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The Monarchy, the Judges and the Constitution

New Zealand does not have a full formal written constitution. In this we are like the United Kingdom of Great Britain and Northern Ireland. In both the United Kingdom and here the independence of the judiciary is rooted in history. It stems from the fact that both countries are monarchies – actually of course they have the same monarch. The Judges are independent of the Government of the day because they are the Queen's Judges. They are not the Government's Judges, whatever ignorant politicians might imagine from time to time. Because they are the Queen's Judges they rank equally with the Queen's Ministers. Neither is subservient to the other. At the heart of our constitutional arrangements is a person not a document, a monarch not a written constitution. For an earlier comment on this point the reader is referred to the editorial "A Constitutional Monarchy", published in the *New Zealand Law Journal* at [1986] NZLJ 1.

Take away the monarchy however and then what will the position be? Mr Bolger with his campaign for a revolution is proposing a constitutional change that it is doubtful if he or any other proponent understands. It is interesting that the similar proposal for Australia being pushed by their Prime Minister has led to the publication of a Charter for the Defence of the Australian Constitution, signed by The Rt Hon Sir Harry Gibbs, former Chief Justice of Australia and The Hon Michael Kirby, President of the New South Wales Court of Appeal and Chairman of the Executive Board of the International Commission of Jurists, among others. This Charter is reproduced immediately following this editorial at [1994] NZLJ 163.

Sir Geoffrey Palmer has not always espoused causes that have appealed to me. In expressing his concern about the abolition of the monarchy however, Sir Geoffrey is wisely sounding a serious warning in my view. If the monarchy is to be abolished we will have a constitutional revolution, and the consequences of revolutions are always greater (and much more disastrous) than the revolutionaries pretend. But having lying politicians is no new experience for New Zealand citizens, so merely being ignorant of what they are talking about should not surprise us. But what must surprise us is that the advocate of revolution (because technically that is what it is) is the leader of what was once thought to be the conservative party in this country. No wonder the Honourable Simon Upton is calling for the National Party to recall its "principles" – one of which of course is a formal commitment in its rules to the monarchy! How, one wonders, can the Queen's First Minister, the Prime Minister of New Zealand square his recent utterances with the fact that on taking office he put his hand on the Bible, thereby calling on God to be his witness and his Judge, that he would bear true allegiance to Her Majesty Queen Elizabeth, Queen of New Zealand!

The Prime Minister would probably respond that he was just raising the question for discussion. Few would see this as anything but sophistry, and in any event with respect he demeans his office by doing so. It may have been appropriate for someone else to raise the question and thereby make it a live issue, but it is hardly appropriate for the Queen's First Minister to do so. The fact that it was done in that way in Australia is surely further reason for it not to be done here!

The recent article by Jenni McManus on the concerns of Sir Geoffrey Palmer about the monarchy was published in *The Independent* for 22 April 1994. The whole article is interesting and should be read by anyone with an interest in our constitutional system. The first few paragraphs set out Sir Geoffrey's position clearly.

> MMP will not change our system of government as radically as many people expect.
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> Scrapping the monarchy would bring far more profound and radical constitutional changes, says former Prime Minister and constitutional law expert, Sir Geoffrey Palmer.
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> Sir Geoffrey believes the effects of MMP have been greatly exaggerated. While the planned electoral reforms will weaken the grip of cabinet on the legislative process and make the executive more accountable to Parliament, with significant effects on public policy decision-making, he says cabinet government will survive. And, in his view, National and Labour will most likely still be the major actors in the new political environment.
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> But republicanism, if this is what Kiwis ultimately

choose, will involve more far-reaching political and legal changes, and probably a formal written constitution.

"If we get MMP – and a republic – the entire edifice [of statute law] will have collapsed," Sir Geoffrey says. "It will no longer be possible for us to have a rather skeletal outline of our constitutional arrangements contained in an ordinary statute which, for the most part, can be repealed at the will of a simple majority in the Parliament. That is the position of the 1986 Constitution Act."

From the point of view of our legal system problems will result if the monarchy is abolished while we do not have a written constitution. If it is to be preserved the guarantee of judicial independence would have to be set out clearly in a document that could not be repealed in whole or in part by a political party holding temporary office. A mere statute, even if technically entrenched, would clearly not be adequate. So there would have to be some kind of Constitutional Convention called, and any resulting document should have to be adopted and ratified by a substantial majority of the population. For the abolition of the monarchy and for the adoption of a formal Constitution the mere approval on one particular occasion of say 51% for and 49% against could not ensure nor enshrine legitimacy.

The independence of the judiciary is one problem as noted above; but even if this is guaranteed in a written constitution there remain other problems. A written constitution gives the judiciary power – political power – to a degree the Judges do not currently possess in this country. They do of course in Australia and the United States, and now even to some extent in the United Kingdom resulting from the Treaty of Rome and membership of the European Union. This is illustrated by the *Factortame* cases [1989] 2 All ER 692 and [1991] 1 All ER 70, and more recently by *R v Secretary of State for Employment ex parte Equal Opportunities Commission and Another*, House of Lords, March 3, 1994, (*NLJ* March 11), in which statutes duly passed by Parliament were, in effect, held to be invalid and therefore of no effect. As was noted by Brian Napier in [1994] *NLJ* 396 in a comment on the latter case:

> Surprising though the result may appear to those not yet aware of the extent of the changes which Community law has brought to our legal system, in the light of the *Factortame* decisions . . . the outcome here was not really in doubt. UK courts *can* use judicial proceedings to strike down Acts of Parliament on the grounds of incompatibility.

Once there is a written constitution it falls to the judiciary (at all levels) to interpret and apply it. The Judges can declare that a law passed by the legislature – even unanimously – and approved by the Head of State, is invalid and not the law of the land. Once this is realised by politicians, the appointment of Judges, particularly to the final Court, will become politicised. One has only to recall the recent indecencies and indignities of the appointment process to the Supreme Court of the United States. And as for the High Court of Australia, not to mention any current incumbents, one can list such names as Murphy, Barwick and Evatt to see an even closer relationship between judicial appointments and politics at the highest level.

The proposed constitutional revolution will certainly have effects on the judiciary and the legal system. These will involve matters of principle and not just practical or procedural political questions. Crystal ball gazing at this time must inevitably see only a dim and murky image. But because it is dim and murky we need to look all the harder.

Before we go much further – and if we are going to have *proper* debate on the issue, which I very much doubt on the evidence to date – the problems that are starting to be seen in Australia need to be considered. And our constitutional system is different from the Australian system it must be remembered. Books like *Monarchy to Republic* by George Winterton (Oxford, Melbourne, 1986) and *Australian Constitutional Perspectives* (ed) H P Lee and George Winterton (Law Book Co, 1992) both indicate some of the issues. Both books however, in my view, are too academic and fail to recognise the political and social issues that arise from constitutional revolutions.

To refer to one of the sillier arguments commonly put forward, about Australia and New Zealand being "Asian" nations and therefore it being constitutionally inappropriate for us to be monarchies, let us remember that Malaysia and Japan are both monarchies. Canada also, it should be remembered, is a Pacific rim country. It is closer to Asia, across the north Pacific than New Zealand is across the south Pacific. But there is no suggestion being made that it is somehow inappropriate that it should have as its Head of State, a Queen who is also Queen of Great Britain and Northern Ireland and who resides in London. The point was well made in a letter by a Mr Stephen W Coates published in *The Bulletin* for 3 May 1994. Mr Coates commented that the comparison had often been drawn with Canada when the argument was about changing the Australian flag, but that any reference to Canada in the republic argument was conspicuous by its absence. He then went on in his letter to ask:

> Why? Because Canada remains a constitutional monarchy and there is no significant republican movement in Canada. While there is, of course, a movement within Quebec to separate that province from the rest of the country, national maturity is defined by attempting to reform the constitution to give Canada a better government, not to zealously rid the country of any traces of its former status as a British colony.

Our institutions, legal, political and social, have historical roots; roots that will be torn up at very considerable cost and great risk. This sense of history, of social and constitutional continuity is as important to all New Zealand citizens as it is to those of us of Maori descent. The abolition of the monarchy, of the Crown as the centre of our constitutional system, would constitute an historical discontinuity, a serious and divisive discontinuity, for no apparent good reason.

P J Downey

This page reproduces a statement from a pamphlet issued in Australia in May 1992 as a response to Prime Minister Keating's suggestion that Australia should cease to be a monarchy. As will be seen two well-known jurists, Sir Harry Gibbs, former Chief Justice of Australia, and Hon Justice Michael Kirby, President of the New South Wales Court of Appeal, are among the signatories to the Charter statement.

LEADERSHIP BEYOND POLITICS

Australians for Constitutional Monarchy

CHARTER FOR THE DEFENCE OF THE AUSTRALIAN CONSTITUTION

We are Australians united to defend our constitutional system of government.

We hold different political views.

We come from different ethnic origins.

We speak for different generations.

We have had different experiences in life.

But above all we are all Australians, proud of our country and united in the defence of our constitution.

We defend the place in our constitution of the Crown. It has served our nation well.

We oppose the attempt of a minority to promote a republican form of government for our country. No more divisive and distracting issue could be forced upon Australia at this time when it faces many real challenges.

We reject the notion that those who defend our constitution and the position in it of the Queen of Australia are less Australian or less patriotic or contemporary than those who would change these things. The history of Australia, in peace and war, gives the lie to the claim.

We assert that our system, as it has evolved over history and in our country, has provided Australia with an enviable record of democratic government.

We are committed to preserving our present system of government.

We live under a constitutional government with democratically elected Parliaments, independent Courts and dedicated Executive Governments. The standard of duty and service of all of these branches of our government is symbolised by the Crown.

We believe that our form of government combines all of the advantages of constitutional monarchy with the full measure of independence and egalitarianism which republicans espouse.

> "THE LEGISLATIVE POWER OF THE COMMONWEALTH . . . SHALL CONSIST OF THE QUEEN, A SENATE, AND A HOUSE OF REPRESENTATIVES, WHICH IS HEREINAFTER CALLED 'THE PARLIAMENT' OR 'THE PARLIAMENT OF THE COMMONWEALTH'."
>
> *The Constitution sec 1*

Under our system of government, Australia has long ago achieved complete independence, symbolised by the Queen's title being changed, by her own consent and by the Act of the Australian Parliament, to Queen of Australia.

We believe that as a system of government ours works well. We should not tinker with it in the name of a theory, or to satisfy the envy or ambition of a few. We should not disrupt our nation with a divisive debate founded on ignorance of its history and institutions, based on outdated, phoney nationalism or drawing on imported prejudices.

As befits a free people, living in a Parliamentary democracy, there are amongst us differences of view and emphasis:

* Some of us support the system of constitutional monarchy in a parliamentary democracy, as such. For those of us it is the least imperfect form of government yet devised and it should endure in Australia indefinitely;
* Some of us, whilst willing to contemplate the possibility of a different form of government at some future time, oppose the attempt to raise such a debate at this time. Those of us consider that there are many other issues facing Australia now which have far greater urgency: reconciliation with Aboriginal Australians; reduction of unemployment especially amongst the young; improved relations with our Asian neighbours; restructuring of the economy; the challenge of public health and education, to name but a few;
* Some of us believe that Australia is already a form of republic under the Crown: a "crowned republic". For those of us, Australia now enjoys all the desirable features of a republican government and a constitutional monarchy without any disadvantages of either system. Agitation for change is unnecessary, irrelevant, divisive and distracting; and
* Some of us simply admire Her Majesty the Queen of Australia. We are hurt and angry at the attacks on her in recent times, despite her exemplary lifetime of service to her people, including the people of Australia.

Whatever our differences of approach or emphasis, all of us agree that for the foreseeable future we should defend the Australian Constitution and the place of the Crown in it. We should celebrate together, as one united nation, the achievement of a century of our democratic Commonwealth. We should defend the Commonwealth and resist its replacement by a republic.

DEFEND THE CONSTITUTION

IN TOKEN OF OUR DETERMINATION TO UNITE IN THIS CAUSE WE HAVE SIGNED THIS CHARTER AND WE CALL ON OUR FELLOW CITIZENS TO JOIN US.

Sir John Atwill, Neville Bonner AO, Richard Cobden, The Rt Hon Sir Harry Gibbs GCMG AC KBE, Gareth Grainger, Stephen Hall AM, Angelo Hatsatouris OAM, The Hon Michael Kirby AC CMG, Dame Leonie Kramer DBE, Vahoi Naufahu, Barry O'Keefe AM QC, Margaret Olley AO, The Hon Helen Sham-Ho MLC, Ald Doug Sutherland AM, Margaret Valadian AO, Lloyd Waddy RFD QC.

Case and Comment

The Court of Appeal on "recognition" of Unions

In *Eketone And Anor v Alliance Textiles (NZ) Ltd and Ors* [1993] BCL 2088) the Court of Appeal considered questions of law arising from different aspects of the Employment Court's judgment in *Adams v Alliance Textiles (NZ) Ltd* [1992] 1 ERNZ 982. That judgment, in turn, had concerned the ambit of ss 8, 12 and 57 of the Employment Contracts Act 1991. Those sections relate respectively to undue influence in the context of freedom of association, recognition of bargaining agents and harsh and oppressive bargaining behaviour. In relation to s 57, the Court of Appeal's decision must be read together with the Court's recent decision in *Talley v Anor v United Food and Chemical Workers of NZ & Ors* [1993] BCL 1829.

Ultimately, the appeal in *Alliance* failed, since there was no longer a live issue between the parties. In the view of the Court of Appeal, compliance orders would be pointless, since the negotiations and the relevant contract were now in the past and any setting aside of the contract under s 57 would also be pointless in the absence of evidence leading to an award of compensation (this claim had been abandoned at the first instance hearing). However, some very significant obiter observations were made as to the scope of ss 8, 12 and 57.

The facts of the case are well-known. When the employer put forward a proposal for what was described as performance-related pay, that proposal was opposed by the union. Some employees signed under threat of a lockout or under protest. Some employees refused to sign and, some two years later, are still locked out. The employer engaged in other questionable tactics. These tactics included the refusal of access to union representatives, coinciding with management-led meetings for employees relating to the contract negotiations in which the union had been authorised to act. It was alleged, amongst other things, that the employer's behaviour in obtaining consent to the proposed contract amounted to undue influence to cease to be a union member under s 8; that it breached the requirement in s 12(2) to "recognise" the union's authority as a bargaining representative; and that the behaviour was "harsh and oppressive" and amounted to undue influence and duress within the meaning of s 57 of the Employment Contracts Act.

Undue influence

Both s 8(1)(b) and s 57(1) employ the term "undue influence", the former in the context of attempts to interfere with freedom of association and the latter in the context of bargaining behaviour. The Employment Court had held that there was no presumption as to undue influence arising from the employment relationship in itself, which the employer would then have to rebut.

Concurring in the judgment of Gault J on this point, the Full Court of Appeal held unanimously that the employment relationship did not constitute one of those special categories of relationship giving rise to a presumption of undue influence. The term "undue influence", according to Gault J, meant the same in both section 8 and section 57:

> . . . is a concept well known in the law, somewhat flexible of meaning according to the intent. It aptly focusses upon improper exploitation of inequality between people in their dealings which equity and conscience will not condone. [There is] no reason to give it any different meaning in the Employment Contracts Act.

Whilst there was no presumption that employees might be unduly influenced in relation to union membership, Gault J noted that:

> It cannot be doubted that certain employees are vulnerable to influence from strong employers and might readily submit to influence exerted directly or in subtle ways. It is important to ensure that in such cases their freedom to choose is assured and is not interfered with by undue influence. That is best done by dealing with particular circumstances as they arise when the true nature of the relationship can be assessed in conjunction with particular conduct said to deny the freedom to choose.

That approach was echoed in the judgments of Cooke P who stated that

> . . . the background of that relationship, wherein the employee is often but by no means always in an inferior bargaining position, falls to be considered in deciding in any given case whether pressure brought to bear by the employer has crossed the line into unconscionability.

Casey J emphasised the need to pay close attention to the realities of the particular workplace in determining whether such influence had been exercised.

> In some instances involving isolated or small groups of employees particularly, the relationship alone may give rise to a prima facie inference of undue influence if the terms of the contract appear unduly adverse to their interests.

This last approach is similar to that adopted by Chief Judge Goddard and Judge Colgan in the Employment Court.

As the Court of Appeal pointed out, the employer remains free under s 8 to persuade persons to cease to be union members, or not to become a member, so long as the means used are not unconscionable. However, this "right to persuade" was found to be inhibited by s 12(2), which we can now examine.

The duty to recognise under s 12(2)

Section 12(2) of the Employment Contracts Act states that, once a bargaining agent has established his or her authority to represent employees for the negotiation of an employment contract, the employer with whom the negotiations are being undertaken "shall recognise" that authority.

In *Alliance*, the Employment Court had held that there was no "rule of neutrality", even where authority had been given. The Court held that employees could be approached directly even while a union's authority was in force provided only that undue influence was not used (per Chief Judge Goddard, at 1023-4). This was a central finding concerning which Cooke P remarked "I do not think that it could be safely assumed that this is correct". In the view of Cooke P:

> I am disposed to think that once a union has established its authority to represent certain employees . . . then the employer fails to recognise the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union's back does not seem consistent with recognising its authority. The contrary argument advanced for the employer here is that authority can be recognised by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not necessarily in accordance with the true intent, meaning and spirit of the enactment. It would apparently mean that, although employees had authorised a union to represent them from the start, the employer need never negotiate with the union. Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt whether he can by-pass an authorised representative. And, although both the employer and the union were adopting intransigent positions here, so that they were for the time being at an impasse, the employer did still wish to negotiate, being anxious to obtain agreement to its proposed new system.

Cooke P's view was concurred in by Casey, Hardie Boys and Gallen JJ. Hardie Boys J added that:

> Section 8 does not prevent an employer from using persuasion, provided the means are not unconscionable. But I think the right to persuade is inhibited by s 12(2). Recognition of an authority given by employees is hollow indeed if the employer is able to undermine it by attempting direct negotiations with the employees while negotiations with their authorised representatives are still in train.

