexibility and independence in the administration of the law, he identifies as necessary and desirable what he calls "judicial autonomy". Judicial autonomy includes, but represents much more than, judicial creativity or innovation. In essence, it is the process by which a Judge translates the standards, needs and expectations of the community at any time into legal principles, or the basis of legal principles, and therefore incorporates the freedom, independence and capacity for Judges

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contract for the supply of 1000 tons of wheat for September delivery at $100 per ton the price of which rises to $200 per ton in September. The seller would still have to supply the wheat at $100 per ton and suffer the economic loss.

8 Conclusion

The Convention has elements of both common law and civil law. In many respects the remedies will be familiar to lawyers in New Zealand. However, there are additional remedies, the import of which is to ensure wherever possible the contract will be performed. In this respect the Convention differs from the common law, as embodied by the case law and statute. Since many of our trading partners are already parties to the Convention it is essential, when dealing with international sales to have a good understanding of the Convention. □

to consciously undertake the task. As such it must necessarily encompass the ability to assess the validity and force of precedents.

Thomas J does not pretend that precedent will not continue to play a significant role in the legal process. What he rejects is the notion that past cases should be followed without question. A past case, he says, should be accepted as an authority and followed in a later case when, and only when, the Judge consciously and sensibly determines that it accords with sound principle, will contribute to the achievement of justice in the individual case, and is responsive to the current norms and needs of the community. Consequently, judicial autonomy controls the application of precedent.

The thesis is developed and argued through a systematic review of the issues and many juristic writings on the subject. In exhorting a return to a principle-orientated approach, one in which principles will predominate and guide the application and direction of the law, from one which he describes as precedent-directed, Thomas J critically examines the notion that the strict application of precedent is necessary to obtain certainty in the law. He undertakes a comprehensive survey of the reasons why there is a perpetual and potent drive for certainty and a corresponding dependence on precedent. The writings of legal philosophers and jurists are examined to reveal that often justification for the authority of precedent is based on the assumed reasonableness of the law or the reasonableness of submitting to the law independently of its merit. That conviction, as a justification for rule boundness, is rejected by Thomas J. In this context he confronts and puts into perspective the declaratory theory of the judicial process, the democratic considerations and constitutional factors supporting the doctrine of precedent, the axiom that "like cases should be treated alike", the "moral" force of precedent, and the "method of logical form". Thomas J challenges the notion that, for the purpose of treating like cases alike the comparison of cases can be restricted to the facts and exclude reference to developments elsewhere in the law, the external sources which bear upon the law, and the comparable standards, needs and expectations of the community. Nor does he accept that the attribute of logical consistency is well served when directed towards a consideration of past decisions or precedents rather than to their underlying principles. In this context his comment that English case law is often given undue weight in New Zealand is one which would strike a chord with most litigators. His conclusion is that certainty is illusory with a precedent bound system. Instead, Thomas J suggests that certainty in the law would be enhanced by the adoption of the principled approach, and he says:

> If Judges have the independence and freedom to question and re-examine settled rules and precedents, the law will be best kept abreast of the standards and needs of the times. The art is to abandon the pretence that they reach decisions by applying pre-determined law and permit them to express openly their true reasoning or the value judgments otherwise implicit in their decisions. They will then be more responsive to contemporary moves. (At p 33.)

Of considerable interest to the practitioner is Thomas J's close examination of the way in which precedent works in practice. He clearly believes from his experience that it inhibits the judiciary in the performance of its basic functions which he defines as the responsibility to resolve disputes in a way which achieves justice for the individual and to make a contribution to the solution of problems facing the community which require or involve the use of law. He sums up his commitment to that philosophy by saying:

> Nor can the Judges make a satisfactory contribution to the community's problems if they are constantly charged with the task of following cases from the past. The conceptions of justice which are involved must be current conceptions. (At p 23.)

The discussion of precedent is practical. Among the issues dealt with are the impact of a precedent notwithstanding that it may be distinguished or reinterpreted in the case in hand, the prospective operation of precedent, the rejection of the idea that the importance of a factual inquiry is due to or requires adherence to a strict doctrine of precedent, the influence of persuasive precedents, and the "precedent" force of famous dicta.

Critical to any consideration of judiciary law is the question of when Judges should leave it to Parliament to effect a change in the law. In keeping with his approach, Thomas J endorses Professor Jaffe's perception of the "potentiality for a fruitful partnership" between the Legislature and the Courts as the two bodies in the law business together. The dominance of the Legislature and the necessity for the judiciary to abstain in appropriate circumstances are recognised:

> Parliament will be favoured if the particular law is deeply entrenched or controversial or generates policy considerations for which the legislature should be held accountable. By and large reforms which might have an undesirable retrospective effect should be left to Parliament. So too will law reform which requires extensive research and resources which are beyond the Court's purview and function. The Courts will be favoured where the area of law has historically been Judge-made law, using the description of "historical" to refer back beyond the more recent times when parliament has been called upon to remedy deficiencies in the general law of contract, tort, trusts or the like. In these areas of the law, change will generally be able to made by reference to basic principles and, in such circumstances, Judges should not hesitate to apply those principles to reshape or enlarge the law or to change the direction of the law. (At p 67).

Thomas J seeks to place his thesis in its jurisprudential context. In that context he claims that his conception of law and the legal process has a sound and coherent foundation. Beginning with the Realist view point that the law is not an end in itself but exists to serve the needs of society and meet the functions society has accorded to it,

he demonstrates how this fundamental premise is best served by the principle-orientated approach that he advocates. That basis leads, in his view, inextricably to the concept of judicial autonomy. The tenet of "Positivism" that decisions can be deduced from pre-determined rules without recourse to social aims, policy or morality is rejected, as is the Positivist notion that principles can be reduced to a set of background values. The opposite extreme embraced in the writings of Gray and Frank restricting law to the decision of the Courts is equally found wanting. Thomas J's view is one of a perception of law as a continuum or process which is constantly being refined to meet current standards and needs. His interest is not in a definition of law or an analysis which simply looks at law in cross-section.

Professor Dworkin is selected for detailed treatment. As Dworkin is the proponent of a philosophy which embraces a theory of law centred upon the supremacy of principles over rules this is to be expected. Thomas J does not accept the reasoning which nevertheless allows Dworkin to proclaim that principles are determinative of the outcome of cases. This determinism is quite different to the concept of judicial autonomy which Thomas J advocates. Accordingly he sets out to challenge Dworkin's theory under the headings "Dworkin's implausible distinction between principles and rules", "Dworkin's implausible rejection of judicial discretion" and "Dworkin's implausible justification for precedent". While undoubtedly Thomas J and Professor Dworkin would both share the broad mantle of a moral philosophical approach the very titles of the headings under which Professor Dworkin's views are dealt with indicates the divergence of conclusion. In part this divergence of view is the result of Thomas J proceeding from his dual experience as senior practitioner and now Judge actually involved in the process.

The central concept of judicial autonomy is examined at length. The elevation of judicial autonomy into something more than an unavoidable residue of judicial power does not in Thomas J's view result in a vacuum devoid of discipline in which the personal predilections of the Judges operate without constraint. He argues that Judges would be more, and not less, accountable in being required to give expression to the underlying premises and value judgments inherent in judicial reasoning. The real restraints on judicial discretion are identified. Thomas J accepts that there must be a source of reference external to the law to provide it with its direction and justification. However, he regards it as a mistake to search for particular values and, when finding them difficult to define, to either pretend that they do not exist or resort to a claim that they are so prolix and diverse that they cannot be counted or classified. Underlying all of these values are the deeply embedded values and principles of justice which mould the community. In Thomas J's thesis the judicial task is to interpret and administer that sense of justice which is immanent in the community. Legitimacy for the judicial function derives from that obligation and society's continuing acceptance of the actual performance of that obligation in the judicial process.

In the course of his dissertation, Thomas J refers to a number of cases to illustrate the absence of a principle-oriented approach. The most notable example which he takes is *State Government Insurance Commissioner v Trigwell & Ors* (1979) 26 ALR 67, in which the High Court of Australia applied the House of Lords' decision in *Searle v Wallbank* [1947] AC 341 in holding that a landowner owes no duty of care to avoid injury caused by his animals wandering on to a public highway. Earlier the New Zealand Court of Appeal had adopted the same precedent respecting approach in *Ross v McCarthy* [1970] NZLR 449. I doubt that many would argue that the result achieved was appropriate in the New Zealand context.

Negative illustrations, however, are not as effective as those in which the principle-oriented approach has been actually applied. An example, not referred to in the monograph, is available in Thomas J's own decision in *Howick Parklands Building Co Ltd v Howick Parklands Ltd,* published in the most recent part of the *New Zealand Law Reports* ([1993] 1 NZLR 749). In that case, His Honour first found in favour of the plaintiff by a conventional process of judicial reasoning. However, he went on to consider the issues on the basis of principle.

A marketing agreement was in issue. The defendant, which Thomas J found had acted inequitably, pleaded that the agreement was unenforceable and illegal being in breach, inter alia, of the Commerce Act 1986. The Illegal Contracts Act 1970 did not apply to the breach because of the specific exclusion contained in s 89(5) of that Act. Thomas J nevertheless held that the Courts possess a residual power to enforce a contract where it would be inequitable and unjust in the circumstances of the particular case to allow the defendant the benefit of a finding that the contract was illegal and void. He acknowledged that there was no precedent for this principle. Rather, Thomas J extracted it from three "sources"; first, the established axiom that the Courts will not permit themselves to be used as instruments of inequity and injustice; secondly, by reference to the existing power of the Court to weigh up the comparative merits where the statute in issue is for the benefit of the plaintiff and the parties are not in *pari delicto*, and to then grant or refuse relief accordingly; and thirdly, by analogy with the doctrine of equitable estoppel. It was not suggested that any of these doctrines could be directly applied or that any of them should be extended. Approached as precedents, they could all be readily distinguished. Rather, the doctrines are referred to in the judgment as the "sources" for a principle which, at the end of the day, accords with commonsense, achieves justice between the parties, and is consonant with current perceptions of justice. Readers who might care to refer outside the monograph for a prime example of the principle-oriented approach advocated by Thomas J will find it at pp 765-768 of the Report.

President Roosevelt once wrote:

> The decisions of the Courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century, we

> shall owe most to the Judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy . . .[4]

The pace and extent of change since those words were written has compounded. Sir Kenneth Keith in a paper[5] to the 10th Commonwealth Law Conference referred to the revolutionary changes which are taking place influencing the position of law and law reform in society. Two of the examples which he gave illustrate the extent of information change. In 1955, New Zealanders made 20 overseas toll calls a day, now they make 100,000; in 1955 50,000 passengers came and left New Zealand by air annually, now the number is over 3,000,000. One could add a host of illustrations from a variety of areas leading to the obvious conclusion that the influences and attitudes of society in the 1990s are vastly different to even the 1950s, which is only a short time past in a legal perspective.

The central truth of Roosevelt's statement is now even more apposite given the radical changes which are occurring. It is a responsibility on the judicial process to accommodate these changes to social, political and economic influences. Many aspects of the judicial process need to be re-examined. Precedent, in the sense of rule boundness, sits uneasily in that company. Its influence will remain significant in areas such as the criminal law where certainty and objection to retroactivity are higher values accepted by society. But, in general, it should be only an influence and not determinative. Interesting questions arise. If principle is to be determinative, is that to apply at all levels;[6] what materials can be put before the Court; will public interest participation be allowed and, if so, how will that be effected; can there really be a place for the Privy Council in that process, etc?

Thomas J's general thesis must be correct. Legitimacy of the judicial process does derive from social context and acceptance. What we are seeing in the law, driven by changes in social context, is a movement towards recognition of universal underlying principles applying to areas of law previously separately demarcated, eg reasonableness and fairness as a concept in administrative, contract and tort law as well as equity. Society is significantly dependent on our Courts, particularly the Court of Appeal, for the way in which this most difficult transition is handled.

As practitioners we are generally too busy dealing with day-to-day issues to see much of the wider picture. However, it is important that we do raise our heads occasionally. In that context, Thomas J's monograph should be read by every lawyer who has any interest in the changes which are or should be taking place. It clearly reflects his strong philosophical commitment to the common law. To many, it will challenge comfortable notions learned too long ago. It is a further valuable contribution by Thomas J to New Zealand legal writing and should provide a stimulus for debate and confrontation of the many issues which surround the function of judiciary law. □

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1 Barwick, "Judiciary Law: Some Observations Thereon", 33 Contemp Legal Probs 239, 240 (1980).

2 Schauer, "Rules and the Rule of Law", (1991) 14 Harvard Jnl of Law & Public Policy, provides a useful review.

3 Thomas J's other extra-judicial writings are:
"Mismatch or Misjudgment: The Mercury Bay Boating Club Inc v San Diego Yacht Club et al" [1990] NZLJ 190.
"He Who Pays the Piper Calls the Tune", Banking Law and Practice (1991) 20.
"The So-called Right to Silence" (1991) 14 NZULR 299.
"A Constructive Look at Constructive Trusts: With Particular Attention to the Position of Banks", Banking Law and Practice (1992) 223.
"Criminal Procedure and the Bill of Rights: A View from the Bench" in *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, 1992) 33.

4 Quoted in Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford 1989).

5 Keith, "Lawyers and the Rule of Law", 10th Commonwealth Law Conference, Cyprus 1993.

6 There is not a lot to be said for the efficiency of a system which prevents a decision maker at whatever level coming out with the appropriate answer.

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Bits, Bytes and Bills of Lading: EDI and New Zealand maritime law

By Paul Myburgh, Lecturer in Law, Victoria University of Wellington

It is one of the ironies of life, and hence of the law, that every technological advance has some drawback. Contracts by electronic data interchange are no exception. In this article the legal implications of electronic data interchange in the area of maritime law are considered. The author suggests there is now a need in New Zealand to consider legal problems like the definition of a "document", the "signing" of contracts, and the problem of the bill of lading as a negotiable document of title. Although this article considers the issues in relation to maritime law, the implications for other areas of legal relations in commercial activities are clear.

I Introduction

EDI, or electronic data interchange involves the transmission of electronic messages in the form of binary digits, or bits, from one computer system to another, using an agreed standard to structure message data. While not requiring especially complex or expensive technology, EDI provides an efficient, flexible and instantaneous communication, documentation and record-keeping system which has the potential to revolutionise international trade practices.[1] This article focuses on the use of EDI in the context of maritime trade. In several overseas jurisdictions, traditional shipping contracts and documents are increasingly being superseded by a network of electronic transactions between shippers, carriers, consignees, insurers and customs authorities. This article outlines the significance of EDI for the shipping industry; discusses the most relevant current model of EDI, namely the 1990 CMI Rules for Electronic Bills of Lading; and evaluates the extent to which present New Zealand law can accommodate any future trends towards EDI use in maritime trade.

II Why does EDI matter to the shipping industry?

Changes in the shipping industry over the last three decades have emphasised the disadvantages of traditional transactions based on paper shipping documents, and have made use of EDI an increasingly irresistible option. Paper-based shipping systems have two basic deficiencies.

First, they are too slow: as they necessarily involve the physical transfer and processing of original paper documents, they cannot ever be faster or more efficient than available postal or courier services. Containerisation and other changes in ship design, navigation and operation have greatly enhanced the efficiency and speed with which goods can be transported. Some containerised liner services now produce cargo at the discharging port before the relevant documentation can be processed; for example, goods on the North Atlantic route routinely arrive before their air-mailed bills of lading. Similar situations occur on the trans-Tasman and USA-New Zealand routes. This inevitably results in delays, deterioration of cargo, and increased demurrage costs, because cargo will not normally be released to the consignee before the relevant documents have arrived and been presented. In an informal survey of the New Zealand shipping industry conducted by the author in June 1993, 72.7% of respondents reported problems arising from delayed or lost shipping documents. An appropriate EDI system could circumvent these problems by providing for immediate, or at least extremely swift, document processing.

Secondly, paper is costly to process, and it has a mysterious tendency to multiply. Excising, or even just trimming the paper trail in shipping transactions should also result in significant cost savings. This is graphically illustrated by the recent decision of the United States Department of Defence to replace paper bills of lading and freight bills with EDI, which has resulted in savings of seventeen million US dollars, and removed the need to produce an annual stack of paper bills four times the height of the Empire State Building.[2]

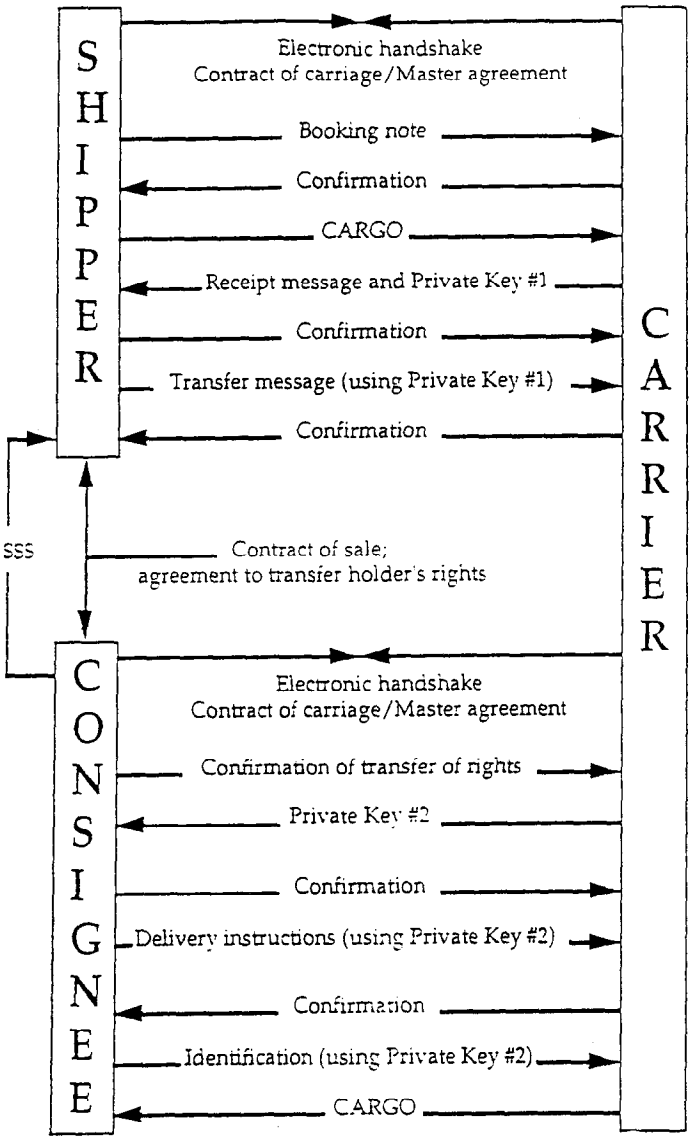
The New Zealand shipping industry has already recognised the advantages of EDI to some extent: some shipping companies routinely use EDI to transfer what is often referred to as "inanimate data"; for example, vessel bay plans and information from shippers which will expedite the preparation of paper bills of lading or ships' manifests. However, the full potential of EDI as a medium for concluding shipping transactions has certainly not been explored in New Zealand. There is scepticism in some quarters of the industry as to whether EDI will ever replace traditional negotiable bills of lading or even waybills. In the final analysis, however, the New Zealand shipping industry will have to come to terms with EDI as its use achieves critical mass overseas and some of our major trading partners come to regard it as a mandatory, rather than merely appropriate, component of trade processing. For example, the UK Customs Handling of Import and Export Freight network (CHIEF) has for the last few years required importers either to adopt EDI, or face receiving a comparatively unsatisfactory clearance service at ports. In the future, New Zealand companies wishing to trade with certain sectors of the European, North American and Asian markets will almost certainly be required to adopt EDI in their cargo documentation and customs clearance practices.

III Maritime EDI: the 1990 CMI Rules

EDI has been used instead of paper shipping documents since the early 1970s, when Atlantic Container Lines introduced Data Freight Receipts, or DFRs, to replace sea waybills on their North Atlantic shipments. Reliance on sea waybills was further reduced by the introduction of a more sophisticated data receipt, the Cargo Key Receipt (CKR). The use of EDI to replace sea waybills has since become common overseas. Replacement of sea waybills with electronic shipping documents is comparatively straight-forward, because waybills are normally used for straight consignments, where it is not intended that the cargo will be resold while in transit, and a negotiable document of title will thus not be required to effect delivery. EDI documents describing the cargo and identifying the consignee who is entitled to take delivery of the goods can instantaneously be sent to all relevant parties. These documents can easily fulfil the sea waybill's primary functions of shipment notice and receipt.

Replacement of waybills with EDI transactions will not, however, have a significant effect on the New Zealand market. Responses to the author's shipping industry survey suggest that only around 8% of transactions are concluded using non-negotiable waybills, and that carriers are only prepared to use waybills in respect of straight consignments between associated companies. Nevertheless, increased future use of EDI transactions instead of waybills will at least alleviate problems caused by delayed or mislaid paper documents on the trans-Tasman and west coast of the USA-New Zealand routes, where the majority of import consignments are shipped under waybills and shipment times are short. Carriers working these routes seem eager to increase EDI use as soon as possible.

By contrast, replacement of traditional negotiable bills of lading with an EDI equivalent would alter the face of New Zealand shipping entirely, affecting as it would approximately 92% of all New Zealand shipping transactions. Replacement of negotiable bills of lading is, however, an altogether more difficult issue. How can one mimic the legal functions of a negotiable document of title without issuing and transferring a signed paper bill of lading? The most recent, and arguably most sophisticated and effective attempt to do so, is contained in the 1990 Rules for Electronic Bills of Lading, a model for electronic bills of lading adopted by the Comité Maritime International (CMI). A very simple carriage scenario under the 1990 CMI Rules, involving a carrier, shipper and a single consignee, may be illustrated as follows:[3]



After the shipper's and carrier's terminals have exchanged an electronic handshake, the parties conclude their contract of carriage or "master agreement", confirming that they will employ electronic bills of lading, and establishing the 1990 CMI Rules as the basis for their transaction. Once agreement is reached, the cargo is delivered to the carrier. The carrier sends a receipt message to the shipper's electronic address. The receipt message is the electronic equivalent of the traditional paper bill of lading. It contains the shipper's name, a description of the goods including any "representations or reservations", the place and date of receipt or shipment of goods, the carrier's terms and conditions of carriage, and the shipper's Private Key # 1. (The Private Key is a digital signature or cypher which is used only once, and is unique to each individual transaction. The Key is used to secure and authenticate messages sent under the Rules: see rule 2(f).) The shipper confirms the receipt message as complete and correct. On confirmation, the shipper becomes the "holder" under the Rules. Only the holder has the right to claim delivery of the goods from the carrier, nominate the consignee, transfer rights in respect of the goods, and issue instructions to the carrier in accordance with the contract of carriage.

When the shipper/holder sells the cargo in transit, it will use Key # 1 to send a transfer message to the carrier, authorising the transfer of its rights and identifying the consignee. Once the shipper's transfer message has been confirmed, the carrier will contact the consignee directly. Another electronic handshake takes place between carrier and consignee, establishing the consignee's identity, confirming the terms of the original contract of carriage, and restating the applicability of the 1990 CMI Rules. After security checks have been completed and the consignee has indicated its intention to accept the carrier's terms of carriage and the transfer of the holder's rights, Key # 1 is voided. At the same time, the carrier issues a new Private Key # 2 to the consignee, who becomes the holder. (If, on the other hand, the identified consignee does not respond, or is unwilling to accept the terms of carriage or transfer of the holder's rights, Key # 1 remains operative, and the shipper remains the holder.)

The consignee/holder can, in turn, use Key # 2 to transfer its rights to a subsequent consignee/holder. The holder can also transfer its rights to a bank in order to obtain a letter of credit. The ultimate holder will use its Key to give the carrier delivery instructions. Only the ultimate holder or its nominated agent will be able to take delivery of the cargo by using its Key, which will then be voided.

The 1990 CMI Rules provide a very useful model for the development of uniform electronic shipping documents. The Rules differ from earlier experimental systems, such as the 1986 SeaDocs Registry set up by Chase Manhattan bank and INTERTANKO, which made use of a "trusted third party" to act as record-keeper and documentary clearing-house. These earlier systems by and large proved unpopular; involvement of a third party meant that they were more costly, and created concerns about privacy and potential conflicts of interest. The 1990 CMI Rules avoid these pitfalls by relying on the carrier, rather than a third party, to create the electronic bill of lading and set up an unofficial registry of transactions involving it. There is no doubt, however, that the Rules are still far from perfect. For example, they place an extremely heavy responsibility on the carrier, without clearly articulating an allocation of liability between the parties. They also leave unaddressed some basic legal questions, and will thus have to be supplemented by additional agreements between the parties to the contract of carriage.

IV Debugging the system

If EDI is to realise its full potential in the New Zealand shipping context without causing legal problems, several issues will first have to be addressed. For a start, EDI use raises some general contract law questions. The contractual consequences of EDI transactions remain unclear in certain respects, despite the fact that EDI has already been in commercial use overseas for some time.

Contract formation issues

It is trite law that any contract must reflect the real or apparent intentions of the parties to agree on certain terms. Charterparties or contracts of affreightment currently fixed by EDI will comply with this basic requirement, as they will consist solely of data fed into the system by the parties. Automatic call-back procedures, however, in terms of which the recipient's computer contacts the sender's terminal without the operator's intervention to verify the correct and complete transmission of an EDI message, are already common. Moreover, technology is becoming available which will, for example, allow a carrier's computer to receive scores of booking notes from potential shippers; assess optimal cargo distribution on the basis of information about cargo capacity which has been entered in advance; and select which bookings to confirm on the carrier's standard terms of contract. These carriage arrangements will be concluded without any human intervention on the carrier's part. As such arrangements become commonplace, they will provide a novel context within which to re-examine the theoretical principles underpinning contract formation.

A rather more immediate and mundane issue relates to the time and place of formation of an EDI charterparty or contract of affreightment. There is no case law directly on point. However, most commentators agree that the reasoning in *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327 and *Brinkibon Ltd v Stahag Stahl GmbH* [1983] 2 AC 34 should apply by analogy to contracts concluded by EDI.[4] These decisions applied the general rule — that contracts are formed when and where acceptance is communicated by the offeree to the offeror — to most instances of contracts concluded by telegraph and telex respectively. It was held that the postal acceptance rule should not apply even though the parties were at a distance, because a means of instantaneous, or virtually instantaneous communication was employed to communicate the acceptance. As EDI transmission is also instantaneous, logic and commercial expediency require an application of the general rule to shipping contracts concluded by EDI. Such contracts would thus be formed when, and at the place where the offeree's electronic message was actually communicated to the offeror.