Gault J emphasised that, even where there was no undue influence under ss 5(b) or 8(d) and before relief under s 57 became available, the employees' right to choose a representative and to have that representative recognised was to be accorded. A purposive approach was to be adopted to the statute. This would not exclude all attempts at persuasion, because of the need to assure freedom of expression. As Cooke P put it, employers were free to express views against unionism, subject to ss 8 and 12. However, compliance orders would be appropriate where the right to have a representative "recognised effectively" was denied. Gault J suggested that this could well have been the case in relation to the behaviour of the General Manager at the defendant's Redruth plant when he refused union officials access to their members working at the plant before calling a meeting between management and the workforce and warning employees not to accept the union as their representative.

Thus, in summary, employers remain free to "persuade" employees to abandon a union as their bargaining representative, by means short of undue influence. But once the bargaining representative has been authorised to act, the employer may not attempt to negotiate with the employees concerned unless and until that authority has been revoked. Attempts to persuade employees to revoke the authority will not, in themselves, amount to "recognition" of the bargaining agent (the "rather cynical" argument rejected by Cooke P, but which had found favour with the Employment Court).

In relation to the duty to negotiate (if at all) with the employees' representative, as Chief Judge Goddard recently reiterated in *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd* (unreported, Employment Court, 1 October 1993, WEC 27/93).

> The legal position is quite simple: employees are entitled to appoint a representative and where they do so the employer must recognise that representative for the purpose of negotiations and must negotiate, if at all, with that representative.

The practical significance of the decision

The decision is a somewhat belated and Pyrrhic victory for the union and its members. In three respects, it may be seen to strengthen protection in bargaining. First, there are now stronger and more authoritative statements as to the risk employers run when attempting to drive a wedge between isolated and vulnerable workers and their bargaining representative. Secondly, the idea that an authorised bargaining representative can be "recognised" and then ignored for all practical purposes even during the currency of the authorisation is now highly questionable. Thirdly, international instruments are now seen as a legitimate tool of interpretation. Gault J stated that the provisions of the Employment Contracts Act and the Bill of Rights (which also guarantees freedom of association) must be interpreted in the light of international instruments (applying *Ministry of Transport v Noort* [1992] 3 NZLR 260).

The main instruments here are Article 8 of the International Covenant on Economic Social and

Cultural Rights and ILO Conventions 87 (as to freedom of association) and 98 (as to collective bargaining). Freedom of association under the Employment Contracts Act is now to be given a meaning consistent with the freedom of association as internationally recognised.

However, it is important not to overstate the practical significance of the decision in these respects. First, most employers inclined to follow the same questionable tactical path as the respondents will presumably have done so by now, with all that that entails for the possibility of future collective organisation in the relevant enterprise. Further, to bring an action of this kind against one's current employer requires a degree of will and persistence which will probably be lacking in many cases, particularly given the type of conduct which is required to precipitate the claim. The sheer financial cost of pursuing such a claim will also often be prohibitive.

Secondly, in relation to recognition under s 12, Cooke P stressed that the employer in *Alliance* whilst intransigent, did still wish to negotiate. There is, of course, no obligation under the Employment Contracts Act to negotiate, still less to negotiate fairly, and the theoretical disjuncture between union membership and bargaining representation remains. Most employers in the respondents' position will by now have learned to concentrate (at least for outward appearances) on the form of the contract rather than the issue of union membership. Thirdly, even if undue influence is proved, the remedies under s 57 are notoriously inadequate.

International Conventions

Immediately prior to the general election a leaked draft report of the International Labour Organisation arising out of the Council of Trade Unions' complaint against the Employment Contracts Act attracted considerable publicity. That complaint concerned, amongst other things, interference and discrimination during bargaining and featured the Employment Court's decision in *Alliance* heavily. The leaked draft was highly critical of the Employment Contracts Act. The formal report has yet to be presented and is now to be delayed until March 1994, to give employer parties time to respond.

One aspect of the Court of Appeal's decision in *Alliance* if taken in isolation, will no doubt provide some comfort to the National Government and the Employers' Federation in this respect. In discussing the relevance of international covenants, Gault J remarked that:

> Freedom of association is affirmed as a fundamental right in the Bill of Rights Act. This is consistent with Article 22 of the International Covenant on Civil and Political Rights and (in the labout context) Article 8 of the International Covenant on Economic Social and Cultural Rights. On becoming party to these international covenants New Zealand entered a reservation to the two articles referred to because of the state of domestic law relating to trade unions at the time. For the same reason New Zealand has not ratified the International Labour Organisation Conventions 87 (as to freedom of association) and 98 (as to collective bargaining). *However with the change from a regime involving restrictions on the right of dissociation to the Employment Contracts Act there no longer appears disconformity between these international instruments and New Zealand's domestic law.* (emphasis added)

The lack of disconformity of which Gault J was speaking may exist in the narrow area of a regime of voluntary union membership, and it is to this aspect that Gault J appeared to be directing his comments. In at least two other fundamental areas in which the repealed Labour Relations Act 1987 had conformed to the underlying principles in the two Conventions, the Employment Contracts Act 1991 breaches those principles. First, in its report to the International Labour Organisation on the position of national law and practice in regard to the two Conventions (for the period ending 31 December 1992), the Government itself recognised that the new restriction on the ability to strike over the issue of employment contracts involving more than one employer (s 63 of the 1991 Act) may prevent or delay the ratification of both conventions. Secondly, in failing to encourage collective bargaining arrangements, and promoting individual contracts, the Employment Contracts Act is almost certainly in breach of Article 4 of ILO Convention 98 which requires that collective bargaining should be promoted (Department of Labour memorandum to the Minister of Labour, "Employment Contracts Bill: International Labour Organisation Obligations", 3 April 1991). The Government decided not to attempt to ratify Convention 87 after doubts on this matter, and on the almost complete silence of the Employment Contracts Act on the role of workers' organisations, were expressed by the ILO itself (unofficial analysis dated 8 November 1991).

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Enforceability of guarantees — the House of Lords decides

The House of Lords decision in *Barclays Bank v O'Brien and Another* [1993] 3 WLR 786 has finally put to rest the uncertainty created by the Court of Appeal decision in the same case which recognised the presence of two conflicting lines of authority on the issue of lender responsibility for the undue influence by the debtor over the surety, by removing such duplicity. This decision has special significance to New Zealand law because the New Zealand Court of Appeal, in *Contractors Bonding v Snee* [1992] 2 NZLR 157, had decided against the surety following one line of authority articulated by the English Court of Appeal. Although the House of Lords decision has more in common with the New Zealand – and not with the English – Court of Appeal decision in terms of the principles set out, however its outcome was reached not by the application of the rules employed by the New Zealand Court of Appeal.

In *Barclays Bank plc v O'Brien*

and Another [1992] 3 WLR 593, Mr and Mrs O'Brien had signed a second mortgage over their house to secure an increase in the overdraft facility to a company in which Mr O'Brien was a director. The documents had been sent by the manager of the branch where the company account was kept, to another branch to secure their signatures. A memorandum attached to the documents requested the second branch to "make sure that our customers are fully aware of the nature of the documents to be signed and to advise that if they are in any doubt they should contact their solicitors before signing". But the officer who attended to the matter failed to follow such instructions, and Mrs O'Brien signed without any explanation and did not read them before signing. When the security came to be enforced against her, Mrs O'Brien alleged undue influence by her husband and also that he misrepresented the extent of her liability.

Scott LJ noted that the English Court of Appeal on this issue had not followed a common path, and said that two clear, but irreconcilable lines of authority emerge from its decisions. It is not easy to favour one such line over the other, because both are well supported by authority, His Honour observed. The application of one or the other in a given situation should be dictated by policy, His Honour further explained. One line of authority would attribute to the creditor any undue influence or other impropriety exerted over the surety, only if either the creditor had knowledge of those facts or if he had appointed the debtor as his agent. The second was an equitable rule recognised in the old cases such as *Turnbull & Co v Duval* [1902] AC 429 and *Chaplin & Co v Brammall* [1908] 1 KB 233, which rule was well supported on grounds of policy in *Yerkey v Jones* (1939) 63 CLR 649. According to this rule, relief for the wife is not for reasons of agency between the creditor and her husband, *but by treating the wife as a special class of surety to be protected when providing security to cover her husband's debts.* Whether or not the creditor can enforce the guarantee in such cases has to be decided by making certain inquiries about the circumstances of the transaction. In a situation where the security was given by the wife and the creditor knew of such relationship, the guarantee would be unenforceable – if the wife had not properly understood the transaction; had no independent advice; and the creditor had done nothing to ensure that the wife understood the transaction, Scott LJ said.

In *Contractors Bonding v Snee* [1992] 2 NZLR 157, Contractors Bonding (CB) had provided a bond to cover the customers' funds in the travel agency conducted by Marco Polo (MP), with which one Mr Savage (Mr S) was associated. CB's exposure under the bond was secured by mortgages over properties belonging to Mr S and another. MP approached CB to get a release of the properties pledged because they were required as security to finance a business venture, and Mr S promised to provide a mortgage over his mother's (Mrs Snee's) house instead. Under this arrangement Mrs Snee signed two documents in favour of CB – a deed of indemnity and guarantee and a mortgage over her house, as security for the first. When MP's business failed, CB called on the guarantee and sought to enforce it by foreclosing the mortgage. However, Mrs Snee instituted proceedings seeking an injunction alleging that the documents she signed were void on the grounds of duress, undue influence and unconscionable bargain, and she also claimed relief under the Credit Contracts Act (NZ) 1981.

Richardson J, delivering the judgment of the Court of Appeal, held that there was no undue influence or unconscionability attributable to CB under those circumstances. His Honour observed that "the appeal raises important questions concerning the nature and the scope of the principles of equity relating to undue influence and unconscionability in their application to standard commercial transactions", and held that a creditor who has provided credit upon security given by a third party could become liable for undue influence exerted by the debtor over the surety, *only if either the debtor had been appointed as its agent by the creditor or the creditor had knowledge of such influence exerted over the surety.* Richardson J also analysed most of the reported decisions concerned with the same issue, to prove that his criteria were correct. Dealing with the facts of the present case, His Honour did not find that CB had expressly or impliedly appointed Mr S as their agent, and said that the mere sending of the guarantee document to MP – even in circumstances where CB may be taken to have expected Mr S to attend to the execution by Mrs Snee – did not mean that CB was holding out Mr S as their agent. There must be something more in evidence to warrant that "he was cloaked by CB with ostensible authority to procure such execution", His Honour said.

In *O'Brien* the House of Lords rejected the "special equity theory" proposed by Scott LJ, saying that it found no basis in principle for affording special protection to a limited class in relation to one type of transaction only. Instead, it said: "If the doctrine of notice is properly applied, there is no need for the introduction of a special equity in these types of cases." Their Lordships recognised the principle that a creditor would be affected by the debtor's undue influence over the surety, *only if the debtor had been appointed an agent of the creditor for obtaining the surety's consent, or if the creditor had actual or constructive notice of such influence being used by the debtor;* but said that, without artificiality, cases where any such agency can be proved would be very rare. The House of Lords was convinced that the answer to solving this issue lies in the proper use of "notice", and said that a creditor is put on inquiry when a wife offers to stand surety for her husband's debts. In such situations unless the creditor takes reasonable steps to satisfy himself that the wife's consent has been properly obtained, the creditor will have constructive notice of the wife's rights. Addressing the issue of what a creditor should do to avoid being fixed with such notice, the House of Lords said that the creditor should "reasonably be expected to take steps to bring home to the wife the risk she is running", and proposed that in the future a creditor would be expected to insist that "the wife attend a private meeting (in the absence of the husband) with a representative of the creditor in which she should be told the risk she is running, the extent of her liability and that she should take independent legal advice". If the creditor is also aware of circumstances between the parties that are disadvantageous to the wife, then the creditor in addition will have to insist that the wife is separately advised. In regard to relationships other than

husband and wife, the House of Lords said that "in a case where the creditor is aware that the surety reposes trust and confidence in the principal debtor in relation to his financial affairs, the creditor is put on inquiry in just the same way as it is in relation to husband and wife".

Although the House of Lords has rejected the "special equity theory" as unsustainable in principle, one could argue that the burden on lenders would be even more onerous after its decision. Whereas a careful reading of the Court of Appeal decision in *O'Brien* would suggest that a guarantee could still be enforced if the wife had properly understood the transaction even if the creditor had provided no assistance to ensure that, the House of Lords decision insists on a "private meeting with the wife" in every case. One could also argue, on the basis of what is now required of a lender when it is known to him that the surety is the wife of the debtor, whether the House of Lords decision has made any difference to the compliance requirements articulated by Scott LJ. In fact, the House of Lords conceded that the law recognises the "invalidating tendency" of surety transactions entered into by a wife to secure the debts of the husband, but said that this was due to "notice" rather than any "special equity" in favour of the wife.

However *O'Brien* has brought certainty to an area of law which is of vital importance to financing. The decision noted the importance of ensuring that the wealth currently tied up in the matrimonial home does not become economically sterile by leaving the rules that operate in the enforcement of guarantees in uncertain terms. Certainly this objective has been achieved, because now the credibility of a guarantee will be ensured by the mere compliance with the guidelines in *O'Brien* rather than such issue being left to be decided on a case by case basis by examining the circumstances. There is however some difficulty remaining with those special cases — cases where the lender knows more about the relationship — when a lender should not accept a guarantee without ensuring that the wife has in fact had independent legal advice. The question here is, as knowledge includes actual as well as constructive knowledge, what are the circumstances in which knowledge will be imputed to a lender. For example, would all five of the *Baden* categories (see *Baden, Delvaux and Lecuit v Societe General pour Favoriser le Developpement du Commerce et de l'Industrie en France SA* [1983] BCLC 325) apply, or only the first three as is now common with constructive trustee liability of a bank for knowing receipt and knowing assistance.

Where does this leave *Contractors Bonding v Snee?* Although the principles stipulated by the New Zealand Court of Appeal were the same as those of the House of Lords in *O'Brien*, they did not amplify the importance of "notice", but instead relied too strictly on "agency" between the creditor and the surety. *Contractors Bonding* was cited in argument before the House of Lords, but the reported decision of *O'Brien* does not say how the Law Lords viewed the New Zealand decision. But one thing is quite clear, that is if the requirements set out in *O'Brien* were followed, the decision in *Contractors Bonding* should have been in favour of Mrs Snee — because the creditor had not taken any steps to advise her separately in the absence of her son. However it is difficult to envisage that the New Zealand Court of Appeal would be prepared to impute constructive notice on a lender simply based on the lender's knowledge of a sensitive relationship between the debtor and surety, as articulated in *O'Brien*. If New Zealand law remains different on this issue, unfortunately lenders will have to face an uncertain future in determining whether or not guarantees obtained are enforceable against unduly influenced sureties.

There is little doubt that *O'Brien* had been influenced by the recently introduced Banking Code of Practice in the UK (Good Banking — Code of Practice to be observed by banks, building societies and card issuers when dealing with personal customers; operative from 16 March 1992) which requires lenders to advise sureties to take independent legal advice before entering into guarantees, the only difference being *O'Brien's* insistence that such advice be in a separate meeting in the absence of the debtor. There was doubt after the introduction of the Code of Practice as to what effect any non-compliance with its provisions would have. In the case of guarantees, *O'Brien* has now removed such doubt.

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Actions for money had and received — but where is the mumbo jumbo?

Martin v Pont [1993] 1 NZLR 25

In a recent note in this *Journal* [1993] NZLJ 277 Professor Rickett criticised the recent decision of *Martin v Pont*. He objected to the Court of Appeal relying on nineteenth century cases rather than promoting an analysis of principle for the twenty-first century, and regretted that the Court failed to seize the opportunity "to make more rapid progress towards modernisation".

This note suggests otherwise.

In *Martin v Pont* it will be recalled that the Ponts gave $600,000 to their accountant Martin to invest. Martin's employee and daughter Carol misappropriated the money. The Ponts initially pleaded three causes of action but only the action for money had and received was considered in the Court of Appeal. As the cause of action was stated in terms of the common law action for money had and received Tipping J thought it appropriate and helpful to make a brief survey of this common law cause of action. He started his discussion by quoting *Bowstead on Agency* 15th ed (1985) at art 53 where it is stated:

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

Tipping J then considered the cases which were cited in support of this proposition. Three were summarised and discussed; each

clearly were authority for Bowstead's proposition and the first to be cited had a similar fact situation to *Martin v Pont* itself. The case was *Parry v Roberts* (1835) 3 Ad & E 118. Parry had employed Roberts to carry £45 for him to a person in Liverpool. Roberts did not deliver the money and told Parry that he had lost it in a brothel. So far so good. His Honour has defined and illustrated the law in the area that had been pleaded. It is plain that if money is handed to a person for a particular purpose (either to pay a Liverpudlian or to invest) and it is not applied to that purpose (but rather lost or misappropriated) it can be recovered as money had and received to the use of the plaintiff.

Clearly the Ponts were to succeed. Tipping J went on to state that one of the classic circumstances in which money can be claimed as had and received is when the money has been paid pursuant to a transaction in which there has been a total failure of consideration. "In other words" his Honour said, "there is now nothing to show for the plaintiff's payment" (at 103, 172). Martin's daughter had, after wishing the Ponts a good Christmas and a prosperous New Year, gone off with their money. Reference was made to *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10 where Lord Goff of Chieveley had considered the action for money had and received as well as the concept of change of position and unjust enrichment. Tipping J noted in passing (at 103, 173) that unjust enrichment is not a prerequisite for money had and received and said that in neither *Parry v Roberts* nor the present case had either Roberts or Martin been unjustly enriched.

Tipping J concluded that

> the money was entrusted to Martin's firm for a particular purpose and by dint of the actions of someone for whom he and his firm are beyond doubt vicariously liable that purpose was not and cannot be fulfilled. In those circumstances it was the firm's duty at common law to return the money. They being unwilling or unable to do so the action for money had and received undoubtedly lay (103, 173).

Rickett stated that by rejecting an unjust enrichment explanation Tipping J forced himself to take refuge in a concept of established authority. Rickett believed the Ponts claim was undoubtedly in unjust enrichment, he argued that both Roberts in *Parry v Roberts* (1835) 3 Ad & E 118 and Martin in *Martin v Pont* had been enriched.

Two points may be made in reply.

First, the pleadings were such that the Court of Appeal was asked to consider a particular common law cause of action, namely action for money had and received. It does not appear that in either the High Court or the Court of Appeal did counsel invite a discussion of unjust enrichment. This alone would not prohibit the Court from embarking on such an analysis if beneficial. One must ask, however, if *Martin v Pont* was an appropriate case to develop the law of restitution? I would suggest that on the facts it was most inappropriate. If one puts oneself in the shoes of Messrs Roberts and Martin both surely would see themselves as worse off rather than unjustly enriched. Had Roberts spent the £45 in the brothel, had Martin, himself, used the $600,000 then it would be appropriate to tell them that they had become unjustly enriched, but not otherwise.

Secondly, why, when the judgment provides a clear and concise modern statement of the law regarding money had and received should there be criticism levelled at the age of the cases discussed? If a case or cases are relevant and illustrate the point under discussion why should they not be used? Furthermore Rickett's criticism that Tipping J relies on nineteenth century cases is not entirely accurate. His Honour did discuss, one might even suggest at some length, the 1991 House of Lords decision: *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10. This decision could have led into an analysis of *Martin v Pont* on restitutionary lines but it was not necessary. The Ponts were entitled to judgment on the simple ground of money had and received. It appears that his Honour was only considering the *Lipkin Gorman* decision from the viewpoint of this action. With respect Rickett seems to suggest that Tipping J was making a general restitutionary response, which he, Rickett, then disagreed with.

Rickett concludes that in his view *Martin v Pont* is

> a paradigm example of the unnecessary proliferation of confusing verbal apparatus in the common law, explicable only by an historical exposition . . . to which as Professor Birks has eloquently, energetically and consistently argued, Occam's Razor should be applied (at p 278).

Rickett quotes from Professor Birks *An Introduction to the Law of Restitution* (1985) at 78, who says:

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

In my view Occam should pocket his razor. The judgment in *Martin v Pont* is clear and concise, and provides a modern illustration of the law for the future. Tipping J was asked to consider the common law action of money had and received. He did so. A just result ensued which did not involve telling a person $600,000 poorer and with an erring offspring that he was thereby enriched.

No mumbo jumbo.

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Significant developments in letter of credit law

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If international trade is the heart of the New Zealand economy, documentary letters of credit might well be regarded as its lifeblood. With the volume and value of New Zealand's international trade steadily growing, so too does the practical significance of the law of documentary letters of credit. It is not surprising, therefore, that the Courts are dealing with a profusion of new legal issues. These in turn are leading to significant new legal developments which the exporter, importer and their legal advisers must grapple with.

Quite probably the most far-reaching development in letter of credit law – the significance of which stretches well beyond our shores – is the recent High Court decision of Penlington J in *Ronstan International Limited (in rec) v R C Marine*[1]. This case serves to clarify two important issues about the nature and scope of the obligations created by the issue of a letter of credit and how these affect the rights of parties under a contract of sale. Namely the clarification of a beneficiary's right of recourse against an account party for the purchase price and, the effect of a beneficiary's failure to tender documentation prior to a credit's expiry.

This article examines the judgment and its likely effect on the nature and application of the law relating to documentary letters of credit.

Issue One — Conditional or absolute payment

The first issue raised in *Ronstan* is; Does the issue of an irrevocable credit constitute an absolute or merely a conditional payment of the purchase price? Put another way, does a beneficiary have right of recourse against an account party if the responsible bank fails to honour the credit without just cause? Theoretically there are at least three possible interpretations of the effect of an issue of a credit on the availability of right of recourse. These are examined in this article.

Right of recourse is often critical to a beneficiary. This is particularly so when a bank becomes insolvent after issuing a credit, but before accepting or negotiating the beneficiary's bills of exchange or effecting payment of bills it has accepted under the credit. Examples can be found in the cases of *E D & F Man Ltd v Nigerian Sweets & Confectionery Co Ltd* [1977] 2 Lloyd's Rep 50 and *Maran Road Saw Mill v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep 156. Right of recourse is also critical when a beneficiary loses control of goods to the account party, despite the document's non-compliance with the credit specifications. This occurred in *Saffron v Societe Miniere Cafrika* (1958) 100 CLR 231.

The availability of right of recourse may be equally important to an account party. In the words of Lord Denning: "It may mean that the buyer (if he has already paid the bank) will have to pay twice over". (*W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 per Lord Denning at 210). In this instance, the luckless account party will no doubt find the law's likely response "So be it. He ought to have made sure that he employed a 'reliable and solvent paymaster' " unpalatable. (at 210).

In view of its practical significance, one might have expected the question of right of recourse to have been long settled. Even in the home of international trade, the United Kingdom, the law has remained unclear until relatively recently[2] and there is still apparently divergent opinion in the United States. The issue has also proved controversial. The High Court of Australia, in *Saffron v Societe Miniere Cafrika* (1958) 100 CLR 231, for example, against the weight of judicial and academic opinion suggested, obiter, that the issue of the irrevocable confirmed letter of credit may amount to absolute payment of the purchase price.

Issue Two — Non-presentation of documents

A second and apparently novel issue raised in *Ronstan* concerns the legal effect of a beneficiary's failure to present the required documentation prior to the expiry of a credit. This raises the question of whether the account party's payment obligation survives in these circumstances. In view of the high failure rate of documentation on first presentation which ranges from around 50% in England to as high as 90% in Australia (C M Schmitthoff, *Discrepancy of Documents in Letter of Credit Transactions* 1987 JBL 94 at 95) the issue of right of recourse despite a beneficiary's fault in failing to obtain payment under a credit is clearly of critical practical importance.

The facts in *Ronstan*

The case involves three companies – the plaintiff, Ronstan International Ltd (Ronstan) a company in receivership; the defendant, a Californian-based United States company RC Marine Corp (Marine); and another California-based company, Fores Manufacturing (Fores) which owed Ronstan US$155,000.

On 5 July 1991 Ronstan entered

into a contract with Marine and Fores. The contract was expressly governed by the laws of New Zealand. Under Clause 3 of the contract, Ronstan agreed to sell Marine its assets for US$152,000 (described as the purchase price) and Fores agreed to repay Ronstan US$155,000 (described as the debt).

Clause 4 of the contract provided: "The purchase price and the debt shall be paid on settlement date as follows . . . (b) by providing the vendor with a letter of credit drawn on the ANZ Bank payable within 60 days of the balance of twenty seven thousand US dollars ($US27,000) or 120 days, in which case interest was to be payable by the purchaser to the lender at the ANZ base lending rate for the additional 60 days lending period." (*Ronstan* supra at 103,118).

The contract stipulated neither the issuing bank, nor whether the credit was revocable or irrevocable, confirmed or unconfirmed. It did, however, stipulate it was to be drawn on the ANZ bank (ANZ). On 23 July 1991 City National Bank of Los Angeles, (City National) as issuing bank, contacted the Takapuna branch of ANZ informing it of the issue of an irrevocable credit in favour of Ronstan. The amount of the credit was US$27,000 and the date and place of expiry was stated as 10 August 1991 in New Zealand. The credit was issued subject to the Uniform Customs and Practice for Documentary Credit (1983 Revision) (the UCP). It required the documents to be presented within 10 days of the date of issuance of the shipping documents but within the validity of the credit.

On 25 July 1991 Ronstan was advised that the credit was available for collection[3]. Upon notification, Ronstan completed shipment of the goods. Due to an unfortunate oversight, however, Ronstan failed to present the documentation to ANZ before the credit expired. Faced with its inability to recover the purchase price from the banks, Ronstan sought to recover from Marine. Marine, which had already taken delivery of the goods, refused to pay. Ronstan sued for the balance of the purchase price.

Theory One — Absolute Payment

Marine contended that, in the circumstances, the provision of the credit amounted to absolute payment of the purchase price. Accordingly, it argued its payment obligation had been discharged.

Authority can certainly be found for Marine's contention. The case law suggests that if provision of a credit constitutes absolute payment, the account party is discharged upon provision of a conforming credit. This is so even where, for example, the responsible bank becomes insolvent. (*W J Alan & Co Ltd* supra at 209, 210 and *Ronstan* supra at 103, 127). The beneficiary ". . . can in no circumstances look to the buyer". (Denning LJ, *W J Alan* supra at 209). Like any of the bank's other creditors, the beneficiary must accept a dividend in the bank's liquidation. An exception is where the moneys paid to the issuing bank are appropriated by the account party for the purpose of honouring the bills. (See H C Gutteridge and M Megrah 7th ed *The Law of Banker's Commercial Credits,* London, Europa Publications Limited 1984 at 38; G A Penn, A M Shea, A Arora *The Law & Practice of International Banking* Vol 2, London, Sweet & Maxwell, 1987 at 317 and *Shawmut Corporation of Boston v Bobrick Sales Corporation* 260 NY 499, 184 NE 68 (1933) aff'd 235 App Div 655).

Theory Two — Conditional Payment

Ronstan, however, maintained that Marine's provision of the credit amounted only to conditional payment of the purchase price. Upon establishing the credit, Marine's payment obligation was suspended and revived when City National failed to pay.

In law, where a credit constitutes conditional payment, the account party has performed his/her initial obligations by providing a conforming credit. The account party's liability to the beneficiary will, however, not have been discharged. Its underlying payment obligation will merely be suspended during the period available to the bank to honour the credit[4]. If the credit is not honoured because, for example, a bank fails to pay, the account party is not discharged. This is because ". . . the buyers promised *to pay* by letter of credit, not to provide by letter of credit a source of payment which did *not* pay" (Stephenson LJ, *W J Alan* supra at 220). In these circumstances, the account party's payment obligation revives. The beneficiary is then entitled to claim from the account party either for the price agreed in the contract of sale or for damages for breach of its contractual promise to pay by letter of credit. (*W J Alan* supra at 220, *Ronstan* at 103, 127).

A letter of credit becomes unconditional and the account party's payment obligation is discharged (even though the credit terms differ from the contract terms) when an issuer accepts the documents tendered and pays the beneficiary's bill, acceptance alone apparently being insufficient. (G A Penn, A M Shea, A Arora *The Law & Practice of International Banking* Vol 2, London, Sweet & Maxwell, 1987 at 317). The law further suggests[5] that the account party's payment obligation is discharged when the beneficiary fails to obtain payment because of a failure on its part to comply with the terms of the credit. If, for example, the beneficiary fails to present the required documents, the account party's payment obligation does not revive because, by failing to present the documents, the beneficiary is not complying with the contract. (*Shamsher Jute Mills*, supra at 392).

Theory Three — No Payment At All

Theoretically, a third way of analysing the legal effect of the provision of a credit on the rights and obligations of the parties under the contract of sale.

On this analysis the provision of a letter of credit is no payment at all — merely a means by which payment may be obtained. The account party's payment obligation, therefore, is unaffected by the provision of a credit. Lord Denning in *W J Alan* relying on *Peacock v Pursell* (1863) 14 CBNS 728 suggested that if this were the case, then upon a beneficiary's failure to present documents to a bank, a beneficiary would be guilty of laches in enforcing its security and an account party would be discharged. If, however, on presentation a banker fails to take up the documents, a beneficiary may then present the documents direct to an account party and demand payment. Ultimately, his Honour rejected this analysis on the basis that it ". . . finds no place in any of the authorities". (at 211).

The analysis was also rejected by McNair J in *Soproma SpA v Marine and Animal By-products Corporation* [1966] 1 Lloyd's Rep 367 (at 386) when he said:

> It seems to me to be quite inconsistent with the express terms of a contract such as this to hold that the sellers have an alternative right to obtain payment from the buyers by presenting the documents direct to the buyers. Assuming that a letter of credit has been opened by the buyer for the opening of which the buyer would normally be required to provide the bank either with cash or some form of authority, could the seller at his option disregard the contractual letter of credit and present the documents direct to the buyer? As it seems to me, the answer must plainly be in the negative.

Presumption favouring conditional payment only

Penlington J began his analysis of the issue by canvassing the divergent case law. In the only New Zealand authority on the matter, the 1894 Court of Appeal decision in *Hindley & Co v Tothill, Watson and Co* (1894) 13 NZLR 13, he found support for the proposition that ". . . a letter of credit is not to be regarded as an absolute payment unless the seller expressly or impliedly stipulates that it should be so". (at 103, 121). In *Hindley,* Williams J, (at 23) in delivering the judgment of the Court rejected the defendant's argument that the provision of a credit amounted to absolute payment. He commented, obiter, that the beneficiary had the liability: ". . . of the bank in the first instance and on the bank's default that of the defendants (the buyers)".

Penlington J then turned his attention to the English cases. In 1956 the issue arose in *Newman Industries Ltd v Indo-British Industries Ltd* [1956] 2 Lloyd's Reports 219. There, Sellers J declined to rule whether the issue of a letter was sufficient in all cases to discharge an account party's payment obligation. He did, however, comment (at 236)

> . . . . the question . . . is whether the seller must look only to the bank who issued the letter of credit; that is, whether the method of payment agreed releases the buyer from direct liability for payment under the contract of sale. There does not seem to be any definite authority on the matter . . . I do not think there is any evidence to establish, or any inference to be drawn, that the draft under the letter of credit was taken in absolute payment. I see no reason why the plaintiffs . . . . should not look to the defendants, as buyers, for payment.

Sequentially, the next relevant case was the 1958 decision of the High Court of Australia in *Saffron v Societe Miniere Cafrika* (1958) 100 CLR 231. In a controversial joint judgment, the High Court of Australia suggested, obiter, that the issue of an irrevocable confirmed letter of credit may constitute absolute payment of the purchase price. Dixon CJ, McTiernan J and Menzies J suggested that the question should not be considered without regard to the *kind* of credit at issue. They suggested that provision for payment by revocable credit could not be regarded as negating an account party's payment obligation in the event of revocation. At the other end of the spectrum, however ". . . a provision for payment by irrevocable and confirmed letter of credit which in words taken from *Gutteridge & Megrah* on *The Law of Bankers Commercial Credits*, (1955) at p 13, is "an absolute undertaking by the banker to honour all drafts complying with the terms of the instrument creating the credit, subject only to limitations as to the amount and the period of time for which it is to be available", might perhaps not unreasonably be regarded as a stipulation for the liability of the confirming bank in place of that of the buyer" (at 243-244). The High Court went on to say there was "less reason" to consider provision of an irrevocable but unconfirmed credit as being sufficient to discharge the account party.

The High Court of Australia's analysis prompted Hudson (A H Hudson *Payment by Letter of Credit* 23 MLR 689 at 690) to comment: "(the) . . . suggested answers to the problem seem . . . so eminently fitted to the three types of credit that in any future discusson of the problem they will have to be treated as of the greatest persuasive force". The dictum was greeted with considerably less enthusiasm elswhere (see, in particular, E P Ellinger *Does a Documentary Credit Constitute Absolute Payment?* 24 MLR 530). Penlington J was also unimpressed, commenting merely: "*Saffron* was decided in 1958. Now I have the benefit of the English cases which have been decided since then" (at 103, 127).

Ellinger (supra at 532-533) went so far as to describe the dictum as "untenable", suggesting it was contrary to principle and should not be followed. His two main criticisms were, first, the suggestion conflicted with the opinion of most Courts and scholars who suggested an irrevocable letter of credit, confirmed or unconfirmed, did not constitute payment. Secondly, he said it was difficult to understand why, for present purposes, an irrevocable but unconfirmed credit should differ in principle from an irrevocable and confirmed credit. This is because the essential nature of the issuer's promise does not differ — the difference is merely quantitative. According to Ellinger, the relevant distinction was merely that in the case of an irrevocable and confirmed letter of credit, a second bank adds its promise to that of the issuing bank. He said: "It is hard to see why a promise given by A should not constitute an absolute payment while the same promise given by A and B should be so considered".

By way of contrast, Clark (M Clark, *Bankers Commercial Credits Among the High Trees* 1974 CLJ 260 at 273) maintains that the High Court's dictum attracts sympathy on the basis that if the beneficiary has the promise of not one but two banks, it is less likely to require the continued liability of the account party. Ellinger, however, suggests that "It is true that an additional promise given by a second bank gives further security. It does not follow that a consignor is always willing to discharge a consignee in return for the promise of two banks". He continued: "Moreover, sometimes a promise given by a single, first rate bank can furnish better security than a promise given by one second-rate bank and confirmed by another second-rate bank". Ellinger finds support in Gutteridge (at 40) who contends that confirmation by a bank in the beneficiary's jurisdiction is not, of

itself, sufficient to justify the conclusion that a credit constitutes absolute payment. Confirmation aims to avoid ". . . possible trouble, by having a reliable payor in his own country, not to forgo the normal rights of a seller against his buyer". Megrah and Ryder (M Megrah & F R Ryder, *Paget's Law of Banking* Butterworths 1982, 9th ed at 538) also suggest that there is nothing in the fact of confirmation which precludes the beneficiary recovery from the buyer.

The issue resurfaced in 1966 in *Soproma SpA v Marine and Animal By-Products Corporation* [1966] 1 Lloyd's Rep 367. McNair J, sitting in the commercial court of the Queen's Bench Division and apparently without the benefit of full argument, commented: "Under this form of contract, as it seems to me, the buyer performs his obligation as to payment if he provides for the seller a reliable and solvent paymaster." (at 385)

Penlington J considered the next case of significance to be the Court of Appeal's decision in *W J Alan*. Having analysed the consequences of the three possible interpretations of the provision of an irrevocable confirmed credit, Lord Denning commented, obiter:

> As a result of this analysis, I am of the opinion that in the ordinary way, when the contract of sale stipulates for payment to be made by confirmed irrevocable letter of credit, then, when the letter of credit is issued and accepted by the seller, it operates as conditional payment of the price. It does not operate as absolute payment. (at 212)

The dicta from *W J Alan* were applied by Ackner J as part of the ratio in *Maran Road Saw Mill v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep 156. (See also *E D & F Man Ltd v Nigerian Sweets & Confectionery Co Ltd* [1977] 2 Lloyd's Rep 50; *Shamsher Jute Mills Ltd*). More recently in *Re Charge Card Services Ltd* [1986] 3 All ER 289 the Court of Appeal accepted the presumption that the payment obligation under a letter of credit transaction was only conditional.

Penlington J then adverted to the position in the United States where, as foreshadowed earlier, there was already apparently diverse opinion on the matter. There, the Supreme Court of Louisiana's decision in *Vicacqua Irmaos v Hickerson* (1939) 190 So 657 is authority for the proposition that providing an irrevocable letter of credit may discharge the account party's payment obligation. In *Greenhough v Munroe* (1931) 53 F (2d) 362, however, the New York Circuit Court of Appeals held that the issue of an irrevocable credit did not discharge the account party.