In some instances, however, EDI will not, in reality, operate as a method of instantaneous communication. An acceptance might be received in the offeror's electronic mailbox and remain there unread for some time, either due to the time of receipt, or the offeror's absence or failure to read mail. Should the general rule still apply in these cases? Precisely this question, albeit in the context of telexes, was raised in *Brinkibon*. Their Lordships concluded that:

> No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie. (Per Lord Wilberforce, 42B-E.)

It is standard computing practice to employ acknowledgement of receipt procedures in EDI. In fact, the 1990 CMI Rules require confirmation of receipt of all messages unless the parties agree otherwise: see rule 3(d). The practice of acknowledgement of receipt of data transfer would seem to reinforce the application of the general rule to EDI contracts in all but exceptional cases. The offeree should be in a position to know whether his or her acceptance message has been received, "whereas the offeror, of course, will not know if an unsuccessful attempt has been made to send an acceptance to him [or her]." (*Brinkibon,* 43 G, per Lord Fraser of Tullybelton.) Parties negotiating a charterparty or contract of affreightment by EDI should, in any case, always expressly stipulate the time and place of contract formation: both to avoid the inevitable uncertainty created by Lord Wilberforce's dicta; and the slim chance that the reasoning in *Entores* and *Brinkibon* might not be extended to EDI contracts.

Message corruption

Corruption of electronic messages containing the terms of shipping contracts concluded by EDI, poses another general problem. Contracts by telex and telegram may also occasionally suffer from garbled transmissions, but electronic data messages are rather more susceptible to accidental corruption in transmission. In most instances, corruption would produce gibberish or an obviously incomplete message, which either could not form a basis for contract formation, or would at least alert the receiver to the problem. However, an electronic message could easily become corrupted in such a way that it would, nonetheless, be reasonable for the receiver to infer a valid offer; for example, only the "$" symbols in an electronic offer might become corrupted in transmission, being received as "£" or "¥". In such cases, an application of the objective principle in *Smith v Hughes* would result in the offeror being prima facie bound by the corrupted version of the message received and accepted by the unwitting offeree.[5] The question would then be whether relief under the Contractual Mistakes Act 1977 was available. The widespread use of verification procedures in EDI, adopted specifically to overcome the problem of corruption, would be likely to influence the Court's decision in such cases. As mentioned above, it is standard practice to acknowledge receipt and confirm the contents of each EDI message; and the 1990 CMI Rules require confirmation that each message is correct and complete before either party is entitled to rely on it: see rules 3(d) and (e), 2(e) and (h). Where the parties have agreed to adopt verification procedures, and one of them fails to comply with them before relying on an electronic message that has accidentally been corrupted, he or she may be taken to have impliedly assumed the risk of mistakes in the offeror's message. This would result in relief under the Contractual Mistakes Act being denied: see s 6(1)(c).

Apart from the general contractual issues discussed above, there are further, more specific hurdles which will have to be removed before full-scale use of EDI becomes a viable option. As mentioned above, maritime EDI is still in its infancy in this country. It is therefore hardly surprising that those New Zealand statutes which are relevant to, and could be expected to regulate EDI use, are framed exclusively in terms of traditional, paper-based systems. In the discussion which follows, the relevant statutory provisions will be examined with a view to establishing the extent of reform necessary to accommodate EDI use.

The Evidence Amendment Act (No 2) 1980

How does one adduce proof of the terms of an EDI contract in the event of a dispute? EDI documents potentially fall foul of both the hearsay and best evidence rules. The data which actually comprise the contract are formulated, transmitted and received in an intangible electronic form (although they may be recorded and stored in physical media). Most EDI systems provide for a physical print-out of electronic messages at any stage, but this is regarded as merely a copy, and therefore not the best evidence of the contract. The New Zealand law of evidence has not yet fully come to grips with the issue of admissibility of electronic data as evidence of a contract.

In terms of s 3 of the Evidence Amendment Act (No 2) 1980, business records are admissible as documentary hearsay evidence in certain circumstances; and the Act does define "document" as including any "information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored". In its 1987 *Report on Business Records and Computer Output* however, the Evidence Law Reform Committee pointed out that, while the definition of "document" is adequate, s 3 is far too narrow and deals inadequately with computer-generated evidence. In particular, because the Act only admits statements "made by a person in a document", automatic computer-generated responses used in confirmation or booking procedures will be excluded, although they may be at the heart of the dispute. Electronic messages which have been automatically processed by the computer in EDI (eg for translation, encryption or editing purposes) may also be excluded as inadmissible evidence for the same reason.

The 1990 CMI Rules try to solve this problem indirectly, by requiring parties who incorporate the Rules into their EDI transactions to agree that their transactions have the same force and effect as if a paper bill of lading had been issued. The parties also agree by incorporation of the Rules not to raise any domestic legal writing or signature requirements which could render the electronic bill of lading ineffective. These

requirements will not wholly resolve the evidentiary issue, however. Even if the parties are taken to have agreed under the Rules not to contest the admissibility of EDI evidence, this cannot preclude the Court from exercising its own discretion to exclude evidence of EDI transactions which, in its opinion, does not come within the exceptions to the hearsay rule contained in the Evidence Amendment Act (No 2) 1980.

The Sea Carriage of Goods Act 1940

International sea carriage of goods from New Zealand is governed by the Sea Carriage of Goods Act 1940 (SCOGA),[6] which incorporates the Hague Rules into New Zealand law. The Hague Rules were drafted in 1924 and set out a mandatory regime of minimum liability of carriers of goods by sea. Of course, neither SCOGA nor the Hague Rules anticipated the use of EDI in shipping. They thus refer exclusively to a paper-based carriage regime employing bills of lading or other negotiable documents of title. Under s 9(1) of SCOGA, all bills of lading or similar documents of title issued in New Zealand containing or evidencing a contract of international sea carriage must include a paramount clause (an express statement that they are issued subject to the Hague Rules). In turn, art III(3) of the Hague Rules requires the carrier, master or agent to issue a bill of lading on the shipper's demand. Bills issued by the manager, agent, master, owner or charterer and signed by any person purporting to have authority to do so, will bind the master and owner or charterer of the ship as if the master had signed them (s 12, SCOGA).

If passed in its present form, the Transport Law Reform Bill 1993 will repeal SCOGA. In its 1992 *Review of the Shipping and Seamen Act 1952,* the Ministry of Transport briefly flirted with the notion of replacing SCOGA and the Hague Rules with the Hamburg Rules. One of the arguments put forward in favour of the Hamburg Rules, was that they offered the most modern international sea carriage regime; one which recognised technological advances in shipping, and attempted to accommodate EDI use. Instead, the Ministry has decided to play it safe: the Bill will introduce the Hague-Visby Rules and SDR Protocol into New Zealand law, and extend their operation to non-negotiable waybills. This move will not radically alter the content of New Zealand's international carriage regime. As Hague-Visby simply restates most of the Hague provisions on bills of lading, the content of the provisions outlined above will remain unaltered under the new regime.

SCOGA and the Hague Rules provide the basis for several of the legal functions of bills of lading. Bills operate as best evidence of the contract of carriage between carrier and shipper (except where that contractual relationship is governed by charterparty) and act as a documentary receipt for the cargo. It is immediately obvious that electronic bills of lading will have some difficulty fulfilling these functions. The evidentiary problems relating to EDI contracts have already been discussed above. Further difficulties are created by the role played by the handwritten signature on traditional bills of lading. The signature authenticates the bill, confirms the carrier's contractual liability, and estops the person signing the bill from later contradicting certain statements in it. Electronic bills of lading clearly cannot satisfy handwritten signature requirements. Most EDI systems do provide "tags" in all electronic messages which identify the terminal from which the message was transmitted. However, this only provides a prima facie link between the message and the terminal from which it was sent, rather than the operator who sent it. This further link between message and operator can be provided by terminal security procedures at either end, requiring operators to use passwords, secret codes or microcircuit cards to gain access to terminals. The potential for unauthorised transmission and mistake of identity is, nevertheless, obviously very real in such situations.[7] EDI technology has recently developed more sophisticated types of digital signatures, however, which provide the same direct authentication link between sender and message that a traditional signature does. This technology involves the sender encrypting the electronic message itself with an individual digital key. On receipt the message is decrypted by the recipient, either using the same key, or, in more complex variants, a different element of a multi-component cypher. These digital signatures greatly enhance the security of the data itself, because it is computationally infeasible for third parties to decode the message, and the recipient cannot tamper with the message and successfully re-encrypt it for confirmation purposes. Moreover, digital signatures are considerably more difficult to forge than handwritten signatures, as long as they contain a minimum number of digits. There is no reason in principle, therefore, why the use of digital signatures should not provide a satisfactory legal equivalent to a handwritten signature. However, unless statutory references to "signing" or "signature" expressly include digital or other electronic signatures, their use may not be recognised by the Courts.

The 1990 CMI Rules attempt to resolve the issue of written document and signature requirements contractually. Rule 11 provides that:

> The carrier and the shipper and all subsequent parties utilizing these procedures agree that any national or local law, custom or practice requiring the contract of carriage to be evidenced in writing and signed, is satisfied by the transmitted and confirmed electronic data residing on computer data storage media displayable in human language on a video screen or as printed out by a computer. In agreeing to adopt these Rules, the parties shall be taken to have agreed not to raise the defence that this contract is not in writing.

It is submitted that this does not solve the problem. While rule 11 may be effective *inter partes,* it should be borne in mind that parties cannot contract out of the mandatory regime contained in SCOGA and the Hague Rules. The 1990 CMI Rules acknowledge this in rule 6, which provides that any EDI carriage contracts "shall be subject to any international convention or national law which would have been compulsorily applicable if a paper bill of lading had been issued". The Rules also provide that the holder of an electronic bill of lading may, at any stage, demand a traditional paper bill: see rule 10. This simply confirms that, where compulsorily applicable regimes like SCOGA and the Hague

Rules require written, signed documents, such requirements will ultimately prevail, undermining the security and efficiency of EDI systems.

A further problem is that electronic bills of lading cannot be physically "issued" by the carrier to serve as a tangible documentary receipt for the goods, as required by art III (3) of the Hague Rules. If the transaction is described in more abstract terms, however, there is no reason why electronic bills and the use of the Private Key under the 1990 CMI Rules cannot effectively perform the receipt function of a traditional bill.

The Mercantile Law Act 1908

The legal status of traditional bills of lading is further spelled out in the Mercantile Law Act 1908 (MLA). MLA includes traditional bills of lading in its definition of documents of title: see s 2(1). Bills of lading may be transferred by endorsement, or (in the case of a straight bill of lading) by delivery: s 10. More importantly, s 13 of MLA allows for the shipper's rights of suit under the bill of lading against the carrier to be transferred to later consignees and endorsees "to whom the property in the goods therein mentioned passes on or by reason of such consignment or endorsement". This statutory device, which has not been without its difficulties, attempts to overcome the lack of contractual privity between the carrier and later consignees or endorsees of the bill. It has conferred on bills of lading much of their commercial significance and efficacy. Of course, a consignee named in a bill of lading also has a direct right of suit against the carrier in New Zealand by virtue of s 4 of the Contracts (Privity) Act 1982. The statutory privity of s 13 of MLA is, nevertheless, necessary to transfer rights of suit to the consignee in other cases, and also to later endorsees, who cannot come within the ambit of s 4 of the Contracts (Privity) Act.

In its present form, the Transport Law Reform Bill 1993 will replace s 13 with new provisions based on the Carriage of Goods by Sea Act 1992 (UK). These provisions should overcome difficulties arising in cases where property in the goods shipped under the bill of lading does *not* pass "on or by reason of" consignment or endorsement.[8] They will allow for the automatic transfer of rights of suit to the lawful holder of a bill of lading, or the person identified in a waybill as being entitled to delivery.

Electronic bills of lading do not fit happily within the matrix of s 13 or the new provisions. In the absence of a redefinition of "bill of lading" to include electronic bills, they cannot realistically be brought within the MLA definition of documents of title. The 1990 CMI Rules attempt to resolve this issue by requiring the parties to agree that the electronic receipt message and Private Key "have the same force and effect" as a paper bill of lading: see rules 4(d) and 7(d). The Courts are likely to uphold such a contractual arrangement *inter partes*, but it is nevertheless unclear whether electronic bills of lading will be accorded the full status of "documents of title" under SCOGA and MLA for all purposes.

Further, electronic bills cannot be negotiated in the manner envisaged by s 13. Because the data comprising electronic bills of lading are intangible, they cannot be physically endorsed or delivered. A print-out of the electronic bill can, of course, be signed and endorsed or delivered, but this would immediately rob the EDI system of its flexibility and start up the paper trail again. Electronic bills of lading thus cannot successfully transfer rights of suit to endorsees through s 13, because they fail both the "bill of lading or other document of title" and "on or by reason of endorsement" requirements. The provisions in the Transport Law Reform Bill which are proposed to replace s 13 are an improvement from the standpoint of EDI compatibility, in that they shift the focus away from physical endorsement. However, they also fail to address the issue of electronic bills of lading, as transfer of rights of suit under the new regime will still hinge on possession of a *physical* shipping document.

The 1990 CMI Rules successfully circumvent the privity issue by creating a network of linked EDI contracts. As mentioned above, under the Rules each subsequent consignee not only enters into a contractual relationship with the previous consignee, but also enters into a "master agreement" directly with the carrier, on the same terms of carriage as the previous parties. The carrier is thus involved directly as a party to each successful transfer of rights to later consignees.

The Carriage of Goods Act 1979

The Carriage of Goods Act 1979 governs all New Zealand coastwise carriage of goods. The Act provides for four basic carrier liability options: at owner's risk, at limited owner's risk, at declared value risk, and on declared terms. Section 8 of the Act, however, requires contracts at owner's risk, at declared value risk and on declared terms to be in a written document; in addition, all contracts at owner's risk and on declared terms must be signed. Failure to comply with the requirements of s 8 means that the default liability regime, at limited owner's risk, will automatically apply. The Carriage of Goods Act regime is compulsorily applicable to all domestic carriage of goods, and will thus override any agreement under the 1990 CMI Rules that writing and signature requirements do not have to be met. As presently drafted, therefore, the Act obstructs the use of EDI in domestic coastal carriage.

The Marine Insurance Act 1908

Section 24(1) of the Marine Insurance Act 1908 requires marine insurance policies to be signed by or on behalf of the insurer. As discussed above, unless the signature requirement is construed liberally by the Courts, this requirement will preclude parties from finalising their marine insurance arrangements by EDI.

The Customs Act 1966

The Customs Act 1966 provides that most goods imported to, or exported from New Zealand by sea will only be released from Customs control once an entry of goods is made to the proper officer. Section 19 of the Act requires the entry of goods to be in the prescribed form, with the proviso that Customs may instead accept "any document that is substantially in accordance with the prescribed form". For our purposes, it is of interest to note that the definition of "documents" in s 2(1) of the Act was amended in 1991 to include "information recorded, transmitted, or stored by means of tape recorders, computers, or other devices, and all material subsequently derived from information so recorded or stored". Further, "documents" in terms of the Customs Act may be "in any form, whether or not signed or initialled or otherwise authenticated by their

maker". This new definition, based on the definition of "document" in the Evidence Amendment Act (No 2) 1980, is framed broadly enough to accommodate EDI customs processing.

However, in practice New Zealand Customs still requires the presentation of traditional paper documents. This means that, for example, EDI customs information concerning goods exported from Australia to New Zealand under the Australian Customs EXIT system, which allows for full electronic processing, has to be translated on receipt and printed out in a paper format that will satisfy New Zealand Customs. This arrangement no doubt suits local EDI translators, but it also inevitably slows down trans-Tasman trade processing and increases the risks of transcription error.

V Conclusions

At present, it cannot be said that New Zealand law relating to concepts of negotiability, title and contractual privity, as well as evidence and writing and signature requirements, accommodates EDI technology to the extent that it can provide a viable, legally secure alternative to traditional negotiable bills of lading. For this to happen, all of the relevant statutes, with the exception of the Customs Act, will have to be amended. Amending these statutes to take cognizance of EDI will require; first, the adoption of a broad definition of "document", perhaps based on the Customs Act definition. Secondly, the signature requirement will have to be looked into – definitions which expressly include digital signatures are called for. It might be useful here to consider the definition of "signature" contained in the Hamburg Rules. Art 14(3) provides that:

> The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, *or made by any other mechanical or electronic means,* if not inconsistent with the law of the country where the bill of lading is issued. (Emphasis added.)

Thirdly, and most importantly, the conceptual basis of the traditional bill of lading as a negotiable document of title requires a radical re-assessment in the light of technological advances in EDI.

It is not too fanciful to envisage a future when electronic trade processing is the norm, adopted in all jurisdictions and governed by international convention, in the same way that the Hague, Hague-Visby or Hamburg Rules currently govern paper-based sea carriage regimes. The 1990 CMI Rules represent a first step in that direction. It makes sound economic sense for maritime jurisdictions like New Zealand to encourage commercial adoption of EDI; to amend domestic legal provisions which are incompatible with its use; and to ensure that the law is flexible enough to accommodate future developments in electronic maritime trade processing techniques. □

1 On EDI generally, see AH Boss "The International Commercial Use of Electronic Data Interchange and Electronic Communications Technologies" (1991) 46 Bus Lawyer 1787; GF Chandler "The Electronic Transmission of Bills of Lading" (1989) 20 Jnl of Mar Law & Com 571; B Crawford "Strategic Legal Planning for EDI" (1989) 16 Can Bus LJ 66; J Crichton "Kicking the Hard-Copy Habit" (June 1993) Containerisation Intnl 36; P Kimberley *The A to Z of EDI: An Introduction to Newspeak* (MCATS, Wellington, 1988); HM Kindred "Modern Methods of Processing Overseas Trade" (1988) 22 Jnl of World Trade 5; B Wright *The Law of Electronic Commerce* (Little, Brown & Co, Boston, 1991).

2 See SM Williams "Something Old, Something New: The Bill of Lading in the Days of EDI" (1991) Trans Law & Cont Probs 555, 556 n 3.

3 This diagram, and the general discussion of the 1990 CMI Rules, is based on B Kozolchyk "Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective" (1992) 23 Jnl of Mar Law & Com 161, 227-240; also see RB Kelly "The CMI Charts a Course on the Sea of Electronic Data Interchange: *Rules for Electronic Bills of Lading*" (1992) 16 Tul Mar LJ 349, 360-375.

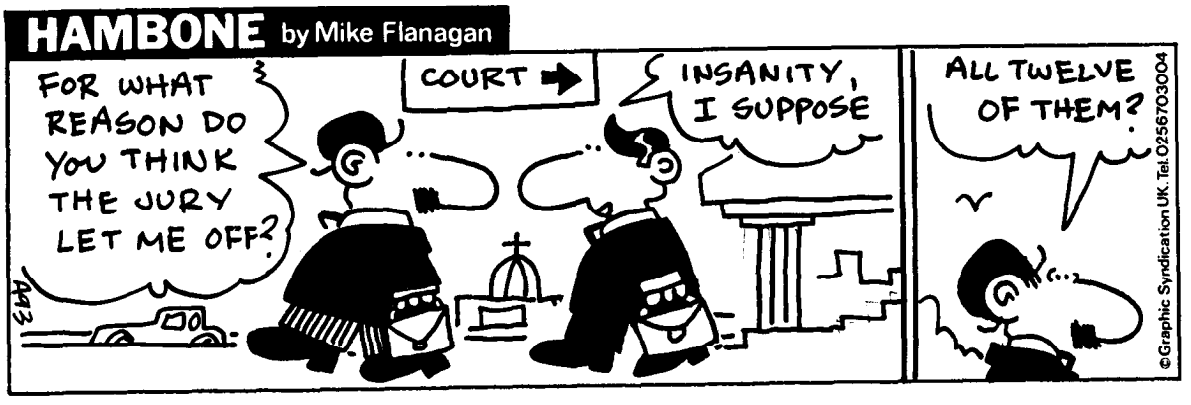
4 See S Gardner "Trashing with Trollope: A Deconstruction of the Postal Rules in Contract" (1992) 12 OJLS 170, 193-194; Kelly, above n 3, 359-360; C Reed "EDI – Contractual and Liability Issues" [1989] Comp Law & Pract 36, 39; I Walden and N Savage "The Legal Problems of Paperless Transactions" [1989] JBL 102, 107-108.

5 See D W McLauchlan "Mistake as to Contractual Terms under the Contractual Mistakes Act 1977" (1986) 12 NZULR 123, 141. The seemingly contrary decision in *Henkel v Pape* (1870) 6 LR Exch 7 turned on the Court's refusal to hold the defendant responsible for a post office clerk's transmission of a garbled telegram, because the latter had exceeded his authority as agent. This somewhat peculiar reasoning will not be relevant to typical EDI fact situations.

6 Carriage of goods from New Zealand to the Cook Islands, Niue and Tokelau is currently covered by the Carriage of Goods Act 1979: see s 5(5). Note that the Transport Law Reform Bill 1993, as presently drafted, will repeal s 5(5): see cl 259(2) of the Bill.

7 The most reliable verification of the identity of the operator may be achieved by employing biometric systems, such as retina scans; thumbprint, fingerprint or hand geometry identification; voice or signature verification; or keystroke dynamics testing. Biometric technology, however, is at present far too expensive for routine use in general commercial transactions. On authentication of EDI messages, see Reed, above n 4, 39-40; Kelly, above n 3, 356-358.

8 Eg, in cases where property in bulk goods passes by reason of ascertainment, rather than endorsement of the bill. The Courts have dealt with this unsatisfactory situation by constructing a *Brandt v Liverpool* contract between the carrier and endorsee in some cases, but this has created its own difficulties. See eg *The Aramis* [1989] 1 Lloyd's Rep 213; *The Delfini* [1990] 1 Lloyd's Rep 252.



Justice not according to law

By Jeremy Finn, Senior Lecturer in Law, University of Canterbury

In this article Jeremy Finn considers the decision in Howick Parklands Building Co Ltd v Howick Parklands Ltd [1993] 1 NZLR 749 *in the light of the Real Estate Agents Act 1976, the Illegal Contracts Act 1970 and the Commerce Act 1986. The author agrees with the judgment in respect of the issues under the first and last of these statutes, but has substantial reservations, and is critical of the judgment in relation to the Illegal Contracts Act. He argues that in so far as the judgment puts forward a principle that the Courts have power to enforce an unconscionable contract which is illegal (outside the remedial provisions of the Illegal Contracts Act) then this principle cannot be justified on the grounds of inherent jurisdiction or of public policy.*

1 Introduction

The recently-reported decision of Thomas J in *Howick Parklands Building Co Ltd v Howick Parklands Ltd* [1993] 1 NZLR 749 is of considerable interest, not to say concern, to anyone concerned with illegal contracts and the principles governing the granting of relief to parties to such contracts. The facts of the case, as found by the Judge, are relatively straightforward. The two parties had been jointly involved in the development of a residential subdivision in Auckland. In essence the plaintiff was to develop the subdivision on lands purchased for the purpose of the development by the defendant. The plaintiff was to be involved not only in the marketing of the subdivision, but was to have the sole right to construct any buildings required by the defendant, and was also to have a right of first refusal over the construction of any dwelling required by any purchaser of a residential section, and also to have the benefit of covenants in any agreements for sale and purchase of sections entered into by the defendant, such covenants requiring any purchasers to acquire their building materials or services from the plaintiff. The plaintiff was also to receive a fee for each sale of a section owned by the defendant. The legality of some of these arrangements was queried by representatives of the plaintiff; the need for alteration was denied by Palmer, a fact which loomed large in consideration of the merits of the later proceedings.

Unfortunately the development did not prosper, and matters became difficult, particularly so because of one of the guiding spirits of the project, one Palmer, had dual responsibilities in that he was employed by the plaintiff to assist in the marketing and development of the subdivision, but was also in fact the local representative of the financial interests (principally Palmer's uncle) which controlled the defendant. Palmer then precipitated a breakdown of the contractual relationship, having decided that its prospects were better without the plaintiff's involvement than with it. The defendant's conduct clearly involved a breach of contract unless there had been agreement to terminate by the plaintiff. Thomas J, in unusually strong terms for a modern day New Zealand Judge, held that there had been no such mutual agreement, and Palmer's evidence to that effect was deliberately false. On the facts this left a clear case for damages, but the defendants then sought to exonerate themselves from liability by advancing various defences based on alleged illegalities in the marketing agreement; these involving, allegedly, breaches of both the Real Estate Agents Act 1976 and the Commerce Act 1986.

Thomas J had little difficulty in disposing of the allegations of illegality under the Real Estate Agents Act 1976. The defendant's case was, in effect, that the plaintiff's receipt of fees for achieving the sale of properties within the development made them, in law, real estate agents; as they were not licensed as such there was a breach of s 16 of the Act. Further, the absence of a licence was, under s 62, allegedly fatal to any claim for moneys due under the contract. The defence failed, primarily because Thomas J held that the plaintiffs did not come within the Real Estate Agents Act. He then went on to consider whether, had there been an illegality of the type contended for by the defendant, relief should be granted under the Illegal Contracts Act 1970. In his view, which has much to recommend it, the wording of s 62 must be interpreted as providing that any contract of agency by an unlicensed real estate agent is illegal, whereas the prohibition in the same section on bringing suit to claim remuneration on any agreement not in writing merely has the effect of rendering the agreement unenforceable by the agent. This reading of s 62 is surely to be welcomed as allowing a reconciliation of the different policy considerations which have been unsatisfactorily combined in the section. If there was jurisdiction and need to grant relief, Thomas J was unhesitatingly of the view that validation was the proper course.

2 The need to plead illegality

However, on the second ground of alleged illegality, the issues were more difficult. The defendant claimed in the pleadings that the requirements that the defendant, and customers, in some way put their business through the plaintiff amounted to a breach of the prohibitions against anti-competitive behaviour in ss 27 and 28 of the Commerce Act 1986; a claim was later made in the defendant's closing submissions that there was also or principally a breach of s 36 of the Commerce Act in that the plaintiff had abused a dominant market position. Thomas J was of the view that these matters did not avail the defendant. Three different bases

for refusing to hold the contract to be enforceable were put forward. Of these the most simple and straightforward was a finding that there was no proof of a breach of the Commerce Act. The defendant had failed to adduce any evidence going to the critical elements of the section, particularly as to the determination of the relevant "market" in which it was alleged that there had been the anti-competitive behaviour. In the absence of such evidence, the defendant had failed to make out the allegation of breach of statute. Thomas J went on to hold, virtually as a matter of impression as to the definition of the relevant "market" that there had been no breach of the Act.