Presumption of conditional payment

Penlington J concluded that "the preponderance" of the authorities reviewed establishes a strong but rebuttable presumption in favour of construing the provision of a letter of credit as merely conditional payment of the purchase price.[6] Accordingly, once the credit is established, the account party's liability is suspended during the period available to the bank to honour the credit (at 103,127). On the insolvency of the bank, the beneficiary is entitled to claim from the account party either the price agreed in the contract of sale or for damages for breach of its contractual promise to pay by letter of credit.[7]

Penlington J went on to hold that the question of whether a letter of credit was absolute or conditional payment depended on the intention of the parties as revealed by a proper construction of the contract.[8] His Honour continued:

> The terms of the promise to satisfy the purchase price in the contract of sale may assist in determining whether the true intention of the parties was that the issue of the letter of credit was to be absolute payment or merely conditional payment. (at 103-127).

Davis (AG Davis, *Recent developments in the law of Commercial Credits* 1959 JBL 323 at 325-326) suggests that looking to the intention of the parties to determine whether or not a letter of credit is absolute or conditional payment is a commonsense principle in accord with general principle. The difficulty is, of course, ascertaining the intention of the parties.

Rebutting the presumption

As a rebuttable presumption, the Courts may, in appropriate circumstances, treat payment under a letter of credit as absolute rather than conditional. Indeed, Penlington J, following the obiter suggestion of Lord Denning and *W J Alan*, said the presumption may be rebutted by "an express or implied stipulation to the contrary". (at 103-127).

Where the contract expressly provides that the opening of a letter of credit shall absolutely discharge the account party's liability, the Courts will apply the provision. Accordingly, the account party will be discharged on opening a conforming credit even if the bank becomes insolvent. (*Ronstan* at 103-107).

Lord Denning in *W J Alan* (at 209-210) suggested that a beneficiary implicitly stipulates a letter of credit is to be absolute payment if he/she:

> . . . . stipulates for the credit to be issued by a particular banker in such circumstances that it is to be inferred that the seller looks to that particular banker to the exclusion of the buyer.

This is presumably because, typically, the choice of the issuing bank is left to the account party with the sales contract merely providing for payment by letter of credit. In these circumstances, arguably, a beneficiary should not be required to take the consequences of the failure of the issuing bank. Lord Denning explained the US cases of *Vicacqua* and *Ornstein v Hickerson* (1941) 40 F Supp 305 on this basis. Additionally, he suggested this may explain McNair J's observation in *Soproma*. Gutteridge (supra at 38) suggests that while a beneficiary's choice of an issuing bank is a significant feature, it should not, by itself, be sufficient to destroy the right of the seller to sue the buyer if the bank fails. In *Ronstan* itself, Penlington J held the reference to ANZ was not sufficient in itself to indicate an intention that Marine was disposed to accept the letter of credit as absolute payment.

Furthermore in *E D & F Man Ltd* it was held that the presumption will not be displaced by the beneficiary merely agreeing on the identity of the issuing bank. In the case Ackner J (at 56) said:

> The fact that the sellers have agreed on the identity of the issuing bank is but one of the factors to be taken into account when considering whether there are circumstances from which it can be properly inferred that the

> sellers look to that particular bank to the exclusion of the buyer. It is in no way conclusive. (See also *Ronstan* at 103-127.)

In fact, as Todd (*Bills of Lading and Bankers Documentary Credits* 3rd ed, Lloyd's of London Press Ltd 1990 at 61) points out, *E D & F Man Ltd* was not a strong case because the principal shareholders of the account party were also principal shareholders of the bank. Given this, he suggests it is likely the account parties chose the identity of the issuing bank and the beneficiary merely acquiesced.

Was the presumption displaced?

Penlington J next turned his attention to the question of whether, on the facts, Marine's provision of the credit was intended to, and did, constitute absolute payment of the purchase price.

Ronstan argued that the sales contract contained nothing to rebut the presumption. On the contrary, it argued Clauses 3 (which referred to the purchase price and the debt) and 4 (stipulating the two ways in which the purchase price and the debt were to be paid) showed that the letter of credit was merely a method of payment and not a discharge of Marine's payment obligation.

Reference to ANZ in the contract aside, Marine's main contention in support of the argument that its provision of the credit constituted absolute payment also hinged around Clause 4. "The purchase price and debt *shall be paid . . . as follows*" were the key to resolving the issue. He said:

> In my view this clause sets out the *ways* in which the two amounts referred to in the clause are to be paid. There was no provision in the contract to the effect that the plaintiff as seller agreed that it would only look to the issuing banker or the ANZ. Likewise I do not consider that there were any other provisions in the contract from which such an agreement could be inferred. Under cl 4, the defendant's obligation was to *provide* a letter of credit as a means of payment. (at 103, 127-103, 128).

Penlington J therefore held the letter of credit merely constituted a conditional payment of the purchase price.

The effect of non-presentation

Penlington J then moved to consider the second issue. This was the question of whether – and if so, to what extent – Ronstan was affected by his own default by not presenting the letter of credit in accordance with its terms.

Marine argued that it had satisfied its contractual obligation under Clause 4.1 (b) by providing the credit and, as a result, had honoured its implied obligation to provide a reliable and solvent paymaster. The failure of the letter of credit was the sole responsibility of Ronstan in that it did not present the requisite documents prior to the expiry of the credit. In these circumstances, Marine argued it was discharged from its payment obligation. To allow Ronstan direct recovery would, they contended, allow it to short-circuit the credit machinery. Marine's argument is supported in para 260 3(1) *Halsbury's Laws of England,* 4th ed which says:

> Where a letter of credit is conditional payment, the buyer is discharged if the seller fails to obtain payment because of a failure on his part to comply with its terms.

Ronstan, relying on the fact that Marine had accepted the goods in California (and had not rejected or returned any of them), argued that the non-presentation of the documents did not relieve Marine of its responsibility to pay the purchase price. Rather, it argued, notwithstanding the fact that the failure to present the documentation was solely its own responsibility, Marine's underlying payment obligation revived. Otherwise Marine would have received an unjustified windfall.

Penlington J began his analysis of the second issue by referring to the autonomy principle – the essence of the law relating to documentary credits. This principle provides that the issuer's undertaking contained in the credit is separate and legally independent of the underlying contract of sale. The autonomy principle is recognised at common law and in Article 3 of the UCP, and is closely aligned with the principle of the documentary nature of the letter of credit operation. Article 4 of the UCP states the principle of the documentary nature of the letter of credit operation as follows:

> In credit operations all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents may relate.

Penlington J thus disposed of Ronstan's argument concerning Marine's acceptance of the goods.

Penlington J went on to say that while there was apparently no direct precedent[9] dealing with a beneficiary's failure to obtain payment on a letter of credit due solely to failure to present the necessary documentation prior to the credit's expiry, there were ". . . pointers in the cases . . . to the way to which the present case should be determined". (at 103, 129)

The first "pointer" Penlington J identified as persuasive was an obiter passage from the High Court of Australia in *Saffron* (at 245). The passage reads:

> It would seem that the only possible ground upon which the seller could have been defeated in his claim for the price would have been that the seller was solely responsible for the failure of the primary source of payment.

As His Honour pointed out:

> The High Court then went on to say that it was not necessary in that case to determine whether in such circumstances the buyer who had received the goods could successfully resist a claim for payment of the price. (at 103, 129)

The second "pointer" Penlington J identified as of assistance is found in Lord Denning's analysis of the effect of a credit as conditional payment in *W J Alan*. Here, His Honour reasoned, Lord Denning made it clear that a beneficiary must look to the bank in the first instance for payment. If the bank does not meet its obligations, the beneficiary may then have recourse to the account party. Penlington J continued:

> Lord Denning then went on to say: "The seller must present the documents to the banker". This is a very positive statement. These words carry the meaning that the

> seller, as a matter of contractual obligation, is bound to present the documents to the bank while the letter of credit is alive in order to activate the banker's obligation to pay or, failing payment by the banker, to revive the buyer's obligation to pay. (at 103, 129).

His Honour felt, however, that the clearest "pointer" came from the judgment of Bingham J in the more recent *Shamsher Jute Mills* case. This case addressed the issue of a beneficiary's failure to operate the letter of credit machinery in the agreed manner. There Bingham J said:

> I know of no case where a seller who has failed to obtain payment under a credit because of failure on his part to comply with its terms has succeeded in recovering against a buyer personally. If this were an available road to recovery, many of the familiar arguments about discrepancies in documents would be unnecessary. Bearing in mind the likelihood that buyers will . . . sell on to sub-buyers, such result would, I think, throw the course of international trade into some confusion. (at 392).

Bingham J went on to hold that when an account party establishes a credit he/she has "performed his part of the bargain so far." (at 392). According to Penlington J, Bingham J suggests that in providing a valid and proper letter of credit, the buyer is required to do no more at that time. Penlington J went on to say that the situation in Ronstan fell within the third of the three scenarios postulated by Bingham J in *Shamsher Jute*, resulting from the issue of a credit while the credit remains alive. These three scenarios are:

> **Payment by the banker.** If the credit is honoured according to its terms, the buyer is discharged . . . .
>
> **Bank failing to pay.** If the credit is not honoured according to its terms because the bank fails to pay, the buyer is not discharged because the condition has not been fulfilled.
>
> **Seller failing to obtain payment due to his fault.** If the seller fails to obtain payment because he does not and cannot present the documents which the terms of the credit, supplementing the terms of the contract, require, the buyer is discharged. (*Ronstan* at 103, 129)

Penlington J then said:

> It is implicit in His Honour's observations that the beneficiary is obliged to present the documents. This learned Judge affirms the same point that is made by Lord Denning in *W J Alan*. By failing to present the documents, the seller is not then complying with the contract and the buyer's obligation to pay is not revived. He is discharged. The buyer has complied with the contract and has done all that he has promised to do. (at 103, 129).

Accordingly, Penlington J ultimately held that Ronstan could not have recourse against Marine. His Honour said that if a beneficiary was solely at fault in not presenting the documents while a letter of credit was alive, then the beneficiary's default was not a trigger to revive the buyer's obligation to pay and, therefore, the beneficiary could not have subsequent recourse to the account party (103-129). In response to the argument that Marine received an unjustified windfall, however, Penlington J said: ". . . other remedies may well be available which would counter this injustice". (at 103-129).

Certainly Ventris (F M Ventris, *Bankers' Documentary Credits* 3 ed, Lloyd's of London Press Ltd (1990) at 86) suggests that if the beneficiary is unable to obtain payment because he/she is not in a position to tender the required documents or has tendered them too late, he/she has no recourse against the account party. Schmitthoff (C M Schmitthoff *The Law and Practice of International Trade* Stevens & Sons 1990 at 440) also suggests that if payment under a credit is not made because a beneficiary is at fault, for example, by tendering non-conforming documents, he/she cannot rely on the conditional nature of a credit and the account party is discharged. Gutteridge, (supra at 42) however, maintains that even if a beneficiary is responsible for failing to receive payment under a credit by reason of his/her failure to tender conforming documents he/she should not lose the right to be paid the purchase price. He suggests that if a credit is only conditional it should not matter for what reason the responsible bank does not pay. He says:

> . . . if . . . (a beneficiary) . . . cannot rectify his irregular tender before the expiration of the credit, the security of which he has lost, he may tender to the buyer with an indemnity to cover the buyer's loss of interest on any moneys he had placed with the issuing bank and necessary expenses . . . (at 42)

Conclusion

Given the key role letters of credit play in facilitating international trade and the New Zealand economy's heavy dependence on trade, the decision in *Ronstan* is timely. *Ronstan* clarifies two key issues about the nature and application of letters of credit.

The first issue – an issue of importance to exporters, importers as well as their legal advisers – concerns the nature and scope of obligations created by the issue of a letter of credit and their impact on the rights of the parties under the contract of sale. Thanks to *Ronstan* we now have clear indigenous guidance on the critical question of when a beneficiary has right of recourse against an account party if the responsible bank fails to honour the credit.

Ronstan's most significant contribution to the law of documentary letters of credit is in its guidance on the question of the legal effect of a beneficiary's failure to tender documentation prior to a credit's expiry. *Ronstan* suggests that if a beneficiary is solely at fault in failing to present required documentation while the credit is alive, the beneficiary's default will not trigger the revival of the account party's payment obligation. The beneficiary will not, therefore, have subsequent recourse against the account party. This should serve as a timely reminder of the deed to observe credit deadlines. □

1 (1993) 4 NZBLC 103, 112. The case involved an application under R 131 (5) of the High Court Rules to set aside an appearance under protest to jurisdiction. This article is confined to the part of the judgment dealing with the nature and application of letters of credit.

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Security of tenure and retirement villages

By Michele Slatter, Senior Lecturer in Law, University of Canterbury

Last December the Securities Commission published a paper outlining proposals for reform of the law relating to resident funded retirement villages. The paper was researched and drafted by the Resident Funded Retirement Villages Task Force, a group established at the instigation of the Trustee Corporations Association of New Zealand and the New Zealand Retirement Villages Association Inc, with the support of the Securities Commission. The seven members of the Task Force volunteered their time and expertise and prepared the paper over a period of sixteen months. Their work is timely. We could see a period of significant expansion of retirement villages and it is appropriate that a review of the relevant law should be undertaken before this occurs.

The writer acknowledges the help given by Sheryn Glass LLB, in collecting material for the article.

A developing industry

The first New Zealand retirement villages were mostly developed by organisations such as churches and charities. Since the mid-1980s, commercial developers have been in the field, marketing life-style accommodation, usually well-located, finished to a high or very high specification and offering security, company, recreational facilities, comfort and health care options to people over sixty. Such developments have a double attraction. Residents are attracted by the ambience and facilities offered *and* by the knowledge that a considerable part of their purchase price is refundable on their leaving the village, thus providing a capital sum which in most cases will benefit their estate. Resident funded retirement villages basically operate using residents' purchase moneys as interest-free loans to the operators for the period of the residents' occupation.

Given the initial and continuing cost of buying into a retirement village, residents are people of means. It has been calculated that the existing villages accommodate only 2.6 per cent of the over-65 population in this country. There is also some evidence that this life-style is only attractive to a minority of people. (*The 1990 Age Concern/National Mutual Study on the Lifestyle and Well-Being of New Zealand's Over-60s*, undertaken by Colmar Brunton Research, p 42.) Nevertheless, the much-publicised demographic trend towards the "greying" of the New Zealand population suggests the market for such accommodation can be expected to grow substantially. It seems likely that not only the number of retirees taking this option but also the proportion of the age group which they represent will increase in the short- and mid-term future! The opportunities this growing market offers will surely continue to attract more operators into the industry. Clear and appropriate ground rules established now, whilst confidence in the industry is still high,[2] could serve both consumers and the industry well.

Regulation as securities

Despite (or because of?) their relative novelty and uniquely complex character, retirement villages in New Zealand have not been subjected to a tailor-made statutory regime. Such formal regulation as exists stems from the Securities Act 1978. This focuses on the investment aspect of the resident's purchase and the continuing financial viability of the schemes. Obviously, these are crucial concerns: the continuing operation of the village, as well as the ultimate refund of the purchaser's returnable payment, depends on the continuing viability

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2 Most recently in *Re Charge Card Services Ltd* [1986] 3 All ER 289 the Court of Appeal accepted that, in the ordinary way, the "payment obligation under a letter of credit transaction was only conditional".

3 There was no evidence that Ronstan purported to reject or question the irrevocable credit and Penlington J held that Ronstan must be taken to have accepted the documentary credit as provided. His Honour additionally held that to the extent the credit did not comply with the contract and contained terms that were not in the contract, Ronstan must be taken to have accepted those alterations and terms. While on 5 August, the amount of the credit was increased to US$33,813 to cover the cost of further goods shipped but all other terms and conditions of the credit issued on 23 July remained unchanged.

4 *Ronstan* supra at 103, 127; *W J Alan* supra, *Maran Road Saw Mill v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep 156; *E d & F Man Ltd v Nigerian Sweets & Confectionery Co Ltd* [1977] 2 Lloyd's Rep 50, and *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388.

5 *Ficom SA v Sociedad Cadex Limitada* [1980] 2 Lloyd's Rep 188; *Shamsher Jute Mills Ltd* supra. See also *Halsbury's Laws of England*, 3(1) 4th Ed Para 260.

6 At 103, 127. Under Articles 21(b) and (c) of the Uniform Customs and Practice for Documentary Credits (1983 Revision) a similar position obtains as between the issuing and advising or confirming banks. Payment by a confirming bank is conditional only, and if the confirming bank does not pay the issuing bank must. See Todd supra at 61.

7 At 103, 127. See Clarke (supra at 274-275) for an analysis of the arguments in support of provision of a credit as conditional payment only.

8 At 103, 127. This compares with the High Court of Australia's comment in *Saffron* at 243 to the effect that the search for the intention is artificial.

9 Penlington J at 103, 128 accepted that the cases so far had dealt with different situations, namely (1) default on the part of the paying banker; (2) failure on the part of the buyer to provide a proper letter of credit; (3) documents being presented which do not match the requirements specified in the letter of credit; and (4) the buyer contributing to the banker declining to meet the credit.

of the enterprise. In essence, the Task Force recommendations would involve a fine-tuning of the present regulatory regime under the Securities Act,[3] reinforced by self-regulation through the New Zealand Retirement Villages Association Inc. (The Association was formed in early 1989 and states that it represents more than 80 per cent of retirement villages in New Zealand.) The revamped regime would apply throughout the industry both to commercial and non-profit operators.

A different dimension

In addition to their character as securities, however, retirement villages clearly have a second and perhaps more immediately obvious dimension: they are residential communities, with a range of communal facilities and services for residents. Purchasers frequently fund their move by the sale of the family home. They might expect that their new home will be as inviolable as the old and that the promised services and facilities will be available to them, uninterrupted, for as long as need be. However, residents' rights to occupation, to services and facilities and to the return of a proportion of their purchase moneys are founded on the contract(s) entered into with the operator/owner/manager at the outset. (In many cases the interest purchased is merely a licence to occupy.) This dependence on contractual rights raises two issues regarding the residents' security of tenure. It is these two issues which are addressed by this article.

Firstly, what security does a resident in a retirement village have as against the manager/operator for the time being? Secondly, how secure are residents' rights against successors in title to that manager/operator?