The claim of a breach of s 36 also failed because, in Thomas J's view, it had not been adequately pleaded.

> I acknowledge that statutory illegality is not strictly a "defence" as such. The Court's refusal to enforce a contract which contravenes a statutory requirement is based on policy grounds and not on any breach of duty which the defendants owed the plaintiff. Indeed, it has been said that, where a contract is prima facie illegal, the Court is to take judicial notice of the fact and refuse to enforce it even though the illegality has not been pleaded (see *Cheshire, Fifoot and Furmston's Law of Contract* (11th ed, 1986) at p 375). However, there can be no universal rule to that effect. The single word "illegal" embraces varying degrees of impropriety. Consequently, the Courts are likely to take "judicial notice", for example of a covenant to undertake a crime and smartly reject it as illegal, but they need not necessarily be so vigilant in policing the law when confronted with, say, a breach of a regulatory enactment. In the former category no pleading may be necessary; in the latter it may not be inappropriate to require a proper pleading before the issue is considered. Such an approach is consistent with the basic principle that, for the most part, the effect of illegality turns on the intention of the parties and that the parties may, in some circumstances, acquire rights and liabilities under the agreement notwithstanding the illegality.
>
> In this case, therefore, I do not think it is sufficient for the defendants to merely draw the attention of the Court to an alleged illegality in argument. Irrespective of the element of policy involved, it is appropriate to consider the issue as a defence. A proper pleading was required, and the plaintiff was entitled to know in advance the issues which it would be required to meet. ([1993] 1 NZLR 749, 762.)

This is a more than slightly surprising line of reasoning. It has a superficial appeal, in that lawyers are familiar with the theory that only the role of pleadings is to determine what issues are to be determined in Court. Further, there are some matters where a relevant statutory matter must be pleaded specifically – the Contracts Enforcement Act 1956 is perhaps the most obvious of these. Yet the argument is flawed. It is surely not proper to leave on one side any issues of public policy. Illegality cannot be equated with allegations of fraud or misrepresentation which may be raised as defences to a claim – indeed, as the statement quoted above shows, Thomas J initially concedes this before asserting the contrary. In the context of enforcement of alleged contractual rights illegality, if established, is a separate and substantial ground on which the contractual claim must fail. It does not bar enforcement because of any matter restricted to the conduct of the parties to the alleged agreement; it bars enforcement because both public policy and statute require that claims based on illegal contracts are not enforceable. The legislative policy is clear, and cannot validly be disregarded. Section 6(1) of the Illegal Contracts Act provides:

> Notwithstanding any rule of law or equity to the contrary, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract.

If s 6(1) is to mean anything, it means that illegal contracts are not to be enforced in the Courts (saving, of course, those cases where relief under the Illegal Contracts Act is warranted). It is a remarkable interpretation of the section to treat it as meaning that only those illegal contracts where the point is fully pleaded are to be considered unenforceable. A Judge surely must take the attitude suggested by the (English) editor of *Cheshire Fifoot and Furmston's Law of Contract* mentioned above and take judicial notice of any illegality. To do otherwise is to allow a litigant to succeed by pleading a right arising from a contract which, to the Judge's knowledge, Parliament has said is not enforceable. If there is an illegality which renders the contract void, as a matter of law no rights accrue under it; the party seeking to enforce "rights" is seeking to enforce that which Parliament has declared do not exist. It is surely no justification for permitting such an enforcement of non-existent rights that there has been a failure to plead the illegality. To consider that a litigant may be estopped from reliance on the law of the land because of a failure to plead the full details of that law is at best to place a Judge-made rule of pleading above the clear policy and words of Parliament. At worst it might be characterised as connivance by the Judge in an evasion of the Illegal Contracts Act. Neither fits well with the proper role of the judiciary. Nor, with all due respect, is it proper for a Judge to determine that there are some breaches of the law which the Judge will note; others which he or she will not. Judges are appointed to adjudicate on and apply all the law of the land, not merely those elements which are not to be characterised as "a breach of a regulatory enactment".

None of these criticisms detract from the validity of the proposition that it is for the person alleging that there has been some illegality which makes a contract of no effect to point out and establish any necessary facts which are relied on to prove that illegality. It should, of course, not be necessary for the relevant evidence to be established as a part of that party's case. If the evidence before the Court proves the necessary facts, it should be sufficient that the Court's notice is drawn to the illegality, either by counsel or, failing that, by the Judge of his or her own motion.

3 A new discretionary power to enforce illegal contracts

However, the most surprising and disturbing element of the judgment is not Thomas J's observation as to the necessity to plead illegality if a party wishes to rely on it. The most novel, and most questionable, element of the judgment is the assertion, for the first time, of a judicial power, in appropriate circumstances, to enforce illegal contracts notwithstanding a statutory illegality, where it is inequitable that a party should not be able to enforce the "contract". This issue arose for consideration because of the possible effects of s 89(5) of the Commerce Act 1986, which provides that nothing in the Illegal Contracts Act applies to contracts in breach of the Commerce Act. Such a privative provision would appear from its wording to be intended to prevent any form of relief for contracts rendered illegal by the Commerce Act. Although Thomas J indicated that this was his view of the section, he, perhaps surprisingly, did not find it necessary to express a concluded view as to its effects. However, if s 89(5) did have effect to prohibit validation, and if (contrary to the Judge's views of the facts) there was a breach of the Commerce Act, any illegality would, on the conventional view, mean that the Court would be prevented from granting any remedy to the plaintiff, regardless of the merits of the case. These merits were the more clearly on the plaintiff's side since it had, on legal advice, raised the question of potential breach of the Commerce Act; it had been the defendant which had insisted that the arrangements were valid.

The Judge, however, considered that the plaintiff could still succeed. Thomas J was not prepared to admit that the Courts would be required to accept the defendant's plea of illegality. In his view, the Court could simply enforce an illegal contract if it would be unconscionable not to do so.

> Irrespective of the Illegal Contracts Act, I consider that, notwithstanding a statutory illegality, the Courts possess a residual power to enforce a contract where it would be inequitable or unconscionable in the circumstances of the particular case to allow the defendants the benefit of a finding that the contract is illegal and void. It has been repeatedly held that the enactment of legislation in a particular area of the law does not mean that the common law in that area ceases to develop. Indeed, although it is not necessarily the case here, the legislation may influence the direction of the common law (see, for example, the dicta of Cooke P in *Day v Mead* [1987] 2 NZLR 443, at p 451; see also my observation in *L C Fowler & Sons Ltd v St Stephen's College Board of Governors* [1991] 3 NZLR 304 at pp 310 and 312).
>
> In this case, therefore, the fact that the legislature has seen fit to enact the Illegal Contracts Act does not mean that a principle along the lines suggested may not inform the common law. But, it should be stressed that it is not the same principle as that underlying the Act; it is much more restricted and is closely related to the concept of estoppel. Whereas the Illegal Contracts Act was designed to ameliorate the harshness and rigours of the common law's response to illegality, the principle I am here referring to is designed to preclude an unworthy defendant from relying upon or benefiting from the illegality in the first place. ([1993] 1 NZLR 749, 764-65.)

The basis of this remarkable new rule is allegedly to be found in three sources. Firstly there is the principle that the Courts should "never willingly countenance the prospect of being used as the vehicle for injustice". In Thomas J's view this means that the Courts should not condone the misuse or abuse of a common law rule. He then goes on to say:

> Indeed the rule that a contract which is illegal, and therefore unenforceable, because it contravenes a statute does not now apply where the parties are not in pari delicto or where the contract has been induced by fraud or undue pressure. Nor, I consider, need it be applied where the enforcement of the contract would not do umbrage to the objects or policy of the statute and the outcome would be wholly inequitable as between the parties. ([1993] 1 NZLR 749, 766.)

The second ground assigned for the new principle is the claim that the Courts already have a power in cases of statutory illegality to grant or refuse relief according to the merits. Authority for this is said to be found in *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 204.

Lastly, a basis for the principle is alleged to arise from equitable estoppel; not indeed in its more conventional guise but in the alleged essence that the doctrine, in its most flexible form, is "a wider doctrine in which the prevention of unconscionable conduct provides the overriding criterion". ([1993] 1 NZLR 749, 767.)

Thus Thomas J can come to the conclusion that

> These three sources, to my mind, establish the basis for the principle that the Courts may deny a defendant the benefit of a finding that the contract is illegal where it would be inequitable or unconscionable for the defendant to obtain that benefit. In invoking this principle in the present case, I have not been unmindful of the effect of s 89(5). The defendants can tenably argue that Parliament's intention to exclude the operation of the Illegal Contracts Act for a breach of the Commerce Act leaves no room for the principle in question in the present case. It can go further and point out that it is logically dubious to assert that the common law has continued to develop, and even to be influenced by the policy of the legislature in enacting that Act, when the legislature's policy of excluding relief of this kind could not be more plain by virtue of the terms of s 89(5).
>
> The principle is not, of course, restricted to the operation of the Commerce Act, and the existence of s 89(5) cannot, therefore, affect its general validity. Rather, the question in this particular case is whether it is impliedly excluded because of the enactment of that subsection. In this respect, I have already pointed out that the present principle is not the same as that

recognised in the Illegal Contracts Act. It does not seek to validate or repair contractual obligations otherwise rendered illegal. Rather, the illegality remains but the contract is not rendered unenforceable at the suit of the plaintiff any more than a contract is declared unenforceable where the parties are not in pari delicto, or where one party has acted fraudulently or exerted undue pressure on the other, or the like. The Court simply refuses to make the contract inoperative when to do so would be tantamount to allowing the Court to be used to effect an injustice and where the defendant would be permitted to go back on a state of affairs and an expectation which it had created. Section 89(5), therefore, is to be construed so as to apply to contracts which the Court holds to be illegal and therefore unenforceable at the suit of the plaintiff; it does not apply to contracts which remain enforceable notwithstanding a statutory illegality. ([1993] 1 NZLR 749, 768.)

The principle put forward is novel; it may even have some intrinsic attraction for those who are prepared to place concepts of fairness above obedience to precedent or, indeed, compliance to the law. However the doctrine propounded is, on analysis, not compatible with our law. Nor are the premises on which it is allegedly founded, and the reasoning which seeks to proceed from those premises, a satisfactory basis for so remarkable a development.

Let us take first the relationship between the existing law and the new doctrine. The Illegal Contracts Act 1970 represented a novel statutory policy of allowing to the judiciary a discretionary power to grant relief from the consequences of illegality where this was warranted, rather than have the result of illegality vary according to the vagaries of the common law rules as to when illegal contracts were or were not enforceable. Section 6(1) of the Act has already been quoted; it supersedes all the prior rules of law or equity (and, on its face, also ousts the new rule promulgated by Thomas J) in favour of the simplicity of making all illegal contracts void and of no effect unless relief is given. Thomas J's new rule contemplates enforcing these contracts which are "void and of no effect". This cannot be done if s 6(1) is given any force at all. Further, the alleged principle falls foul of s 7(7) of the Illegal Contracts Act, which provides that

> Subject to the express provisions of any other enactment, no court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act.

However the alleged new power to enforce illegal contracts is expressed, it contravenes the clear words and policy of s 7(7). The only attempt made by Thomas J to reconcile his new principle with the express words of the Illegal Contracts Act is, as quoted above, to treat the Illegal Contracts Act as being a statute which is concerned with attempts to "validate or repair contractual obligations otherwise rendered illegal". This represents a remarkably narrow view of the Illegal Contracts Act and its functions, not the least of which was to provide some degree of certainty in the law. The failure to discuss expressly the provisions quoted above certainly does not assist in the credibility of either the thesis advanced or the reasoning put forward to justify it.

Secondly, we may examine the argument put forward based on the ability to enforce contracts where the parties are not in pari delicto. It is manifest that in so far as this is a common law rule of substance, it has been superseded by the Illegal Contracts Act. Nor does the reference to *Kiriri Cotton Co Ltd v Dewani* provide direct support for the proposition, since the case concerned a breach of statute where the burden of compliance had been expressly placed on the party now seeking to enforce the illegal contract. In such a case it might, absent the Illegal Contracts Act, be appropriate to prevent a litigant from reliance on his or her own default. It is difficult to extrapolate from such a restricted ground of decision the general rule that the Courts always have a power to enforce an illegal contract; in the face of the Act such an extrapolation becomes untenable.

Lastly, we may turn to the broadly stated arguments that enforcement of the illegal contract is possible where there has been unconscionable conduct by the defendant. The criticisms of this reasoning are twofold. The first is the, by now familiar, plaint that the result is manifestly contrary to the Illegal Contracts Act. The second is that the reasoning is defective. Thomas J's argument may be represented by the following syllogism:

> 1 The Courts should not allow unconscionable conduct by a litigant;
> 2 Reliance on the rule that an illegal contract is unenforceable is unconscionable conduct;
> Therefore the Court should not refuse to enforce the illegal contract.

While the first premise may be taken as established, at least in theory, the same cannot be said of the second. Is it unconscionable to rely on the law of the land? Is it really unconscionable or inequitable for a litigant to deny liability under a contract on the basis that Parliament has said the contract has no effect? It is difficult to see that any Judge can be justified in refusing to allow a litigant to put forward a statutory defence because, absent the defence, the Judge thinks the litigant should be liable. If that approach is once accepted, why have rules of law at all?