Both these issues are discussed in the Report. The differing attention each receives is indicated by the following comment:

> Security of tenure is, in the view of the Task Force, a principal expectation of mature aged residents. While contractual arrangements between a manager and a resident govern a resident's security of tenure as between those two parties, problems may arise if a third party, such as a mortgagee or other creditor, intervenes.

As is evident from this quotation, the first issue is not seen as essentially problematic by the Task Force, which directs more attention to the second matter. However, both issues repay consideration.

1 Eviction

It has not been argued that any retirement village arrangement falls within the protection of the Residential Tenancies Act 1986.[4] Rights of termination are governed by the contract between operator and resident. For the purposes of this article it is the various provisions governing the operator's right to terminate which are of especial interest. Perusal of a number of current Occupation Agreements[5] disclosed an interesting variety of provisions governing the eviction of a resident from a village. The situations which may give rise to the termination of residence rights are common to many contracts but the precise powers reserved to operators differ considerably.

Operators' powers

i. Period of notice

The majority of agreements perused provide for one month's notice to be given by either party. In some cases two months' notice was applicable.

ii. Breach of the agreement or of owner's regulations

Most agreements include a provision that the owner may give notice of termination if the resident is in breach of one or more obligations under the agreement. In many contracts termination will occur if, after one month's notice in writing, the default has not been remedied.

This right is frequently extended to cases where the resident is in breach of any "regulations issued by the [operator] and in force at any time for the control and management of the land". The operator's power to promulgate bylaws is reserved in clauses thus:

> the owner may from time to time issue rules and regulations for the control and management of its land, buildings and facilities including the [resident's apartment] and the licensee shall accordingly be bound by and required to observe all such rules and regulations.

Residents' Committees or residents' forums operate in many retirement villages as a useful channel of regular communication between management and residents. Their right to contribute to the drafting of bylaws is, however, often not secured by the agreements to occupy.

iii. The general interest

Many contracts include a provision that the operator may terminate an occupation right "if in the opinion of the landlord it is in the best interests of the community of Residents that the Resident ceases to reside within the complex".

This power is unrestricted and subjective. It is not expressly limited to situations of deteriorating physical or mental health or well-being; indeed, such situations are generally covered by a separate provision. The scope of such of clause therefore seems vast.

iv. Medical reasons

Several agreements include a provision "that the licence shall terminate immediately the licensee becomes (in the opinion of the owner's medical and social assessment team) physically or mentally unable or unfit to continue the occupancy of the [apartment]".

In some contracts a more elaborate clause provides that:

> when in the opinion of a medical practitioner appointed by the Landlord the Resident has become so ill or enfeebled as to require special attention or has become affected with a dangerous infectious or contagious disease for which the Landlord is not permitted or equipped to provide care or has become mentally ill to the degree that his or her presence within the complex shall be deemed detrimental to the health or peace of the other residents or any of them the [landlord] may transfer the Resident to an appropriate institution, public or private. The opinion of the medical practitioner appointed by the [landlord] shall be final in assessing the state of health of

> the resident for the purposes of this paragraph. All costs and expenses so incurred shall be the sole responsibility of the Resident.

Clauses such as this tend to be separate from and additional to positive undertakings frequently included on the part of the operator to

> make such arrangements as are considered necessary by the Landlord for the Resident to receive appropriate care in a Residential home for frail ambulants or in a hospital if such care is required. In the event of any dispute as to whether or not such care is required the opinion of the medical practitioner appointed by the Landlord shall be absolute and final in deciding whether or not the Resident requires such special care. The Resident shall be responsible for the costs and expenses incurred or to be incurred in connection with such arrangements.

Variations of this clause include undertakings by the landlord to "respect the Resident's wishes as far as possible" on the question of transfer and also undertakings to "notify the Resident's next-of-kin of any changes".

v. A general power

A number of Occupation Agreements include a general provision that

> without prejudice to the right of the owner otherwise hereunder, this licence shall be terminated immediately on the occurrence of any one of the following . . . (d) the expiration of one month's written notice by either party to terminate the term of occupation;

or:

> the [operator] reserves the right to terminate the licence and dismiss the resident for good and sufficient cause. In the event of such dismissal a refund will be made for the cost of the apartment as hereafter set out. Upon the cost of the apartment being refunded the [operator] will be discharged from all obligations whatsoever in terms of this licence;

or:

> arrangements and authority regarding admission of occupants and termination of occupancy and adjustments of rates and accommodation shall be vested in the Landlord and the Resident shall not have the right to object to such admission terms of occupancy or termination of occupancy of any Resident (sic).

Dispute resolution

Given the extraordinarily wide and ill-defined parameters of some of the clauses quoted, it is sensible to have in mind the possibility of disputes arising between residents and management on aspects of their operation.

A very high proportion of the Occupancy Agreements perused provide that any dispute arising from the Agreement will be dealt with under the Arbitration Act 1908.

Freedom of contract?

Retirement village Occupancy Agreements are drafted by the operator's advisers (although most provide that the cost of preparation will be met by the resident). Like commercial leases of the pre-crash period, many appear to retain the maximum degree of control and discretion to the owner. They also provide for the private and costly option of arbitration should a dispute arise from their terms.

It may well be pointed out that the most sweeping powers lurking within these clauses have not been used. It might be added that, in practice, the powers reserved would be employed conservatively, if at all, in the best interests of individual residents and the village community as a whole. An eviction would prompt negative publicity, might reduce confidence in the enterprise and would also require the repayment of the evicted party's refundable payment: all these factors mitigate against the promiscuous use of the termination provisions. One might ask then whether the retention of such sweeping terms is either necessary or desirable in contracts of this type.

Despite the Task Force's implicit faith in freedom of contract, bargaining on the contract terms is not likely. In practice, the terms are not negotiable. Each operator needs uniformity of contract across the whole body of residents.

It is not easy to ascertain how far, if at all, the terms of the Occupancy Agreement, other than those governing cost, affect the purchaser's choice of village at present. (It was said in 1985 that, given the nature of the consumers the market for retirement villages was "likely to become highly selective": Gamby, fn 1, below.) A purchaser may be set on moving to a particular development because of its location, for example, or its ambience, or the presence of friends. If the supply of retirement village accommodation were to exceed demand, it is conceivable that contractual terms might be a more important factor as purchasers "shopped around". Operators might then be prompted to reassess their documentation in order to provide a more attractive "product". Without a very strong push from a changing market place, however, revision of Occupation Agreements is only likely to be provoked by some type of regulation.

Regulation?

In Australia, State legislation designed specifically to regulate the retirement village industry has tended to concentrate attention on the residential rather than investment character of the villages.

In both South Australia and New South Wales an order of the State's Residential Tenancies Tribunal is necessary before the village operator can evict a resident. (South Australia: Retirement Villages Act 1987, s 7(1); New South Wales: Retirement Villages Act 1989, s 24.) Further, s 17 of the New South Wales Act provides that the Tribunal may make an order setting aside a "residence rule" if it is of the opinion that the provision is "unconscionable, harsh or oppressive". Both states thus intrude an external check into the operation of the contracts and provide that disputes are taken to the Tribunals, established as cheap, expeditious and expert bodies appropriate to residential disputes.

Queensland's Retirement Villages Act 1988 makes express provision for a resident who is threatened with removal from the village to apply to the Supreme Court for an injunction either in person or through the

registrar. Victoria's Retirement Villages Act 1986 lays down procedures and a timetable of notice for the termination of a residence contract. This gives the resident 28 days to remedy the breach and if the breach is "substantial" and unremedied or continues after the 28 days then the resident has 60 days' maximum notice to leave.

The Task Force recommendations

The Task Force does not consider that termination provisions need to be regulated in an Exemption Notice or by legislation. Its Report states that "the contractual arrangements will usually provide for termination. As a matter of good practice termination provisions should be referred to in a prominent manner in any prospectus".

The Task Force does not consider that standard occupancy documents should be required. It suggests that minimum requirements should be imposed, leaving the parties "free to contract as they see fit" beyond that framework, thus providing for "commercial flexibility while still providing a measure of protection for residents". In reality, if the Report were given effect, the NZRVA's Code of Practice would be the minimum benchmark, since a principal recommendation of the Task Force is that membership of the Association should be a requirement for all retirement village operators. The Code states that "in recognition of the fact that retirement villages are marketed by the industry as permanent accommodation for residents", managers' termination rights should be limited to specified circumstances and these should be set up in the contract or prospectus. The five grounds on which management may terminate according to the Code are:

- decline of the resident's physical or mental health, making the premises unsuitable;
- breach by the resident of the residence rules and failure to remedy after due notice has been served;
- intentional or reckless damage or disturbance caused or likely to be caused by the resident;
- abandonment of the premises by the resident;
- that the management would suffer undue hardship if the resident contract was not terminated.

The Code also suggests that one month's notice in writing be given of management's intention to terminate the contract.

It is clear that these grounds for termination are considerably less extensive than those in some existing contracts, although the scope of the last ground is not immediately clear.

It should also be noted that the Code of Practice encourages the creation of "appropriate structures" for residents to contribute to the formulation and revision of village rules and bylaws. The Code also "places particular emphasis on providing easy access to informal and inexpensive means of resolving disputes" between residents and to this end requires the establishment of a Disputes Committee in each village.

The Code therefore, if given effect throughout the industry, could provide a practical measure of minimum uniformity in respect of termination provisions and would prompt the revision of some Agreements. It could also help to pre-empt some problems by involving the residents in the formulation of village rules and in the prompt resolution of village disputes, whilst nevertheless recognising "management's requirement of reasonable managerial autonomy". As a 1992 review of the New South Wales legislation pointed out:

> On the positive side, the provision of accommodation and services in a medium density environment provides opportunities for the development of cohesive networks and close friendships in an environment of physical safety and security. It is undeniable, however, that such a communal living environment may also lead to tensions among residents and between residents and management. Problems will inevitably arise and structures must exist to enable these problems to be properly aired, discussed and resolved in a sensitive, timely and fair manner.

Consumers were not directly involved at all with the formulation of the Report. Whether the Code is felt to meet their concerns remains to be seen. As with any self-regulatory scheme, the standards imposed and the rigour with which they are enforced are both matters which affect public confidence in the industry.

2 Successors in title

The second major concern to be discussed here is the strategy recommended by the Task Force to secure the enforceability of residents' contractual rights of occupation and rights to ongoing services against third parties, for example mortgagees or other creditors of the operator or purchasers of the operator's interest. The Task Force points to two major problems.

Firstly it observes that "often mortgagees will accept that their ability to realise their security in the event of default will be subject to the occupancy right of residents. This is not invariably the case, however". Indeed, it could be pointed out that, at least where the resident is a licensee, any such "acceptance" would be a result of purely extra-legal considerations – hardly the most reassuring propsect for a purchaser.

Secondly, the Task Force raises the possibility that an occupancy right is a contract which may be disclaimed by a receiver or liquidator as an onerous contract.

In many retirement villages, the residents' interests are a licence to occupy accompanied by a contract for services. The licence terms include provisions concerning the resident's entitlement to the repayment of a proportion of their capital sum on the termination of their residence. Thus the licence secures both the residential and the investment aspects of their purchase. How can these contractual rights[6] be enforced against parties not privy to the original bargain? How, if at all, can they secure priority for the residents as creditors should the enterprise fail?

The Task Force recommends that the Securities Act 1978 be amended to provide for the introduction of a compulsory notification system. This would identify land being used for a retirement village and, in the words of the Task Force, while the notice is registered "all transactions affecting the land will then be subject to the interests of residents through the mechanism of the notice".

Specifically, the Task Force

recommends that the Act be amended to provide for:

- the obligation to "register a notice" (sic);
- the binding of subsequent owners . . . to the terms and obligations contained in any occupancy right which is issued;
- a statement that a notice does not create an interest in the land;
- a statement that the obligation to register a mortgage shall not be contracted out of;
- a requirement that mortgagees' or other chargeholders' consent for a discharge of the mortgage or charge be obtained;
- transitional provisions for existing villages;
- the deeming of a notice as a charge for the purposes of registration under the Companies Act 1955 and
- a statement that an occupancy right is not a contract which may be disclaimed by a receiver or liquidator or set aside by a statutory manager.

Consequential amendment of the Land Transfer Act 1952 would also be required to permit registration of such a notice and its subsequent discharge.

Clearly, notification is here being deployed to secure the performance of contractual obligations and to secure the priority of a contractual liability. Using the procedure in this way would be something of a novelty. Even with further legislative intervention through the Property Law Act 1952, analogous to that in favour of restrictive covenants perhaps, the notification of purely contractual rights on a land title so that they might bind third parties would seem to sit uncomfortably with the orthodox understanding of indefeasibility and the purpose of sections such as s 62 and s 182 of the Land Transfer Act 1952. This Task Force recommendation adopts only selective parts of the Australian retirement villages legislation. The extension of privity of contract could be straightforwardly achieved by a section such as s 14 of the Victorian Act. It is the issue of priority which seems more problematic and which lends itself more readily to the remedy of a charge. However, the Task Force rejected the use of a charge partly because, it suggested, the mechanics of its enforcement were unclear and also because of funders' anticipated objections to the protection of residents' refundable payments by way of first charge. "Funders" here are lenders to the operators, of course, not to the purchaser.

A good buy?

The Task Force Report was published after an introductory Foreword had been penned on 13 December 1993 by the Securities Commission. Submissions were sought by the end of February, although in recognition presumably of the "vacation factor", this repressively tight time limit was ultimately extended to the end of March. The Commission anticipates that more precise law reform recommendations will be with the government by the end of this year. (See *Sunday Star-Times* 20 March 1993, p A17.) It is to be hoped that the Report prompts widespread discussion before reform is effected. It is a "producer's blueprint" for the future pattern of the industry. Consumer interests and those with a less immediate axe to grind, such as professional advisers, now need to be actively involved in the development of long-term ground rules.

Meanwhile, a useful if unintended short-term result of the Report may be to focus the attention of lawyers on the "small print" of retirement village contracts. Operators' advisers might feel inclined to review their agreements with the purpose of discarding provisions of intimidating but ultimately redundant breadth. Those advising prospective purchasers might examine even more closely just what it is that their clients are considering. As these purchases are made for cash, there is no intervention of an interested third party to offer an opinion on the intended purchase. This leaves the purchaser's lawyer in a uniquely important position. Remember caveat emptor? □

1 By 2001 almost 600,000 New Zealanders will be over 60; by 2031 the projection is 1.13 million: *Elderly Population of New Zealand* Department of Statistics Wellington 1990 p 11. Overseas experience in Australia and in the USA shows higher proportions in villages and the pattern has been for New Zealand to follow similar patterns after some delay: M Evan Gamby "Housing the Elderly" in *Proceedings of the 13th Pan-Pacific Congress of Real Estate Appraisers, Valuers and Counselors* 1986 p 1.

2 See the survey in *Consumer* February 1993 pp 12-15. To date, the retirement village industry has not attracted the adverse publicity which dogged time-shares, which clearly the industry would wish to avoid.

3 The first preference of the Task Force would have been for legislation specifically for retirement villages but practical considerations drove them to recommend this "more pragmatic" approach to reform.

4 While some, eg those founded on the Unit Titles Act 1972 are clearly excluded: s 5(q) Residential Tenancies Act 1986, others are not as unambiguously outside its protection: the "provision of services" exclusion of s 5(1) might be invoked although it might also give rise to some interesting calculations; the general exclusion from the Act of "any hospital, home or other institution for the care of sick, disabled or aged persons" (s 5 (d)) might have to be treated somewhat liberally to give a blanket exclusion! Unlike the English legislation licences are not automatically excluded. The express statement in an Agreement that it is not subject to the Act is not sufficient to exclude an arrangement otherwise included: s 11.

5 This does not claim to be a comprehensive survey but refers to various current agreements.

6 The difficulties of treating licences as anything resembling an interest in land are well-known: no successful solution to this has been found. The statutory solution adopted for "company leases" in the Companies Amendment Act 1964 seems inappropriate here.

Liberty and the independent Bar

I will for ever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he *will* or will *not* stand between the Crown and the subject in the Court in which he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend from what *he may think* of the charge or of the defence, he assumes the character of the Judge; nay, he assumes it before the hour of judgment . . . .

Thomas Erskine
(1750-1823)

The enforceability of contracts which are illegal under the Commerce Act 1986

By Yvonne van Roy, Senior Lecturer in Commercial Law, Victoria University of Wellington

Illegal contracts at one time were unenforceable, but the Illegal Contracts Act 1970 made the situation more flexible. Under the Commerce Act 1986 some contracts are specifically declared to be illegal and unenforceable. This article looks at the implications of this in the light of Court decisions. The author considers that the Howick Parklands *case could have been met by an interpretation of the remedies contained in s 89(2) of the Commerce Act.*

Introduction

Contracts or covenants which contravene ss 27, 28 or 29 of the Commerce Act 1986 are illegal and unenforceable (ss 27(4), 28(4) and 29(6). Contracts which contravene any of ss 36, 36A, 37 or 47 are illegal also.) None of the remedies in the Illegal Contracts Act 1970 can apply to contracts which are illegal under the Commerce Act because s 89(5) of the Commerce Act states that:

> Nothing in the Illegal Contracts Act 1970 applies to any contract entered into in contravention of this Act or to any contract which contains a provision the giving effect to of which would constitute a contravention of this Act.

Instead, s 89 provides a number of remedies, (such as cancellation, variation, payment of compensation etc), similar to those in the Illegal Contracts Act. However, unlike the Illegal Contracts Act, the Commerce Act does not provide for validation of illegal contracts, but provides instead for a procedure whereby the Commerce Commission may grant authorisation to contracts which although in breach of the Act, have sufficient benefits to the public to outweigh the detriments. The reason for this is that such contracts affect a wider group of persons than the parties themselves. Indeed, such contracts are detrimental to the public interest in that they are generally anti-competitive, and for that reason those which have not been authorised should not be enforced no matter what issues of individual equity are involved.

The *Howick Parklands* case

In a decision last year of the High Court, *Howick Parklands Building Company Ltd v Howick Parklands Ltd* [1993] 1 NZLR 749 the Judge decided that not all contracts which contravened the Commerce Act and which are therefore illegal[1] are enforceable. He considered 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 defendant the benefit of a finding that the contract is illegal and void" (p 765). The result of this decision is very unfortunate in that it would seem to be providing the very remedy (ie enforceability) which has quite clearly been excluded from the remedies available under s 89 of the Commerce Act. Even more unfortunate is that there was little consideration given in the judgment to the provisions of the Illegal Contracts Act or s 89 of the Commerce Act (other than s 89(5)). Consideration of these provisions would have made clear the legislative intention with respect to illegal contracts, and in particular contracts which contravene the Commerce Act.