Why not decide every case on what the Judge sees as the merits irrespective of the law? In the instant case reliance on the lack of contractual force is only unconscionable if one takes the view, as Thomas J did, that the defendant ought to be liable on the contract irrespective of the illegality. To then say that reliance on the illegality is unconscionable is a piece of reasoning which can charitably be described as both unsatisfactory and circular.

It is highly probable that Thomas J's views were influenced by his view of the merits of the case; indeed on reading the facts as he outlines them one cannot help but agree with his view of the merits. Nor can one dissent from his handling of the issues concerning the Real Estate

continued on p 335

The swearing-in of Dame Silvia Cartwright as a Judge of the High Court

Rt Hon Sir Thomas Eichelbaum, Chief Justice of New Zealand, speaking at the ceremony in the High Court, Wellington, 28 July 1993

Your Honour, almost 100 years ago, in 1895, your predecessor as a female law graduate from Otago University, Ethel Benjamin, commenced the first of her battles to become accepted in the legal establishment in Dunedin. In 1904 another pioneer, Edith Haynes, who in every respect except as it turned out one, held the necessary qualifications, applied for admission as a legal practitioner in Western Australia. The full Court of the Supreme Court however declined on the ground that women were not eligible, solemnly holding that the word "person" in the Legal Practitioners' Act 1893 did not extend to the female of the species. The Acting Chief Justice, I regret to say, stated that the idea of women practising in the Supreme Court seemed quite foreign to the legislation which had prevailed for years past. Another member of the Court, concurring, said ominously that if women were entitled to become members of the Bar they would be eligible to sit on the Bench. The third Judge said that throughout the civilised world – mark those words – the Court had not been able to ascertain any instance under the common law where the right of women to be admitted to the Bar had ever been suggested.

Today one can only look back on such episodes, which unhappily were not unique, with a sense of shame. At least some progress has been made since those days, but many would say it has been too slow and that the signal step being marked today, the appointment of a woman to the High Court bench, has taken far too long to arrive.

Two comments on the Warrant the Registrar read a few moments ago. The first is to emphasise that as stated by the Attorney-General in announcing your appointment, it is a permanent one. The Warrant is worded as it is because in terms of the statute there is no immediate permanent vacancy.

The second point is that the Warrant, signed as it is by the Governor-General, affirms that the appointment is by her in the name and on behalf of Her Majesty the Queen. The counter-signature by the Attorney-General reflects that according to convention, Judges of the High Court and the Court of Appeal are nominated by the Attorney, a nomination made in his capacity as holder of that office and not on behalf of Executive Government or Parliament. Also by convention, the Attorney-General consults about appointments, but the convention is not explicit as to the persons consulted, or regarding any limitations on the range of consultation. It is one of those time-honoured concepts, a traditional and peculiarly British one, which has worked well in the past. At the New Zealand Law Conference earlier this year I said I was unaware of any example in New Zealand history where an appointment had been criticised as politically motivated – a remark which greatly amused the Justice of the United States Supreme Court who was taking part in our discussion by video link, but I stand by it. Nevertheless the question remains whether we should debate and re-examine the selection procedure.

One suggested alternative is sometimes referred to as a Judicial Commission. The name is capable of misinterpretation, and it would be unfortunate if any misunderstanding obscured the real point at issue, namely whether judicial independence would be confirmed and enhanced by establishing a more open appointment process, likely to be better understood and more readily accepted by the public.

The term "Judicial Commission" may tend to suggest a body of Judges, but I do not believe its proponents have ever so intended. Perhaps "Judicial Appointments Board" would be a better expression but whatever the name, the intention as I understand it is that the body should have a membership drawn from various sectors concerned with the Courts system. It would certainly not be composed solely of Judges. Its role would be a recommendatory one; the formal nomination would still be by the Attorney-General.

The proposal of a Judicial Appointment Board or similar is not novel; it was recommended 15 years ago by the Royal Commission on the Courts chaired by Sir David Beattie. I am not wedded to that particular concept which is not the only alternative. What I do submit is that it is timely to consider a selection process more visible, systematic and accountable than the present.

Your Honour, I suggest that whatever appointments system was in force in New Zealand, your appointment had a certain inevitability about it. You have made a notable contribution to the status

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Agents Act. But the new principle arrogating to the Courts a power to enforce contracts which Parliament has declared to be void cannot be sanctioned. Neither the bases on which it allegedly founded nor the policy of the law can justify such a new judicial power.[1] Justice surely requires that cases are decided according to law, not law according to the Judge's view of the merits. A litigant is entitled to justice according to law. No more, but certainly no less. □

1 Thomas J has provided an illuminating insight into his perception of the role of the modern Judge in his stimulating monograph *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy* (VUWLR Monograph 5, 1993). Although it is acknowledged that extra-judicial statements are not necessarily any guide to the reasoning employed in determining a case inter partes, the extra-judicial support for a greater role for the judiciary in resolving unsatisfactory areas of the law coincides so well with the assertion of new policy-oriented judicial powers that an intellectual nexus may reasonably be presumed.

of women. As was said in one of the many editorials welcoming and commending the announcement of your new office, you are an outstanding person in fields far wider than law alone, and your example will encourage many of your female colleagues to persist in a career where traditional attitudes and male dominance still have to be overcome. A change of culture is required but you have done much already to ensure that that takes place and your appointment will be the catalyst for further change for the better.

You bring to the Court a rich diversity of experience as a lawyer, a Family Court Judge, and Chief Judge; as Commissioner in the high profile enquiry into cancer treatment, as an accomplished speaker and writer in many relevant fields, and an international representative for New Zealand. All this emphasises a point not to be overlooked, that you do not join the High Court as a representative of your gender but as a person fully qualified to fulfil the demanding and diverse role of a High Court Judge.

I now welcome you most warmly to the High Court Bench and assure you, if any such assurance is necessary, that this welcome is equally extended by all your new colleagues.

Hon Paul East, Attorney-General

May it please your Honours.

I am grateful for the opportunity to attend and speak on behalf of the Government at this special sitting of the High Court which marks the appointment of Dame Silvia Cartwright as a Judge of this Court.

Not only does the Court sitting allow me to extend my best wishes to Your Honour for your judicial career, it also gives me the opportunity as a Law Officer to acknowledge and thank all members of our judiciary on behalf of the whole community.

To the general public, the system by which our Judges are appointed does remain something of a mystery. Whatever may be thought of the system of appointment, no one has ever had cause to question the strength, integrity and independence of our judicial system. In that respect we are an example to the rest of the world and we have been fortunate to avoid many of the problems that have befallen other jurisdictions.

On behalf of the Government I thank our Judges for their hard work and dedication in the difficult task that they undertake.

It has been the privilege of the Attorney-General to address this Court on a number of occasions on the appointment of a new Judge of the High Court. It is always a significant occasion – for the individual it represents the pinnacle of their career as a lawyer and marks the beginning of one of the most difficult jobs that any citizen is called on to do. It calls for a great depth of knowledge of the law, the ability to quickly recognise the claims of the respective parties, and an ability to be sensitive to the prevailing mores of the community to which the judiciary is ultimately responsible so that justice is done, and seen to be done, in the individual case.

For many years now appointments of our High Court Judges have been drawn from the ranks of senior practitioners recognised as leaders in the profession at the independent bar. In recent times, however, there has been a move away from this tradition and there have been recent appointments from a practising law firm and from a leading university. Such appointments collectively broaden the experience and understanding available to the law. They also enhance the respect that the Judges are able to command by recognising and understanding the interests of people from every element of our society.

At a time when the whole country is in a state of great change, and when social and economic pressures are exerting great influence on the essential fabric of our society, it becomes more necessary than ever for Judges to be seen to be aware of the problems faced in our communities and sensitive to the issue that are changing our values.

Now, for the first time, I have the great honour to address this Court on the appointment of the first woman to the High Court bench.

Justice Cartwright you have already had a long and distinguished career in the law.

After graduating in law from Otago University you practised in both Rotorua and Hamilton, becoming a partner in the well known and established Hamilton firm of Harkness Henry & Co. You quickly built up a reputation as a conscientious and skilled advocate. Appointed a Family and District Court Judge in 1981 you became our Chief District Court Judge in 1989.

Your Honour is well known for having conducted the enquiry into the Treatment of Cervical Cancer and Related Matters at National Women's Hospital in 1987 and 1988. You were also a member of the Commission for the Future between 1975 and 1981 and chaired the enquiry into the Social Science Research Fund Committee in 1986 and 1987. In 1989 the considerable contribution you had already made to our country was recognised when you became a Dame Commander of the Order of the British Empire.

The Government is particularly pleased to learn, that following your election to the United Nations Committee for Elimination of All Forms of Discrimination Against Women, in 1992, you will be able to continue to serve on this Committee, following your appointment to the High Court.

With such a varied background you bring a wealth of knowledge and experience to the Court. But, most importantly, for the first time you also bring a woman's perception and understanding of the law and the way in which legal issues are shaped and, indeed, a woman's perception of our community and our society. On behalf of this Government I can only express my best wishes to you personally in this next stage in your career and express my confidence that the High Court Bench will be enriched by your appointment.

On behalf of the Government I extend my best wishes to you and your husband and family as you embark on your new responsibilities.

Judith Potter,

President, New Zealand Law Society

May it please Your Honours.

It is with great pleasure and pride that I appear on behalf of the New Zealand Law Society and the legal profession in New Zealand, at this the swearing in of Justice Silvia Cartwright as a Judge of the High Court.

Yet my pleasure is mixed with concern as I note that this is a unique occasion – the only time a woman has been sworn in as a High Court Judge in New Zealand; and that while I appear today as the first woman President of the New Zealand Law Society, for two years of my term as President, the Council of the New Zealand Law Society has comprised me and 28 men, and only this year has the female representation changed – it has doubled to two.

In October 1992 the Chief Justice calling for a resurgence of ethics in business said of the New Zealand judiciary that it is "an effective and just system of complete integrity".

I am sure he is right. We are blessed in our judiciary.

But we all know for justice truly to be done, it must be *SEEN TO BE DONE.*

New Zealand is no longer an isolated island nation. Our society is a diverse one. We are ethically diverse, racially diverse, financially diverse, and culturally diverse.

And we comprise men and women.

When Napoleon said: "I can't stand women meddling in politics" Madame De Stael responded:

> Sire, in a country where women have been sent to the guillotine, you can't blame them for asking why this happens to them.

We may have dispensed with the guillotine but women are still entitled to ask, and do ask, of our law and our system of justice:

> Why am I affected in this way?

If they are to find the response credible – as they must if the integrity of our justice system is to remain intact – they must find credible, the system which delivers the response.

Sir Robin Cooke put it this way in *Phillips v Phillips:*

> The six Judges who have sat on this case in the two Courts are all men, most of us more than middle age. This is a type of case suggesting that a woman's insight would be helpful on at least one of the benches in assessing the claims, personality and situation of a litigant woman and arriving at justice between man and woman.

I am increasingly concerned about the widening credibility gap between the law and the citizens it serves – for one reason or another, or for a whole host of reasons, the law is not seen to be relevant to the lives of many people living in our society.

It would be idle to pretend that the presence of women in representative numbers on our judiciary, could alone bridge the credibility gap. But the necessity for women to be actively represented is a fundamental starting point. Without adequate representation the integrity of this system and the wisdom and compassion our Judges bring to it, are seriously at risk.

Justice Cartwright's appointment is therefore not only a matter of pleasure and pride, but a necessity. Addressing the New Zealand Law Society conference in March this year, Her Honour said of her experience in being denied employment as a lowly law clerk because of the "trouble . . . caused" earlier, by Ethel Benjamin –

> That one act probably did more than anything else in my professional career to guarantee that I would not remain the quiet shy lawyer with no thought of public acknowledgement, that women had and have a valuable role to play in the legal world in New Zealand.

Perhaps we should be grateful to that employer who missed such an opportunity. But, whatever the reason, we are fortunate indeed that Justice Cartwright has shown the courage and determination to accept the responsibility of judicial and public office when very often hers has been, and will be, a formidable and lonely task.

She has brought to every facet of her career strength of purpose, integrity, ability and unselfish commitment.

These qualities she will now contribute in full measure to the High Court bench. The High Court bench will be strengthened by the breadth and balance she will bring.

I know I speak for all the legal profession in wishing you well, Your Honour, as you take up the burden and challenge of your new office.

Peter Jenkin, QC, President, Wellington District Law Society

Chief Justice, Justice Cartwright, Your Honours.

The appointment of the first woman to the High Court bench has been a very significant event for the profession. Appointments to the High Court are always of great importance, because it is in this Court that our most significant litigation commences. Both the profession and the public generally have a strong interest in having the best people sitting in this Court and it is for this reason that Your Honour's appointment has been greeted so warmly by the Wellington profession. Although you have been with us for only a few years, we have been privileged to have had that association.

Here, as in your previous office, Your Honour is in a sense blazing a trail – and that is a difficult and, I suspect, daunting task. I trust that there may some comfort in the knowledge that you will receive every possible support from the profession in this city. Our only regret is that you may be moving to Auckland later this year.

We wish you well.

The Honourable Justice Cartwright

I would like to thank the Chief Justice, Sir Thomas Eichelbaum, the Attorney-General, the Right Honourable Paul East, the President of the New Zealand Law Society, Judith Potter, and the President of the Wellington District Law Society, Peter Jenkin, for their remarks.