The *Howick Parklands* case involved a marketing agreement between Howick Parklands Building Company Ltd (referred to in the case as Liberty Homes) and Howick Parklands Ltd, which conferred on Liberty Homes the sole and exclusive right to promote and market a particular subdivision as a predominantly residential subdivision.

In particular, Howick Parklands Ltd argued that the provision of the marketing agreement which required that all purchasers must use Liberty Homes for all construction services and/or materials contravened ss 27 and/or 28 of the Commerce Act[2] and that the agreement was therefore unenforceable against them. This argument was used in "defence"[3] with respect to an action for damages brought by Liberty Homes against Howick Parklands for breach of contract. The Judge found that there was still a valid contract, that the defendants had breached this, and that the Commerce Act "defence" did not apply because the marketing agreement did not contravene the Commerce Act. However, in case he was wrong on the latter point, the Judge went on to consider whether the contract could be enforceable notwithstanding contravention of the Commerce Act.

The Illegal Contracts Act and the residual power

He considered first whether relief could be granted under the Illegal Contracts Act, but concluded that s 89(5) of the Commerce Act effectively precluded this. With the remedies of the Illegal Contracts Act unavailable, he decided that the Courts had a residual power to enforce a contract where it would be inequitable or unconscionable to allow the defendant to benefit from a finding that the contract was illegal or void (as in this case). This residual power is "closely related to the concept of estoppel" (p 766) and is "designed to preclude an unworthy defendant from relying upon or benefiting from the illegality in the first place" (p 766). He distinguished this from the principle underlying the Illegal Contracts Act which he considered to be "designed to ameliorate the harshness and rigours of the common law's response to illegality" (p 766).

With respect, this does not fairly state the aims and effects of the Illegal Contracts Act. Firstly, the Act covers all contracts which are illegal at law or in equity (s 3), subject only to the provisions of other enactments, and s 6 specifically precludes the application of any rule of law or equity to illegal contracts:

> 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 . . .

In addition, s 7(7) precludes the application of all but statutory remedies:

> 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.

This would appear to preclude the residual power, based on equity, which the Judge used to enable enforcement of the contract. The Judge did not expressly consider ss 6 and 7(7) of the Illegal Contracts Act, and the difficulties which these sections present. He just stated:

> It has been repeatedly held that the enactment of legislation in a particular area of law does not mean that the common law in that area ceases to develop . . . . 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. (pp 765-766.)

With respect to the need for a residual power to address inequities, s 7 of the Illegal Contracts Act specifically recognises that factors such as the conduct of the parties (s 7(3)(a)) and knowledge of illegality (s 7(4)) may be taken into account by a Court when deciding whether to give a remedy or what remedy to give. Indeed, the Court of Appeal in *Broadlands Rentals Ltd v R D Bull Ltd* stated:

> Inter partes it may well be reasonable to exercise the discretion under s 7 to ensure that the party more culpable does not profit at the expense of the other. ([1976] 2 NZLR 595, at p 600.)

The relief available includes restitution, compensation, variation of the contract, and validation of the contract in whole or in part (s 7(1)). It would seem therefore that not only has the Illegal Contracts Act addressed the very situations considered by the Judge to require a residual power, but has expressly removed any such powers arising out of common law or equity. Only statutory provisions are to override the provisions of the Illegal Contracts Act.

This has not resulted in decisions which are inequitable as between the parties or left the Courts without adequate remedies, because the Courts have construed very strictly any statutory provisions which are argued to exclude or take precedence over the Illegal Contracts Act.[4] If the other enactment provides that certain conduct (etc) is illegal but does not provide for relief in the case of illegality, the Courts have used the relief provisions of the Illegal Contracts Act.

Section 89 of the Commerce Act

Sometimes the Illegal Contracts Act is excluded completely, and it would be hard to find a clearer statement excluding the Illegal Contracts Act than that in s 89(5) of the Commerce Act. However, s 89 does not leave a plaintiff without relief or remedies. If, as in the *Howick Parklands* case, the Commerce Act is argued as a defence (and proceedings are therefore not brought under Part VI of that Act), s 89(1) will not be available.[5]

However the remedies still available under s 89(2) include variation (s 89(2)(a)) or cancellation (s 89(2)(b)) of the contract, and payment of restitution or compensation to the other party (s 89(2)(c)) (although these require application by a party to the contract or someone claiming through or under that party). Section 90(6) also enables the enforcement of the provisions of a contract which remain after the illegal provisions have been removed. The remedies which are not available to Courts under the Commerce Act are orders validating or enabling the enforcement of contracts which contravene its provisions. This is not surprising, for contracts which contravene the Commerce Act detrimentally affect not only the interests of the plaintiffs but also the public in general because of their anti-competitive effects. The only way in which contractual provisions which contravene the Commerce Act (ss 27, 28, 29, 37, 38 or 47) may be enforceable is if they have been authorised by the Commerce Commission under Part V of the Act. Authorisation is granted only if the detriments arising from the contract are or are likely to be outweighed by one or more benefits to the public. The Act therefore does not provide for authorisation or enforcement on other than public interest grounds. To allow such contracts to be enforceable in order to address inequities between private individuals would appear to negate the very purpose of the Act. In such cases, the remedy in s 89(2)(c), ie requiring restitution or compensation to be paid to the innocent party would be quite adequate. It would certainly have been adequate for the innocent party in this case, ie Liberty Homes.

In this case the innocent party did not make an application for relief under s 89(2) of the Commerce Act, so it might be argued that a residual power should apply to assist in such cases. It is however a well known saying that "hard cases make bad law", and it should be seriously considered just how far a Court should go to make up for failure by parties to present adequate cases.

Also, there does not seem to be anything which would prevent such an innocent party from making the required application at a later date.

The importance of the object of the Commerce Act

By finding that a residual power existed that overrode the express provisions of ss 6 and 7(7) of the Illegal Contracts Act,[6] the Court has also ventured beyond the constraints provided in the Illegal Contracts Act with respect to the granting of relief under s 7. In particular, the Judge did not consider whether providing for the enforceability of a contract which contravened the Commerce Act would be consistent with the object of the Commerce Act, a factor required to be considered under s 7(3)(b) of the Illegal Contracts Act (when that Act applies). This is a significant omission, for the Courts have always considered the object of the other enactment to be of extreme importance when deciding whether to grant relief, or what form of relief to grant. For example, the Court of Appeal in *Harding v Coburn* [1976] 2 NZLR 577 at 584-585, stated (and reaffirmed this view in its more recent decision *NZI Bank Ltd v Euro-National Corporation Ltd*`.[7]

> In practice validation might well be out of the question if it would produce a result contrary to the object of another enactment. It is no part of the purposes of the Illegal Contracts Act to undermine the social or economic policies of other measures.

The Judge in *Howick Parklands* did recognise that when the Illegal Contracts Act applied the objects of the other enactment had to be considered. When considering whether the contract could be validated under the Illegal Contracts Act if it was illegal under s 62 of the Real Estate Agents Act 1976[8] he decided that relief could be granted as this "would not transgress the object of the Real Estate [Agents] Act".[9] It is surprising therefore that he did not consider this factor when using his residual power to address the effects of illegality under the Commerce Act. The Judge also recognised that the old common law rules relating to contracts which were illegal and therefore unenforceable[10] need not apply where "enforcement of the contract would do umbrage to the objects or policy of the statute" (p 766), but seems to have looked no further than the object of s 89(5) alone. He admitted that there was force to an argument that it was the legislature's policy to exclude relief of this kind (ie enforceability under a residual power) and that this "could not be more plain by virtue of the terms of s 89(5)" (p 768), but he considered that the residual power was not restricted to the operation of the Commerce Act and the existence of s 89(5) could not therefore affect its general validity (p 768). This really is an argument that a residual power can override a remedy provision of a statute. It does not address in any way the overall object or purpose of the Commerce Act and whether enforcement would do umbrage to this.

The remedy of enforceability

The Judge made a distinction between validation and enforceability, stating that the residual power

> 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 . . . (p 768).

With respect, the result of validation is much the same as that of providing enforceability, and the latter is also distinctly opposed to ss 27(4), 28(4) and 29(6)) of the Commerce Act which provide that the effect of contravention is unenforceability. Although the plaintiffs required only damages in this case, the remedy of providing for enforceability of an illegal contract must be recognised as being wider than that.

Is there need for a residual power?

The only cases where a residual power might be arguably relevant to give relief where a contract contravenes the Commerce Act, is where an innocent party has failed to make the application required by s 89(2) of that Act (providing for remedies such as compensation or restitution). As stated earlier, there are good reasons why a residual power should not be applied even in these cases. In *Howick Parklands* no previous cases were cited where Courts have found a residual power which supersedes the Illegal Contracts Act or which supersedes the relief provisions of enactments to which that Act is subject (such as those in s 89 of the Commerce Act). It is difficult to see a situation in which such a power would be needed, and this is probably because of the careful way in which the Illegal Contracts Act is framed.

Conclusion

It is unfortunate that the Court in the *Howick Parklands* case considered that it was necessary to find a residual power and to override the express provisions of the Illegal Contracts Act. It is also unfortunate that the remedy provided was not one which is available under the Commerce Act, but one which may instead be argued to be quite inconsistent with the objects of that Act, and the provisions it contains for dealing with contracts which contravene it. It could be strongly argued that the remedies contained in s 89(2) of the Commerce Act would have been sufficient to meet the relief requirements in this case. □

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1 Although the Judge did not mention authorisation, he was clearly contemplating contracts which had not been authorised.

2 Howick Parklands also argued contravention of s 36 but as this had not been specifically addressed in the pleadings, they were not entitled to argue it.

3 The Judge acknowledged that "statutory illegality" is not strictly a "defence" as such (p 762).

4 For example, *Harding v Coburn* [1976] 2 NZLR 577 (with respect to the Land Settlement Promotion and Land Acquisition Act 1952) or *Broadlands Rentals v Bull* (with respect to the Hire Purchase and Credit Sales Stabilisation Regulations 1957) – see [1976] 2 NZLR 595 at 600.

5 That is, orders against persons causing loss or damage to others.

6 This was the effect of the power, even though ss 6 and 7(7) were not addressed in the judgment.

7 (1992) 6 NZCLC 96-549, at p 67,933. See also *Hurrell v Townend* [1982] 1 NZLR 536 where the Court stated, "We think it would be wrong to grant relief by way of validation if there is a serious risk that as a result the objects of the [Act] would be defeated in the particular instance" (p 539) – quoted in *Lower Hutt City Council v Martin* [1987] 1 NZLR 321, at p 328.

8 He found that it did not contravene s 62 of the Real Estate Agents Act 1976, but just in case he was wrong on that point he went on to consider whether he could give relief under the Illegal Contracts Act.

9 The judgment refers at times to the Real Estate Agents Act, and at times to a Real Estate Act – it is s 62 of the former Act which is relevant.

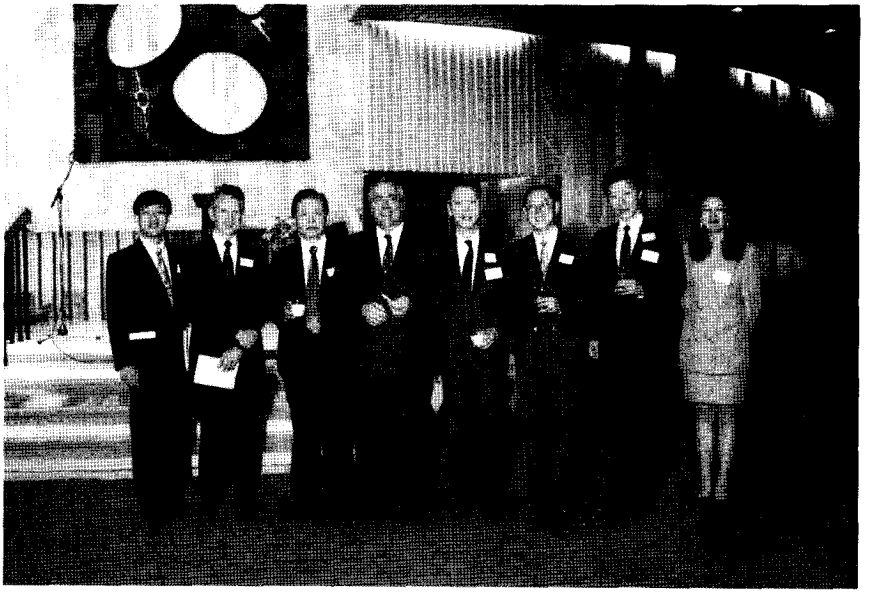
10 The rule is set out in s 6 of the Illegal Contracts Act.

China Law Society visit

By Oren Jonathan Schlein, Attorney-at-Law

The author is an American attorney from New York, currently working in the Wellington office of Buddle Findlay which was sponsor of the recent visit to New Zealand of a delegation from the China Law Society. He expects to be admitted as a Solicitor of the High Court of New Zealand in the near future. The author has made a special study of Chinese law and speaks Mandarin. The article begins with some comments on the Chinese legal system as Mr Schlein knows it and learnt in discussions with members of the delegation. He concludes with observations on the delegation's visit to New Zealand, which followed a similar visit to Australia.

I recently had the privilege of accompanying a delegation of Chinese lawyers during a visit by the China Law Society to New Zealand at the invitation of the New Zealand Law Society. Accompanying the delegation during its visit was Mr P J Downey as a member of the New Zealand Law Society LAWASIA-IBA Standing Committee and as LAWASIA Councillor. The visit was one of many undertaken in recent years by the Chinese to promote greater understanding and cooperation between the legal communities of the People's Republic of China and foreign countries.



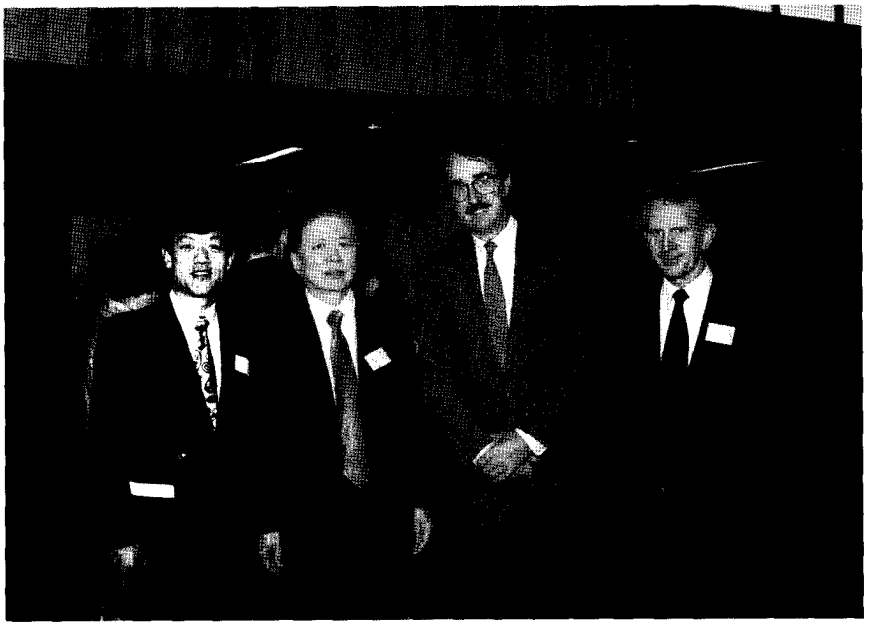
Mr Zhang Fan (Interpreter), Mr David Stock (Buddle Findlay), Mr She Mengxiao (Vice President, China Law Society), Hon Douglas Graham (Minister of Justice), Mr Yue Xiang, Mr Ma Rui, Mr Liang Yi, Miss Lu Qing (King and Wood, Beijung)

This particular delegation was headed by Mr She Mengxiao, Vice-President of the China Law Society and a former Vice-Minister of Justice. Mr She was accompanied by three other high ranking lawyers and an interpreter. The deputy head of the delegation was Mr Yue Xiang, the Secretary-General of the Legislative Committee of China's National People's Congress. His role as Secretary-General of that Committee is to supervise law reform in China, including the drafting of new legislation. The third delegate was Mr Ma Rui, Vice-President of the Shanghai Law Society, and a senior member of China's International Arbitration Centre. The fourth member of the delegation was Mr Liang Yi, deputy director of the International Liaison Department of the China Law Society; and the final member was Mr Zhang Fan, interpreter from the China Law Society. In addition, the delegation was accompanied during the visit by Ms Lu Qing, a partner at King and Wood, a private Beijing law firm, who has previously studied and practised law in New Zealand while working for the firm of Buddle Findlay in Wellington.

The delegation's visit was significant for two reasons. First, it represented an acknowledgment by the Chinese that New Zealand has certain unique qualities, distinct from larger developed countries, which China may find useful in its endeavour to adapt foreign legal models to its own nascent legal system. It is a recognition that the success of China's market reforms is inherently linked to the further development of a reliable and advanced legal system, and that New Zealand has a great wealth of knowledge and information arising from its recent experiences with law reform and privatisation. Secondly, the delegation's visit highlighted a recent trend in New Zealand to expand links between New Zealand and the Asia Pacific region. The week-long visit was jointly organised by the New Zealand Law Society and the national law firm Buddle Findlay. This firm is one of a growing number of New Zealand organisations and companies actively involved in promoting business, educational and cultural exchanges between New Zealand and Asia, and encouraging increased trade and investment between the two.

Delegations from the China Law Society have visited more than 30 countries in recent years, including countries in Europe, in North and South America, Japan and now New Zealand and Australia. This represents a significant change from the 1960s and 1970s when China adhered to an isolationist attitude

towards the world. During the Cultural Revolution Mao Zedong attacked "Western elements", which included legal institutions and the rule of law. When Deng Xiaoping came to power in 1979, China's legal system was virtually non-existent, the country had faced years of hardship and lawlessness, and the state of the economy was disastrous. Deng embarked on a radical programme of reform called the "Four Modernisations". It was his view that sound socialist reconstruction required the modernisation of China's agriculture, industry, national defence, and science and technology. All of these reforms in turn depended upon foreign trade and investment. This led to Deng's "Open Door Policy", which favoured a more cooperative relationship with the world community.