My most pressing problem has been to decide just what I should say on this second occasion when I have been sworn in as a Judge. I have presided at many of these occasions and spoken calmly to the new Judge, reminding him or her that the ceremony is no worse than getting married, safe in the knowledge that I would never again have to suffer the ordeal myself.

I will follow a traditional course, and speak first of those who are the most important to me on what many see as a momentous day.

I am touched and delighted today by the men and women from the profession many of whom are my friends, who have made such an effort to be here in Court. Their presence means so much to me, as does the presence of my colleagues and friends from the District Court Bench. The last four and a half years have often been extremely difficult and many times I have told the Judges that I would not remain Chief Judge of the District Court for more than five years. I have beaten my own deadline, but appointment to this Bench had not quite been what I had in mind.

I have many friends among the District Court Judges. They are a varied, talented, but sometimes underrated group of Judicial Officers. They work under trying conditions at great pressure and with the broadest range of jurisdiction of any judiciary of which I am aware. I am proud to have been a member of this Bench, and to have been its Chief Judge.

The women Judges who now number only eleven in the District Court have been a joy to work with. They have encouraged me in trying times, and have offered constant support. We have had many happy occasions and will continue to do so. It is my hope and expectation that we will be joined both in the District Court and in this Court by many more women over the next few years.

My new Associate first began working with me during the National Women's inquiry when she organised Counsel Assisting the Inquiry, Lowell Goddard and me in a very short space of time. Her energy, organisational skills, optimism, and humour have been stretched during her time as my assistant in the Chief Judge's Chambers. I look forward greatly to continuing our excellent working relationship in my new role, although on reflection, I do not recall offering her the Associate's job. She simply told me she was coming.

Today is particularly poignant for me and for my family. This is the first time that my father, who died two months ago has not been present at a significant family occasion. He was aware before he died that my appointment might be a possibility, but advised firmly against it. I do know that he changed his mind. I received a letter from him just after he died telling me to take this new position.

It is wonderful to have my mother, a woman of courage and strength with me, my brother, and a sprinkling of my four sisters. I am inordinately proud of all of my family, who sadly show me little respect.

My husband is a remarkable man who has supported me (sometimes it must be said through gritted teeth) through my constantly changing career, usually at the expense of his

Swearing-in ceremony at High Court, Wellington

own. That he has managed to build and develop his own career in spite of three changes of city in ten years demonstrates more than I can say about his talent and his determination. It has been a striking feature of the letters and messages that I have received since my appointment to this Court was announced that many have remarked on the personal sacrifice and the hard road I have chosen. It is axiomatic that my husband shares those experiences with me. For his love and loyalty, I thank him publicly today.

Most of those in Court today will know that I would not be able to let this occasion pass without reference to the place of women in the profession and in the judiciary. Some months ago I predicted that there would be a woman appointed to the High Court before the end of this year. I have since discovered, somewhat to my embarrassment, that that was a self-fulfilling prophecy in two senses of that phrase. At the time I made those remarks, I had in mind very different women, so I remain confident that it will not be long before I am joined by others.

Whether the jurisdiction be District Court, Maori Land Court, Employment Court, High Court, or Court of Appeal, without a Bench that is broadly representative of the people it serves, those who use the Courts could be forgiven for thinking that justice was for the most part a male concept, and distant from the experiences and concerns of half the population.

You will also know that I am concerned that so many women seem to find that legal practice is not for them, and leave within the first few years of graduating. I hope that this seepage will cease. The legal profession can ill afford to lose so many of its graduates. Although I recognise that there is fierce competition for places in the profession, there are opportunities for women, and I would like to continue to do all that I can to encourage them to remain, to pursue a legal career, and for some to join me and my women colleagues in judicial service.

I now look forward to the next phase of my career. I have been delighted and reassured by the warmth of my welcome to the High Court. Without exception, the Chief Justice and the Judges of the High Court have offered me encouragement and assistance. I am also fortunate to have friends among the High Court Judges, and if I may single one out, it is a great pleasure to share this Bench today with Justice Robertson who has known me since we were both 15. He has been a friend to both me and my family for many years. I am confident that I will continue to receive the advice from him which he has always proffered so freely in the past.

I am acutely conscious of the responsibilities that I have assumed in taking this oath today. The administration of Justice is the cornerstone of our society. Plato considered that the ideal State embodied the qualities of wisdom, courage, and temperance, all of which were overshadowed by the fourth quality, Justice. He also argued that

> . . . there is no occupation concerned with the management of social affairs which belongs either to a woman or to man, as such. Natural gifts are to be found here and there in both creatures alike; and every occupation is open to both, so far as their natures are concerned . . .

I hope that my natural gifts are suited to the pursuit of justice, and that I can also emulate those qualities of wisdom, courage, and temperance which Plato saw as vital for the good of the people. I am grateful for the overwhelming support shown to me today and contained in the hundreds of messages I have received. I hope that I can justify your confidence and affection. Thank you. □

Correspondence

Dear Sir,

"Judges and Gender — A Reply to Mr Justice Young" [1993] NZLJ 218

The following is a response to this article from the Wellington Women Lawyers' Association. We would like this piece published both to inform New Zealand practitioners about the outcome of the appeal in South Australia and also to contribute to the debate about the need for "gender training" for the judiciary, a topic which will be discussed at the International Women Judges' conference in Wellington in September.

In August of 1992 Bollen J in a South Australia (marital) rape case said the following to the jury:

> Bear steadily in mind — I am sorry to be repetitive — it is for the Crown to prove the lack of consent. "Consent" means free voluntary agreement to engage in an act of sexual intercourse at the time relevant. Submission is not consent. Of course, you may run into considering in this case the question of, shall I say, persuasion. There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree. (From pp 12-13 of the full jury direction in *R v J*, 26 August 1992.)

As pointed out by Karen Phelps, he

could have said that "the maximum force that is appropriate to persuade a person to have sex with you is a bunch of flowers and a massage." (As cited by Anne Thacker in "Justice Bollen, community attitudes and the power of Judges" (1993) 18(2) *Alternative Law Journal* 90.)

In "Sex Education for Judges" Young J contributed to the debate concerning the jury direction by Bollen J. In his commentary on the incident, Young J made four points. First, that it is inappropriate to "educate" Judges into a "socially correct" view, when education in this sense really means indoctrination. Secondly, that the only correct recourse in the face of such remarks is to an appeal Court. Thirdly, that the widely quoted part of the direction was taken out of context. Finally, that the groups who were concerned about the content of the direction "are not interested in the rule of law but the rule of lawyers". In other words, that "law" is a separate, and immutable institution, separate from individuals be they Judges or barristers.

There are several responses to Young J which we feel need to be made. First, the argument about context is not valid. The offensive part of the direction (and there were several others, as became apparent on appeal) *was* made in the context of a discussion about the Crown's need to prove lack of consent. As was confirmed on appeal, Bollen J dealt with the elements of the crime of rape *before* turning to the extra requirements under s 73(5) of the Criminal Law Consolidation Act (SA) (those of "gross indecency" or "calculated seriously and substantially to humiliate the spouse"). One of these elements is needed *in addition* to the rape in order for the charge to be proved against a spouse (this subsection was repealed in 1992).

Young J also suggested that if the statement was wrong in law then it is up to the appeal Court to remedy it for the future. The full Court of the Supreme Court of South Australia did just that on 15 March 1993. A majority found that "the words used by the trial Judge [were] more likely to have conveyed the impression that the law condoned a measure of force to bring about consent and, viewed in this way, it must be said that the direction was contrary to law". *R v J* (unreported, 20 April 1993, Supreme Court of South Australia s 3896.1, judgment of Duggan J at 8-9.) The Court also decided unanimously that another part of the direction contained four errors of law (in relation to the telling of an anecdote which seriously questioned the credibility of rape complainants in the absence of corroboration). Of course, as Young J pointed out, the finding of the appeal Court had no effect on the decision of the jury. The defendant had been acquitted of rape and regardless of how prejudicial the direction may have been, he must remain so.

The other two arguments of Young J expose no small degree of naivete about what constitutes the law in a common law jurisdiction. He claims that the rule of law cannot be criticised from any political perspective – it is somehow removed from the "rule of lawyers", despite it being lawyers (and politicians) who make, interpret and apply the law. The argument that Judges are neutral arbitrators of justice can not be sustained. Judges, like any decision makers are necessarily informed by their own life experiences and view of reality. The President of the Court of Appeal validated this argument recently in *Phillips v Phillips* (unreported, 26 February 1993, Court of Appeal CA 369/91, 23) when he recognised the need for more women Judges in order to "[arrive] at justice between man and woman."

The final point of concern is the argument of Padraic McGuinness which Young J cites with approval. He stated:

> The last thing we need is educated Judges. Educated, that is, not in the law but in the various fashionable theories and political orthodoxies which are current among feminists, environmentalists, social reformers, deconstructionists, or whatever.
>
> Indeed, wherever the term education is used as a substitute for indoctrination it ought to be treated with the greatest suspicion. So too with proposals to "educate" lawyers and Judges in what are supposed to be obvious truths about our social, family and marital relations.

Indoctrination here is clearly used in the pejorative sense. Equating informing Judges about feminist arguments, for example, with indoctrination, overlooks the kind of indoctrination that Judges and lawyers are already exposed to in the course of their legal education and their lives. Although we would not endorse any call for education that would require Judges, or any group, to believe steadfastly in one political, social or economic point of view or belief about the world, we do encourage education that informs Judges about some of alternative world views that have meaning for other groups in society, be they women, Maori or homosexuals. To the extent that the legal institutions in New Zealand have traditionally only recognised and validated monocultural and gender specific concerns, a more compelling argument may be that lawyers and Judges are already indoctrinated. Education of the type proposed in other jurisdictions is then a way of lessening the blinkered effect of traditional legal education.

To leave aside the general for the particular, however, it must be said that very few thinking individuals could condone the comments of Bollen J, and that it is not only feminists who fall into this category. The Wellington Women Lawyers' Association adds its voice to those who have already expressed their concern that Judges like Bollen J who still subscribe to an outdated view of male sexuality, are in a position to make decisions about the culpability of the actions of some men against some women. By contrast, we welcome the decision of the full Supreme Court in finding an error of law and approve the sentiments of one Australian women lawyer who stated, after the appeal was handed down, that:

> One can only hope that some members of the judiciary will eventually become so well educated they will no longer require rougher than usual handling from women's groups and the media. (Anna Front "Sit Down Girlie" (1993) 18 (2) *Alternative Law Journal* 89.)

Wellington Women Lawyers' Association,
per E McDonald

The Peoples' Right to Self-Determination — A new challenge for the ICJ

By Michael Kirby, President, Court of Appeal, Supreme Court, Sydney, Australia. Chairman, Executive Committee, International Commission of Jurists. Chairman and Rapporteur, UNESCO Expert Groups on the Rights of Peoples; Member of the Permanent Tribunal of Peoples.

Nationalism, particularly in 19th century Europe, has been a destructive as well as a liberating ideology. Its effects seemed beneficial in the colonial freedom movements in the years after the Second World War, but in more recent years its negative aspects have become very noticeable. In this article Justice Kirby of New South Wales considers the question of self-determination in the context of the human rights movement and other issues that affect the present international order. He considers that new international institutions appear to be needed and makes suggestions in this regard.

The context

Re-birth of nationalism

There is no doubt that the issue of self-determination presents one of the key issues of our time. It is an issue of great importance to the International Commission of Jurists (ICJ). Lately, at a number of international conferences, I have found European participants profoundly discouraged and depressed about this subject. Not only by the unfolding horrors of the murderous conflicts between the communities of the former Yugoslavia, but also at the risk of the awakening giants of nationalism, chauvinism, populism, tribalism and authoritarianism evident in some parts of the former Soviet Union and its old satellites, reaching now even into Western Europe itself.

The sight of these developments has caused even some long campaigners in the struggle to uphold human rights and the peoples' right to self-determination to pause and to suggest that the international order should return to the strong pre-eminence of nation States. The way of self-determination of peoples seems fraught with the danger of instability and conflict. The way of the nation State may involve some injustices. But at least there is stability and protection against the horrors of war and civil conflict. So goes the new argument of the cautious.

It should not be thought that the issues of self-determination are confined to the peoples of Europe. They are as much a concern of the Kurdish and Palestinian peoples; of the people of East Timor, Acheh and Hong Kong; of the Zulu, Afrikaner and other peoples of South Africa. And of the multitude of indigenous peoples of South and Central America. They preoccupy the Inuit in all the Polar lands of the Arctic. They are of concern to the indigenes and the people of Indian origin in the far-away Fiji Islands. This is an issue of global significance.

Advances of international law

International law will not provide a complete, or even substantial, response either to peoples' rights or individual human rights. But it does provide the framework which is increasingly bringing nation States and their leaders to account before the bar of humanity in respect of the complaints about individual and group right deprivations for which they are responsible. Both in the Human Rights Commission of the United Nations and in the Sub-Commission established to hear and determine complaints under the International Covenant on Civil and Political Rights (as well as in other organs), the international legal order now calls nation States to answer. The international media has a role in publicising this process. Even autocratic nations seem sensitive today to the ignominy which attaches to condemnation of their records in respecting human and peoples' rights.

The ICJ is dedicated to defending the rule of law, upholding and furthering human and peoples' rights and protecting the independence of Judges and lawyers. There is no doubt that in the last forty years important achievements have been made in building a new world order which accepts the universality of basic human and peoples' rights. The process began in earnest with the Charter of the United Nations in 1945. It took inspiration from the Universal Declaration of Human Rights in 1948. It was reinforced by the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966. It has been elaborated by numerous other conventions and declarations to many of which the ICJ has made a notable contribution.

Most of these international

instruments have been made under the aegis of the United Nations Organisation. But many important regional statements of human rights have been adopted, including the European Convention on Human Rights, the Inter-American Convention and the African Charter of Human and Peoples' Rights. The machinery established by all of these instruments of international law may be imperfect. But at least humanity has commenced the long journey towards an effective international legal order to protect human and peoples' rights. This journey is continuing. The Security Council recently accepted in principle the establishment of an adhoc international tribunal to try war crimes committed by the combatants in the conflict in the former Yugoslavia. Bodies such as the ICJ are urging, for consideration at the forthcoming Vienna World Conference on Human Rights (June 1993), the establishment of a Permanent International Penal Court not confined to the human rights abuses in Yugoslavia to put the sanctions against abuses of basic rights on a permanent international footing.

The notion of self-determination

A number of bodies have become involved in the controversies which exist, relevant to the international order and to the urgent issues of cultural and national identities. For some years committees of UNESCO in which I have taken part have aimed at providing definitions, or at least compendious descriptions, of who are a "people" for the "peoples' right to self-determination" which is accepted in principle in the Charter of the United Nations and recognised in the opening articles of the two International Covenants of 1966.

This activity has led, in turn, to a number of other relevant developments. For example, in November 1992, the Permanent Tribunal of Peoples in Strasbourg was concerned with the claim on behalf of the peoples of Tibet for the exercise of their right to self-determination in relation to the People's Republic of China. More recently the implications and limits of the peoples' right to self-determination has been scrutinised in conferences in both London and Saskatoon, Canada in which I participated. The Saskatoon conference was specially pertinent because of the claims in Canada made by the peoples of Quebec and by the indigenous peoples of Canada, including those living in Quebec. The need to reconcile the freedom concept of the peoples' rights to self-determination guaranteed by international law (on the one hand), with the need for stability, peace and security in the world, and in the States which make it up (on the other), was a major preoccupation of the Saskatoon conference.

Who are a "people"?

Historical origins

Classical international law has traditionally been based upon the relationships between Sovereigns – initially the personal sovereigns of Kingship but more recently of the nation States. Yet the claim for the self-determination of *peoples* is not something new. For example, it found a vivid manifestation in the claim of the American colonists for separation from Britain. The Declaration of Independence 1776 was voiced in terms which have a very modern sound about them. Similarly, President Wilson's Fourteen Points for the Allied war aims in the First World War included a reference to self-determination on the part of the colonies of the Central Powers. This was perhaps ironical, given that the United States had fought the Civil War to deny a claim to secession on the part of the Confederate States.

The notion of self-determination came to be adopted as a war aim of the Allies in the Second World War because of the insistence of President F D Roosevelt. It was in this way that it found a reflection in the Charter of the United Nations, adopted at San Francisco in 1945. It was unsurprising therefore that the same idea should have been recognised in the Universal Declaration of Human Rights drawn up by a committee chaired by Mrs Roosevelt and profoundly affected by Anglo-American ideas of individual human rights. In the work of that Committee some of the early leaders of the ICJ, such as John Humphrey of Canada, took a leading role. The ideas of the Declaration, in turn, affected the International Covenants.

Not limited to colonies

Accompanying these developments was the process of decolonisation by which the great world empires of the European powers were dismantled and replaced by various forms for self-government in the former colonies. But the question remained as to who were a "people" to whom was promised by international law the "peoples' right to self-determination"?

Many of the newly liberated ex-colonial powers insisted that a "people" for this purpose meant only a formerly colonised people across the seas. This was the "salt water" doctrine. It would have confined the right to self-determination most narrowly. Many of the formerly colonised States were themselves concerned to resist separatist threats – such as that of Katanga in the Congo and Biafra in Nigeria. The very artificiality of many of the colonial borders enlarged those threats of secession by dissident peoples. Sometimes formerly colonised States, by their actions, departed from respect even for the rights of colonised peoples to have self-determination. Goa in India, East Timor in Indonesia and Hong Kong in China are illustrations. The ICJ recently conducted a Mission to Hong Kong. It called attention to the right of the peoples of that colony to self-determination – a right denied by Britain and China.

The notion that cultural and national identity is limited, for the purposes of the peoples' rights to self-determination, to formerly colonial States cannot be accepted. It is conceptually and historically unsound. It also denies the generality of the language of the Charter, the Universal Declaration and the Covenants.

Four criteria

That is why the UNESCO committees in which I participated attempted to provide a more satisfactory definition or description of the characteristics of a "people" for this purpose. The suggested characteristics are four-fold. Although not universally accepted, they have been influential in the recent consideration of this topic. The four features are:

1 Commonality of history, ethnicity, language, religion, culture, geographical connection, commerce, philosophy or otherwise so as to provide a group identity for the "people" concerned;
2 Sufficiency of number to warrant being treated as a "people" for international law purposes – so as to exclude a group of tiny numbers of insignificance for the international community;
3 A will to be seen as a separate and distinct "people"; and
4 Institutions, having some degree of formality, which can give effect to that will.

These criteria are, I believe, useful touchstones for determining claims by particular "peoples" that they qualify for the guarantee now provided by international law of the peoples' right to self-determination. For example, at two recent meetings, in which I have taken part, the experts had no hesitation in determining that the Tibetan people constituted a "people" for the purpose of international law. They had the commonalities, the number, the will to separate identity and the institutions to justify their claim and to provide a basis for their asserted right to self-determination in relation to China.

Competing interests: Peace and security

Reconciling international order

The right to self-determination guaranteed to peoples by international law is not, however, an absolute one. It is certainly important as its position in the first article of the International Covenants demonstrates. In fact, the inclusion of this peoples' right in both of the Covenants gives emphasis to the fact that full implementation of the right to self-determination is a prerequisite to the guarantee of other civil, political, economic, social and cultural rights. Unless self-determination can be afforded to the "people", made up of individuals, it is unlikely that the other basic rights will be enjoyed, at least in full measure. By ensuring that a "people" have representative democratic institutions, the preconditions are established for the protection of the people and of the individuals and cultural and national minorities who may make them up.

Nevertheless, the peoples' right to self-determination must be reconciled with other rights and duties provided by international law. In particular, it must be recognised that the international legal order is still fundamentally organised in terms of nation States, and more lately international organisations. There are few international institutions which respond to the demands made by peoples, minorities or other groups. Many of the nation States resist such demands. They are perceived by them as potentially divisive, distracting and even treasonous: with plots for secession, the loss of territory and resources, instability of their borders and ethnic divisions at home. The recent events in the former Yugoslavia, the former Soviet Union and elsewhere appear to have lent credence to this fear.

Secession is a last resort

International law does not forbid secession from a State. Secession may sometimes be the appropriate result of the exercise of a people's right to self-determination. But it is not the *only* way in which self-determination may be achieved. Thus, in the case of indigenous peoples – who are undoubtedly a "people" for international law purposes – it may be impossible to contemplate secession, given their scattered disposition throughout large territories now also occupied by settlers and migrant newcomers. For such "peoples" the right to self-determination must take other forms which are compatible with the continued existence, unchanged, of the nation State so long as it recognises the local autonomy of cultural and national minorities. This can be done in various forms of federation, self-government, devolution, de-centralisation and other governmental mechanisms for self-determination.

There is no simple mechanism for achieving peacefully the consideration and decision by a people on the form of self-determination which they themselves wish. It is for default of such mechanisms that the international legal order stands by, largely helpless, and watches the kinds of conflicts which have occurred in Yugoslavia, as the claim for self-determination is fought with guns and bombs. There are many other such cases as we all know.

Towards a new culture

Re-drawing artificial borders

Clearly, important achievements have been made in the building of a new world legal order since 1945. Yet the present system is inadequate and unsatisfactory. Abuses of individual human rights and affronts to minority rights continue to be an important source of grievances. These lead to instability and, sometimes, to the violent demands for secession as the only "acceptable" means of achieving self-determination by a people.

This is why various suggestions are now being put forward to improve the international machinery which is available for dealing with such claims. In an ideal world, artificial boundaries which were drawn by colonial or other rulers with indifference (or insufficient attention) to cultural and national identity would be re-drawn. International mechanisms for consulting the people concerned, polling their wishes and, if appropriate, peacefully redrawing boundaries would be established to giver effect to the liberation concept that peoples should ordinarily be allowed to live together in a group identity which is congenial to them, harmonious to their members and respectful of other national and cultural minorities in their borders.

Modern multiculturalism

But this is not an ideal world. On the one hand, the nation States which control the organs of the international legal order and the international organisation resist such proposals, seeing in them the risks of promoting secessionist movements. Even some observers who are generally sympathetic to human rights are cautious about such ideas. They believe that the future, after Hiroshima, should be built in multi-cultural and multi-lingual societies, not reverting to small, selfish, nationalistic communities resting on

often over-idealised and even false visions of cultural and national identity: depending on chauvinism and xenophobia and rekindling irrelevant historical antipathies.

Our problem is therefore one of reconciling the undoubted peoples' right to self-determination with the need to reduce areas of potential risk to peace and security in the world and the danger of instability which may arise from ongoing neglect of the claims of a distinct people to govern themselves. To respond to this problem proposals have been made. They include the establishment of new institutions both within and outside the United Nations system.

New international machinery

Thus, at the recent symposium on self-determination at Saskatoon in Canada, the participants unanimously recommended that the United Nations and its member States should give serious consideration to the progressive development of the concept of self-determination and to identifying or creating a mechanism which could consider self-determination claims where there is a risk of disturbance of the peace or violations of fundamental human rights. It was suggested that consideration be given to the establishment of a new United Nations Commission on Self-Determination, equivalent to the existing Commission on Human Rights.

Alternatively, it was suggested that the mandate of existing bodies such as the Trusteeeship Council, the Committee of Twenty-four or the Fourth Committee of the General Assembly should be expanded to take on the challenges of this time. The machinery of the United Nations often continues to reflect the problems which were confronting the world in 1945. With the end of the European empires and of the Cold War, there are acute new problems. They sometimes require new institutional arrangements.

Another recommendation frequently voiced is for the appointment of a Special Rapporteur or High Commissioner with appropriate powers to monitor the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic Religious or Linguistic Minorities. There is before the United Nations at this time a draft Declaration on the Rights of Indigenous Peoples. It has been drafted by a working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Clearly, effective machinery is needed to turn brave words about indigenous and other peoples into practical protection for their cultures, national identities and living environments.

Another recommendation of the Saskatoon meeting was that the Secretary-General of the United Nations should have enhanced powers to investigate and act upon claims for self-determination where these are denied. Such powers should range from early warning to peace-keeping, peace-making and peace-enforcement.

New non-governmental organisations

Outside the United Nations, the participants at Saskatoon resolved to establish an independent non-governmental Commission on Self-Determination. This commission, if established, will be charged with examining the scope and content of the right to self-determination; identifying the criteria for determining claims; recommending specific mechanisms to decide such claims, to promote dialogue between parties in conflict and to afford rights against nation States which are unreasonably intransigent. I would hope that it would co-operate closely with the ICJ in its work relevant to peoples' rights.

In some ways, the need for new international machinery to give substance to the peoples' right to self-determination is more urgent even than providing machinery for individual human rights. Out of claims for self-determination, unreasonably denied, it is even more likely that armed conflict will grow than out of repeated abuses of individual human rights. The international machinery to redress abuses of human rights may be most imperfect. But the machinery for addressing unrealised claims for self-determination is even more imperfect — almost non-existent. This is so precisely because of the resistance of nation States.

Diminishing the agony

If the first fifty years of the United Nations saw concentrated attention upon the issues of universal human rights, the next fifty years will see attention given to perfecting the institutions for safeguarding individual human rights. There may even be progress in the development of effective institutions to evaluate and afford protection to cultural and national minorities, indigenous peoples and all those who have their right to self-determination denied.

It is important to realise that that right is itself an attribute of human liberty. It does not necessarily mean secession. But it does mean that a people, as an identifiable group of sufficient number with a will to assert their separateness and institutions to reflect that will, should have appropriate measures of self-control and self-government. Unless they do, we will see many more Yugoslavias. And the toll of human suffering, loss of life and deprivation of basic human rights will be a fearsome agony for humanity.

That is why I express the hope that the ICJ — which has played such a vital leading role in the building of the human rights environment which we now share — will work creatively and persistently on this very urgent problem. Truly it is a major issue of this time. If you are in doubt think of the death, pain and destruction of the Balkans at this time. And not only in the Balkans. We should resolve to do something to prevent, in a just way, the sad repetition of these catastrophes in the four corners of the world.

One way is by the establishment of a permanent International Penal Court — as proposed by the ICJ to the World Conference on Human Rights. This would sanction and redress abuses against human rights as provided by international law. But, in addition to this, as a preventive measure, new international institutions are needed to eliminate or reduce the causes of human rights abuses, racism and "ethnic cleansing". One such institution would surely address the unrequited demands of the peoples' right to self-determination. Promised by international law. Not yet delivered. □