Zhang Fan, She Mengxiao, Hon Paul East, David Stock

The history of legal developments in China over the last 15 years has been an interesting one. Early on in the reform process legislation was drafted in the expectation that this would attract foreign investors. However, inadequacies in the system quickly became apparent. In the absence of a sound legal history and proper legal institutions, the Chinese government was unable to implement its broad legislative programme effectively. This in turn failed to stimulate investor confidence in the early 1980s.

Foreign commentators have frequently noted Chinese legislation as being brief and incomplete statements of principle. Typical of such legislation was the 1979 Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures. This law contained 15 articles and for several years was the cornerstone of China's foreign investment legislation. However its failure was the absence of adequate implementation measures, and its inability to adapt itself to the realities of the marketplace and the investment climate in China. The scarcity of proper legislative guidance and frequent and uncertain changes in the government's economic policies created difficult conditions for foreign investors.

One of the fascinating features in the development of China's legal system over the past 15 years has been the Government's recognition of the inadequacies in the system, and its ability to shift gear and adopt new and more comprehensive legislation in an attempt to remedy the mistakes of earlier legislation.

Since China first opened its borders to overseas investment in the late 1970s, foreign investors have regularly advocated the need for more comprehensive legislation governing foreign trade and investment. Indeed, foreign investment legislation took several years to get off the ground. By the 1990s, however, more than 150 foreign investment laws had been enacted, and in 1994 as many as 50 major pieces of legislation will be passed. These new laws will include finance, banking and securities as well as property and labour law. Most recently, a competition law and a new unified tax regime were promulgated.

One additional indication that a new legal system is beginning to take root in China is the rapid growth in the number of lawyers and law firms around the country. At the end of the Cultural Revolution there were virtually no lawyers in China. There are now more than 50,000 lawyers and over 4,000 law firms. And while the number of lawyers increases each year, the fledgling profession cannot keep up with demand. The authorities have now permitted some lawyers to establish private law firms, or privatise previously state-controlled firms. These concerns now number over 400.

As the legal profession has expanded in recent years, so has the membership of the China Law Society, a non-governmental organisation with approximately 100,000 members. Its members are practising lawyers, Judges, professors and academics and other legal professionals. The China Law Society provides a forum for its members to exchange views on recent developments in China's legal system and it undertakes legal research projects in foreign and domestic law. One of the Law Society's most significant functions is to establish and develop relationships with foreign law societies. Currently it has close ties with over thirty countries.

The China Law Society's visit to New Zealand in March was an important step in the development of closer ties between the legal communities of our two countries. The delegation's visit provided a valuable opportunity for all concerned to learn about each other's legal system, but equally important, it was an opportunity to make friends.

The visit lasted a week. The delegation spent four days in Wellington and two days in Auckland. They travelled by car through the Ruapheu National Park and Taupo, and visited a farm where they saw sheep being rounded up by sheep dogs and being shorn. Generally, it was a week of formal meetings and seminars, interspersed with less formal social functions and Chinese banquets.

In Wellington, the delegation visited several governmental and non-governmental organisations. They had formal discussions with the Governor of the Reserve Bank, Mr Don Brash, with Assistant-Secretaries at Treasury, as well as with the Securities Commission and the Commerce Commission. They met senior officials of the Ministry of Foreign Affairs and Trade, TRADENZ and Crown Law, and they visited the Victoria University Centre for Asia-Pacific Law and Business. The delegation was received by Sir Robin Cooke, President of the Court of Appeal; by the Hon Paul East, Attorney-General; and by the Hon Douglas Graham, Minister of Justice. The delegation met officials from the New Zealand Law Society and members of the Wellington District Law Society, and also met representatives from Wellington's business community at a luncheon sponsored by Buddle Findlay.

In Auckland, the delegation met representatives of the Auckland District Law Society and Bruce Slane, Privacy Commissioner and a Vice-President of LAWASIA. They were also taken on a tour of the High Court after meeting the Hon Justice Barker and several other High Court Judges. The delegation ended its visit with a seminar jointly sponsored by the New Zealand China Trade Association and Buddle Findlay. Mr Ma, as member of China's International Arbitration Centre in Shanghai, spoke on "Alternative forms of Dispute Resolution in Chinese Commercial Transactions". The seminar was very well received by the sixty-odd members of Auckland's business and legal community who attended. A report of that meeting is published at [1994] NZLJ 187.

The China Law Society delegates appreciated their numerous meetings during their stay in New Zealand. They were particularly interested in discussions relating to commercial legislation, including our financial, securities and banking laws; anti-trust and competition laws, including the Commerce Act and Fair Trading Act; the role of the Privacy Commissioner; and the nature of state-owned enterprises and privatisation in New Zealand. They also tried to understand the respective roles of the Attorney-General and the Solicitor-General, but acknowledged that they found it difficult to relate this to the Chinese system. They also found difficulty in understanding how these offices were connected to, but independent of, the office of the Minister of Justice. The visit offered the delegation an opportunity to exchange views on these issues in an open and constructive manner and to appreciate some of the unique qualities of New Zealand's legal system.

The delegation's visit was equally beneficial to the New Zealand participants. It offered members of the local legal and business communities an opportunity to gain some insight into the current market and legal reforms in China. In particular, the visit reinforced the importance of continuing recent efforts by the public and private sectors in New Zealand to promote greater understanding between our two cultures and business communities.

The relationship between New Zealand and China goes back to the last century. The friendship between our two countries has always been a special one. It will undoubtedly continue to grow and prosper as New Zealand becomes more integrated into the Asia-Pacific region in the coming years. The visit by the China Law Society was successful in that it represented an important step in forging closer professional and personal ties between the legal communities of our two countries. □

China Law Society

The ten years after the reestablishment of the China Law Society [in 1982, following the suppression of its predecessor during the Cultural Revolution] have been a blooming decade in the building of socialist democracy and legal system in China and a decade of steady advance in opening up the field of work of the Society.

In the past ten years the Society has steadily grown in organic structure and size; it has become an important link in uniting the jurists, lawyers and other professionals of the law in the country.

The Society now has more than 6,000 individual members and over 100,000 group members. Among the members are 6,515 professors, research fellows, assistant research fellows and lecturers, 6,716 judges, 5,404 public procurators, 3,267 lawyers and 8,456 standing committee members of the People's Congresses and the Chinese People's Political Consultative Conferences at all levels and leading members of government departments and juridical and law enforcement organs. On the whole, the Society is a grouping centre of elite on the juristic and legal front in China.

The Society now has 523 local affiliated branches. They include 29 branches at the provincial, autonomous regional and municipal levels, one preparatory group of the society at the autonomous regional level, 14 branches at the city level, 260 branches at the prefectural (city) level and 219 branches at the county level.

There are 14 research committees on various disciplines and specific subjects under the leadership of the China Law Society. They cover jurisprudence, constitutional law, administrative law, civil law and economic law, criminal law, procedural law, marriage law, reform-through-labour law nationality law, military law, comparative law, labour law, legal problems on both sides of the Taiwan straits and laws in Hong Kong. There are 248 such committees under the leadership of the various local branches of the Society.

Over the past 10 years the China Law Society has steadily expanded its scope of business and domain of service. It has done a large amount of fruitful work to uphold and develop the Marxist conception of law, step up the construction of socialist democracy and legal system, uphold and strengthen the people's democratic dictatorship, safeguard social stability and promote reform and the opening policy as well as economic construction.

Extract from Commemorative Album of the Tenth Anniversary of the China Law Society, July 1992

Alternative forms of Dispute Resolution in Chinese commercial transactions

Transcript from New Zealand China Trade Association and Buddle Findlay Seminar, Auckland, 18 March 1994

Stuart Ferguson — Chairman, New Zealand China Trade Association

I am Stuart Ferguson from the New Zealand China Trade Association and this morning it gives me very great pleasure to welcome you all along here today and to particularly thank the New Zealand Law Society and Buddle Findlay for bringing this event together. We have behind us a very distinguished panel of experts on this subject from China and I am sure all of us will be very, very interested to hear what they have to say. There is no doubt that dispute resolution in the burgeoning trade between China and New Zealand is becoming an issue of some concern, certainly of some importance. Dispute resolution has traditionally been from the heart, if you like, in China, rather than by legal process, and the transformation from the heart to nationally recognised and understood standards is something that I am sure is most welcome for many of those companies in New Zealand who have never had too much experience of resolution from the heart. Anyway, that is not my subject, it is the subject of these gentlemen and the experts around us. May I thank you again for your attendance and for coming along today.

Thank you very much.

Bernie Hill from Buddle Findlay will now start proceedings formally and I will get out of his way so that he can do that.

Bernie Hill — Partner, Buddle Findlay (Auckland)

Thank you, Stuart. Members of the Delegation, Ladies and Gentlemen, on behalf of Buddle Findlay I would like to welcome you to this presentation on dispute resolution, China style. The visit of the representatives of the China Law Society is a healthy sign, I think, of the deepening commercial relations between China and New Zealand and we are sure that this visit will be the first of many exchanges between legal professionals of both countries. Given the very positive outlook for commerce between New Zealand and China, today's topic may at first glance seem to be a rather negative focus. It will be reasonably transparent, I am sure, to most of the New Zealand audience here, however, that lawyers have a vested interest in disputes. If there were no disputes there probably would be no lawyers, and of course some might say if there were no lawyers there would be no disputes. Be that as it may as Stuart has pointed out, the possibility of commercial disputes is a major risk management factor in all aspects of trade, and I think it is particularly important for New Zealand business given the novel changes in China's trade law and in particular the changes in its legal system. Accordingly, we believe it is a very practical issue and we are most grateful for the China Law Society members' contribution. The format will be that Mr She Mengxiao will present an overview, Mr Ma Rui will then also take part in the address and then Richard Fyers and Lu Qing will present their papers and there will finally be an opportunity for people to put questions to the speakers. The handout you have gives you a little more detail about the people who are speaking. Mr She is, of course, the Vice-President of the China Law Society and one of China's most eminent and respected legal figures. Richard Fyers is a partner at Buddle Findlay's Auckland office. He has been a very frequent traveller in the East in recent years and recently completed a two month stint in Beijing at the Chinese law firm of King and Wood. Lu Qing is, of course, a partner in King and Wood. She knows New Zealand very well. She graduated from Victoria University at Wellington before returning to China to take up the challenges of establishing a private legal practice. I understand Mr Ma is an Arbitrator on the Panel of the Shanghai Branch of the China International Economic and Trade Arbitration Commission.

Mr She Mengxiao — China Law Society (Vice-President)

Mr Hill and Mr Fyers, Ladies and Gentlemen.

We feel very pleased that the delegation from the China Law Society can have a chance to visit Auckland. At present the economic developments in China are increasing very rapidly. In the past two years the economic development rate in China is 14 per cent and it is predicted that in the next few years the economic development rate will be maintained at 8 or 9 per cent. Therefore, many countries are very keen on understanding China and visiting China, so you may say that investment in China is very good and many investors want to go to China. And I think that the first reason is that in China we have a large market and the second reason is that we have sufficient legal protection and laws to encourage the investment. Last year

we published a company law and a law on combating unfair competition and other important laws. This year we will also publish a property law and a central bank law and a commercial bank law and other important laws. Therefore, we can say that we have created a better situation for foreign investment. And so welcome businessmen and lawyers from Auckland, you are welcome to come to China. Since I got to know that all the participants here are interested in dispute resolutions between Chinese and foreign enterprises, we are going to introduce Mr Ma who is an Arbitrator from Shanghai who will give you a detailed explanation. As you know Shanghai is the largest industrial city in China. It is a very well developed city with a population of 12 million, and foreign trade is well developed in Shanghai.

Thank you.

Mr Ma Rui — Shanghai Law Society (Vice-President) — China International Economic and Trade Arbitration Commission (Member)

Respected participants, Ladies and Gentlemen.

I feel greatly honoured that I have a chance to explain to you about dispute resolutions by arbitration and other ways of dispute resolution in China and Shanghai. As Mr She has just mentioned, during the last few years the open door policy and foreign investment has gone very rapidly. Shanghai is what we call a model of economic development in China. With the economic development in China and Shanghai many foreign investors would like to do business in Shanghai. Especially in the last year it has been very fast. And in 1993 in Shanghai we approved about 3,600 joint foreign enterprises and we have now at present 138 very famous multi-national international corporations doing business in Shanghai. The total investment in these companies will be about US$100m and these companies will produce about 200 products. About 80 per cent of all these new enterprises have begun to make products. Now we have about 50 enterprises which will base their market in Shanghai. The number of countries who are investing in China has grown from 40 to 56, especially the development of the Pudong area in Shanghai is very fast and also the development of Waigaoqiu, another tax free area, is well developed. Now there are about 50 big skyscrapers in Shanghai and in the Pudong area. So among all the registered foreign enterprises investing in Shanghai we have got altogether 6,139 and among them about 5,072 are joint venture enterprises, that is foreign joint cooperative enterprises, number 1080, and there are also 774 exclusively foreign owned enterprises.

With foreign investors coming into Shanghai to do business, disputes between the Chinese and foreign enterprises is also increasing. Mainly there are two categories of these disputes. One is the purchase trading and the other category is maritime disputes; and others will include infringement in compensation trade, processing of loans and also construction projects. We can say that the reasons for these disputes are various. I think the main reason is that at the time of signing the contract, the rights and obligations of the two parties are not so well clarified and another reason is that foreign investors are not so clear about Chinese laws and regulations. In China we have many laws and regulations for protection or guarantee of joint ventures and joint cooperative enterprises. The main basis is our principal code of civil law and civil procedure law. The procedural law in Chapter 9, Article 186 stipulates that foreigners have the same rights as Chinese citizens and for foreign enterprises and foreign organisations they have the same procedural rights in Chinese Courts. Also in Chapter 20, Article 192, it also stipulates that if there is an arbitration agreement between the two parties they will not go to Court if there is a dispute.

In order to handle foreign economic disputes we also have some special legislation. We have a law on Sino-foreign joint venture enterprises. If a dispute arises between the Chinese party and the foreign party, if this dispute cannot be solved by the board of directors, it can be submitted to arbitration or litigation. Also they can get an agreement to arbitrate at another agency or organisation. And also there is a law on the protection of Sino-foreign joint cooperative enterprises. This is stipulated in article 126. If there is a dispute between Chinese and foreign cooperatives they can go through a procedure of reconciliation, and if these two parties are not willing to go through these reconciliation procedures, or if the reconciliation is not successful, these cases can be handled by the Arbitration Centre, according to the arbitration clause, if it has been made before, or if they have agreed after these disputes come up. If between these two parties they do not have any arbitration agreement and they have no other agreement between them they can hand it to the Court.

We have a foreign contract law and in Chapter 6 we have special stipulations. It stipulates that if a dispute arises between the two parties, it is the two parties' obligation to settle it through reconciliation or mediation. If these conciliations are not successful, then those parties are free to hand it over to the Arbitration Commission or to other organisations for arbitration. In the China International Economic and Trade Arbitration Commission Centre and also in the China International Maritime Arbitration Commission we have special principles of jurisdiction for the handling and processing of these cases.

In China generally we have four main approaches for dealing with these arbitration cases. The first way is friendly reconciliation between the two parties and the second way is conciliation. These conciliations are conducted by third parties or by the agencies in charge of the administration of these enterprises and even these kinds of cases can be handed to the Arbitration Commission or to the Courts for this kind of mediation.

In the third category if mediation or conciliation is not successful, the parties are free to submit these cases to the Arbitration Centre. The China International Economic and Trade Arbitration Commission is established according to trade laws, treaties and international conventions to which we have participated. The China International Economic and Trade Arbitration Commission has its headquarters in Beijing, and now in Shanghai and Shenzhen we have these offices. For other kinds of cases in different provinces and regions in China we have also some agencies and organisations which are set up for the arbitration process. These include some special arbitrations like labour disputes and real estate and science and technological arbitration.

The fourth way of dispute resolution is the Courts. Disputes between Chinese and foreigners handled by the Courts are not so many. In terms of cases handled by the Courts in Shanghai, it is about 100 per year. Generally these disputes are resolved in between three months and six months. Some more complicated disputes may last longer.

I welcome lawyers and businessmen from Auckland and New Zealand to come to Shanghai and have a look. I have lawyers in Shanghai who would be willing to show you around.

Thank you very much.

Richard Fyers — Partner, Buddle Findlay (Auckland)

Thank you Mr She and Mr Ma for giving a very interesting presentation. It was interesting that the main reasons for disputes, Mr Ma said, was that parties don't clarify their rights and obligations, and that foreigners don't understand Chinese law. You may be surprised to know that Chinese law is not that different from the law in New Zealand. It is probably fair to say that twenty years ago foreigners might not have seriously considered litigation in China but that is not the case today. In tandem with the dramatic surge in economic activity there has been a rapid development of laws and regulations in a judicial system to facilitate and manage the market economy. It was said in 1993 that China had about 4,200 law firms of which approximately 400 were independent partnerships. Over 35 of these were located in Beijing, but today I have been told that there are now over 80 in the greater Beijing area that are independent law firms. According to the *China Daily* in December 1993, international business accounted for 31 per cent of the total business of lawyers in Beijing. In 1993 these lawyers handled 15,000 cases involving foreign business, double that in 1992.

Among the interesting features of dispute resolution in China is a market preference for arbitration rather than litigation. An arbitration clause is now standard in most foreign contracts. This saves later legal head-scratching over whether to litigate or arbitrate because as Mr Ma has just told us, China's civil code requires arbitration to be exhausted first if there is an arbitration provision in the agreement. Features of Chinese arbitration include various different legislation and mechanisms for domestic arbitration and arbitration involving a foreign party. You can select an arbitrator from a given panel, including foreigners, who may have special knowledge and practical experience. You can challenge an arbitrator if you doubt his impartiality. You can specify arbitration inside or outside China and you can call expert witnesses. Foreign lawyers can appear. You can specify in your contract the governing law. It could be the governing law of another country, but if it is an investment contract in China, then Chinese law must be applied. If one party does not appear, the arbitration panel can make a binding award.

China has joined the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chinese Courts will enforce arbitral awards as if they were judgments of the Chinese Court. The costs charged by arbitration panels like CITAC are based on a sliding scale by reference to the amount of the claim and are slightly higher than Court fees. These procedures are less formal than Court proceedings and arbitrators are likely to be more proficient in English than Chinese judgments.

As far as litigation is concerned, a litigant does not have to be represented by a qualified lawyer, but if he wants to be represented by a lawyer, then it has to be a Chinese lawyer. Major cases involving foreign interests are not heard in the Basic People's Court which is the lowest in the hierarchy, but in the Intermediate People's Court. If the case involves a very large claim, or is of great importance, it may be filed in the Higher People's Court. Appeals from the Immediate People's Court go to the Higher People's Court in the same province, whereas appeals from the Higher People's Court in a province are heard in the Supreme People's Court in Beijing which is the highest judicial authority in China. Written pleadings are not as extensively used as they are in New Zealand. On the other hand a unique feature of the Chinese judicial system is the emphasis on mediation and Mr Ma has just talked about that. Even after the trial, a Court may adjourn to allow the parties an opportunity to settle.

Chinese lawyers can charge on a time basis with regard to the usual range of factors that lawyers in the West use, such as the complexity or the urgency or the experience of the lawyer, but frequently they charge on a lump sum basis, particularly for domestic clients. In addition to paying the lawyer's fee there is a case acceptance fee, which has to be paid to the Court in advance and this is calculated on a sliding scale with the ratio at the lower end being 0.5 per cent of the value or amount of property in dispute, so that can really add up. Chinese Courts have the discretion to award costs between the parties as in New Zealand but these may be of little relation to the actual legal costs and disbursements as in New Zealand.

I would invite Lu Qing to speak to us. She is a partner in King Wood and she is a practising lawyer in Bejing and I think she might be able to give us a case study on an arbitration matter or litigation matter.

Lu Qing

[The tape for Lu Qing's talk was not very clear and there has had to be some slight editing, but the casual conversational style of the talk has been retained on purpose. — Ed.]

Well I will just provide an example of a special case which involves both Chinese parties and foreign parties in China.

One case is in relation to the import/export system, and a purchase agreement in China between a foreign company and a Chinese company. You may know that there must be a licence to import or export. The licence system in China is different from many countries. Many of the factories themselves cannot get the licence directly from the Government to do the import or export so they have to go through an import/export company in China to get a licence to do the work. So there comes the problem that when foreign companies want to buy a product from China and normally they negotiate with the factory at the beginning, and then they have to find out a import/export company that can do import/export work for them. So the contract will be duly signed between the import/export company and the purchasers, but actually the foreign purchasers and the factory do the job.

In one case we had there was quite

a bit of trouble because the foreigners did not have a full understanding about the whole system. So the contract wasn't signed by the Chinese company itself as some of them don't have the licence right to export-import. Of course, when the product was imported from overseas to China – some form of foreign made product – when the product arrived in China the import/export company paid the first lump sum payment to the foreign company. But because the market in China later on found the product wasn't very good they couldn't get a payment from the final purchaser in China. Consequently they couldn't pay off the other parties. The whole product has been in China and the dispute is on the delay of payment. This case was later handled by the Arbitration Commission and hopefully the Chinese company will win over the faulty foreign company in this case.

And another one I think would be a very interesting case too. One foreigner, probably a kind of one person operation company, and he tried to purchase a large amount of metal product from China. He went to factories and people inland, inside China. These people of course have no experience in import/export products before and he signed a very large contract with them, I think about a US$70m deal. The whole product should be delivered overseas within a year – every month they had to deliver one shipment – and there was an issue after the product had been checked by the foreign purchaser for quality and to satisfy everyone. But I think later on because the overseas person couldn't find another final purchaser overseas, he denied the payment. The thing is they paid the first instalment from a Hong Kong company that was totally irrelevant to the contract. This meant the LC [Letter of Credit] was totally different from the agreement itself. From the Chinese party side they had organised almost 169 factories around this area – they have a kind of economic area inside China – so they organised over 160 factories to produce the product according to the contract. Then the whole project just gets . . . there's no payment, nothing – and funny enough the foreign company also asked the Chinese company to pay about 1 million Chinese yuan for bank fees – which is totally rubbish – but because the Chinese company had no idea they paid the money. So they got the products being made and they couldn't sell them to anyone else because the metal product market in China, and also in the rest of the world, is quite low at the moment. They suffered a very huge damage. Also the whole of the factories in the area had to stop working – workers can only get probably a percent of their salary paid – just waiting for the dispute to be sorted out.

This case has also been handed over to the Arbitration Commission by us. We are representing the Chinese company. The thing is we think we are very hopeful we will win the case because the facts are so obvious. But there also comes the question of enforcement. The final arbitration statement, judgment, will come out, and there is probably no property at all because the foreign company is overseas.

So there is something happening in China now, and I thought these kind of two cases you might find interesting.

Stuart Ferguson — Chairman, New Zealand China Trade Association

I'd like to thank the panel, our visitors from overseas, for coming here today and talking to us. I'd like to thank Buddle Findlay and the New Zealand Law Society for making this possible. I'm sure that the information that has been gleaned today will be of some major benefit to almost every one of us.

It's quite clear, however, that New Zealanders and foreign companies must ensure that they enter agreements in any foreign country, and China is no exception, with a full understanding and knowledge of the local conditions, regulations and costs attached to those conditions as they apply in their case. There is no doubt that Chinese people – I think we can safely deduce from the discussions we have heard this morning – tend to negotiations in the settlement of any dispute, and Court action appears to be taken as a very last resort when friends cannot resolve their differences. It is also apparent that those Court actions result in even further friendly negotiations between the parties before the Court will apply a judgment. Once a judgment is applied it is then a matter of settling it and obtaining satisfaction. It would seem to me as an individual watching the proceedings and listening, that perhaps it's settlement and satisfaction, rather than the law, that really starts to come into play as we would understand it.

Ladies and gentlemen, thank you very much for your kind addresses and I hope that these, your New Zealand friends will now have a better understanding of the situation in China. □

Judicial correctness

Supreme Court of Canada Justice John Sopinka criticised political correctness in a recent speech to Concordia University political science students.

The Judge claimed that certain segments of society "have extended their demands so far that they threaten the freedom of others."

"They not only criticise the expression of views that do not accord with their own but demand that contrary views be suppressed."

He told students that "this movement has had its effect on the judiciary . . . there is cause for legitimate concern that over-zealous dissection of every word that drops from the Bench, with a view to finding some indicia of political incorrectness which may be the basis for a complaint to the Judicial Council, may result in decisions that are politically correct but not legally and factually correct.

"Surely," said Mr Justice Sopinka, "a judge should be able to comment on matters relating to the administration of justice and any reforms to that system."

He added, "With respect to political correctness, we must still rely on the common sense of public opinion to stand up for the right to say things no matter how unpalatable they may seem."

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Australian trade in legal services: A stimulus for the New Zealand profession?

By John Skinnon, Law Lecturer, The Open Polytechnic of New Zealand

On 12-13 November, 1993 the 20th annual International Trade Law Conference was held in Canberra. This Conference is the leading Australian forum for discussion of developments in international trade law from an Australian perspective. This year, there were about 110 registered delegates, including the writer who was apparently the only New Zealand representative to hear the latest about developments in such matters as improved access to the Japanese legal services market, Australian interstate mutual recognition (of qualifications — and the invitation for New Zealand to join) and creation of an Australian foreign law expertise register.

Countries focused on this time were Japan, South Korea and China, although papers presented ranged more widely and generally on topics like trade strategy, proof of foreign law, arbitration, intellectual property, taxation, maritime law, EC developments and the internationalisation of legal practice in Australia. There were also a number of short Government department and ad hoc group reports on the year's activity.

The Conference has, for the last two years been jointly sponsored by the Commonwealth Attorney-General's Department and the Law Council of Australia.

Introduction

This article reports on developments in Australia relating to aspects of the internationalisation of legal practice there. This topic should be of interest judging by the number of articles[1] that appeared in law or law related periodicals here during 1993, and concerned with some of the same matters. Moreover, some developments to be mentioned here will, impact on legal practice in New Zealand in the near future. Now is the time for considering the implications.

The International Legal Services Advisory Council (ILSAC)

Since the mid 1980s, recognition of the need to interact with the dynamic Asian economies to its north gathered pace in Australia, stimulated by reports such as that of 1989 by Professor R Garnaut, *Australia and the Northeast Asian Ascendancy.* Government, the private sector and educators took independent steps, to take up new opportunities emerging in markets, particularly Asian markets, for both goods and services.

The Australian Government was keenly aware of the increasing trend toward the globalisation/integration of markets. One example, is the present Gatt round which includes comprehensive negotiations on services trade (known as General Agreement on Trade in Services – GATS). Other manifestations of the trend include NAFTA, with its inclusion of Mexico, the single EC market with its extension to the Alpine countries, our own CER Agreement and the fledgling Asia Pacific Economic Co-operation (APEC) initiative.[2]

Initiatives by the Australian private sector have included some dozen or so law firms setting up branches overseas during the 1980s and a marked growth in international commercial dispute resolution centres.

From 1986, tertiary education institutions were permitted to enrol full fee paying students, and overseas marketing moves by these institutions have been a success story. Asian law students alone accounted for A$13 million in export earnings in 1991. (ILSAC Secretariat, February 1992.)

Enter the International Legal Services Advisory Council (formerly Committee). ILSAC was established by the Federal Government in 1990 as a high level advisory group to help coordinate these various sector moves aimed to "improve" the country's performance in the legal and related services area. It is not hard to see why the Government wants to improve performance.

It is regularly stated (see, for example, *The Australian* of 23 July, 1993 at 14), that Australian export of legal services is presently worth in excess of A$100 million and is projected to rise steadily.[3] While the USA, Britain and Japan in that order were its principal markets for the export of legal services, other Asian economies are viewed as presenting valuable new opportunities. Opportunities include assisting some Asian economies to develop more sophisticated legal and educational systems that can keep pace with rapid economic growth.

ILSAC's output involves providing advice to government on policy issues, facilitating communication between government and private sectors groups, and researching, publishing[4] and, occasionally, making representations. Members come from private legal practice, business, dispute resolution centres, educational institutions, the Law Council of Australia and relevant Government departments. ILSAC serves a connecting link, involved in a number of developments detailed below. A measure of its success is that it is now commencing its second three year term.

Indochina legal co-operative initiative

Given the significant disruption and change that has occurred in Indochina over the last decade and more, it is believed that a significant degree of modernisation of existing laws, the drafting of and implementation of new legal codes and the further implementation of new legal codes and the further development of legal infrastructure generally, are necessary to provide the level of legal sophistication needed to underpin business growth.

As a strategy to assist in some of the above, with Vietnam, Laos and Cambodia in particular, Australia recently set up a further advisory committee – the *Australian Indochina Legal Cooperation Committee* (AILEC), which held its first meeting in October 1993. It comprises 14 persons, including private sector lawyers with experience, university representatives and personnel from Government departments whose overseas work overlaps. The hope is to complement programmes already operating from within the Department of Foreign Affairs and Trade. (When you look at the some of the development assistance work listed as given to particular Asian and Pacific countries, that assistance has largely, though not exclusively,[5] to do with Police, narcotics and customs assistance, rather than commercial law development). There is a gap to be filled.

AILEC reports through ILSAC to the Commonwealth Attorney General.

While the long term aim is trade development, AILEC in the shorter term seeks to stimulate interchanges between the countries concerned and Australia. Hopefully, there will be exchanges of legal personnel and materials, the opportunity for the giving of Australian policy advice and an improved understanding of each other's societies emerge.

Evolution of an Australian national practice in law

This is another issue on which ILSAC has acted as a catalyst, and it is one that will impact on legal practice in this country, as suggested below.

Readers will likely be aware that Australia is eight autonomous jurisdictions when it comes to the control of domestic legal practice and the practice of foreign law. Yet it now wishes to be perceived from outside more as one nation and as being able to give meaning to the idea of having a "national practice". There is an almost unanimous agreement at the highest levels to achieve what is called a single domestic market for occupations. Thus, the States, Territories and the Commonwealth have agreed to pass legislation for the mutual recognition of interstate qualifications. A Commonwealth Mutual Recognition Bill 1993 has been drafted. Additional reasons are given below.

Opening the professions to great competition will, allegedly, reduce transaction costs at home and should lead to enhanced export competitiveness in the provision of services. Second, the move supports a trend toward larger practices, and those participating in that who wish to see fewer impediments in the way of interstate practice development. It is believed that more amalgamations and associations will create a stronger infrastructure, better able to compete in the face of overseas law firms seeking entry to Australia. Last, and perhaps most significant, there is a compelling sense that Australia must put its own house in order to better help Australian lawyers gain access to external legal services markets. Better results here are likely if it is able to offer reciprocity of access on a national basis. Japan is a case in point.

Improved access to the Japanese market sought

The Japanese legal services market is reputedly valued at A$5 billion. The Special Measures Concerning the Handling of Legal Business by Foreign Lawyers (Law No 66, of 23 May 1986) regulates the practice of foreign law. The United States, the EC and Australia all claim the law is unnecessarily restrictive and seek liberalisation. To this end, in March 1993 ILSAC, the Attorney-General's Department, the Law Council of Australia and the Australian & New Zealand Chambers of Commerce made a joint Submission to the Study Commission of Japan on the Issue of Foreign Lawyers. This submission is quite ambitious, asking the Study Commission to recommend

- Permitting foreign lawyers to enter into practice with Japanese lawyers and share fees. (This would make joint ventures possible both within Japan and in other Asian markets).
- Permitting foreign lawyers to hire Japanese lawyers. (Allowing the foreign firm to practise Japanese as well as a particular foreign law.)
- Abandoning the rule that foreign firms are prohibited from using their name in Japan.

The joint submission gives emphasis to the steps now being taken to create a uniform legal services market in Australia, arguing that it is no longer appropriate for Japan, for the purposes of the Special Measures Law, to treat Australia on a federal basis by referring to an Australian lawyer's home jurisdiction as the State or Territory of primary qualification.

According to a report in the *Australian Financial Review* of 21 September 1993, at p 12, two Japanese daily newspapers hold the view that this market will be liberalised in 1993. Liberalisation in this area, if it occurs, may not be of enormous benefit to the profession in general, but it could facilitate the capture of investment funds at source.

Slow progress on reform of foreign law practice

To complement the implementation of domestic mutual recognition it has been recognized, since at least 1988, that a uniform enforceable national scheme for regulating the practice of foreign law was needed. Readers will likely know that foreign law practice is also regulated at state level, and requirements vary. By and large, it is regulated as an aspect of "unqualified practice", to which many practice restrictions apply. Some jurisdictions require prior admission to the State's domestic practice. In others, there are guidelines or rules which contain wide discretions and lack enforceability. Guidelines vary between jurisdictions.

Apparently, the issue is not one that involves major reform of the profession. Nor will it affect the majority of practitioners. Yet there is strong feeling as to how the practice of foreign law should be regulated. Progress has been slow. In 1991, the Standing Committee of Attorneys-General (SCAG) agreed on the need for uniform regulation and adopted New South Wales and Victorian guidelines as a basis on which to build. In 1992, the Law Council of Australia released a Policy Statement

based on the above-mentioned State guidelines. The present intention is for the Commonwealth to provide a detailed legislative scheme for approval by the States and Territories this year.

A Foreign Law Expertise Register

This was another possible development that caught the writer's eye while at the Conference. The Law Council of Australia has indicated willingness to operate a register of foreign law experts for use by the Australian profession. A database would be built up using a questionnaire system. Prospective registrants would be vetted by a committee, and an annual charge made to each registrant. Registration would be on an annual basis, with no charge to those seeking information about persons on the register. Information would be given to inquirers, subject to a disclaimer regarding the actual expertise of the registrants. The profession would be notified of the register's existence through the usual professional journals.

New Zealand responses?

A *Foreign Law Expertise Register* here? There seems to be scope to create a facility like this. Or would the demand for this type of service be too small? We have Legal Directories, for example, the one published by Law Corporation Publishing Ltd (*Law 1994*) which comes out updated annually. However, the fields of practice in which practitioners or firms listed in that register are prepared to accept instruction, do not include foreign law expertise. If viable such information would warrant a separate section.

Very soon a wide ranging trans-Tasman mutual recognition scheme for "equivalent" occupations is likely to be settled between our respective Governments. A Discussion Paper jointly authored by the Ministries of Foreign Affairs and Trade and of Commerce has been in circulation around New Zealand during 1993, asking for submissions. Provision is already made in Part IX of the draft Australian domestic mutual recognition Agreement between the Commonwealth, States and Territories as follows:

> Relations with New Zealand
>
> 9.1 The Parties to this Agreement agree to review in due course with New Zealand the potential benefits, consistent with the Australia - New Zealand Closer Economic Relations Agreement, of participation by New Zealand in a scheme implementing mutual recognition principles, recognising that an appropriate inter-governmental agreement may be concluded.

Trans-Tasman mutual recognition in occupations is not something entirely new. Physiotherapists and veterinary surgeons, for example, have cross-recognition with their Australian counterparts. Perhaps quite soon, the reality for the legal profession will be that lawyers registered to practise in one country will be able to practise in the other.[6]

Such a development should be of particular interest to large New Zealand firms who might wish to establish offices in Australia. However, there have, apparently, been some misgivings in New Zealand, for example, at the unevenness of admission requirements as between Australian States. A greater degree of evenness is thought desirable. This will come. An additional uncertainty concerns the degree to which large Australian corporations will bring across their own legal assistance rather than use New Zealand practitioners. Clearly, we will not know for a while where the balance of trans-Tasman benefit will come to rest.

Those, maybe few, of our law firms interested in Japan may perhaps already know of the role played by the New Zealand Chamber of Commerce in Japan in the joint submission to the Study Commission of Japan on the Issue of Foreign Lawyers. The point is that New Zealand, too, may soon enjoy improved opportunity for access to the Japanese legal services market. Watch that space.

The writer noted in passing ILSAC's interest in the overseas marketing of legal education. No comparative comment is attempted here, but it is worth noting and applauding the University of Auckland's new Master of Commercial Law degree, which begins its offering of some 22 papers in 1994. About half of these are oriented toward international law practice. This may well help legal practitioners here to avoid being marginalised by giving opportunity to prepare for competition with overseas (Australian) firms in what can be a lucrative corner of the field. Further, many of the papers should be attractive to overseas students wishing to take a postgraduate qualification. Some Asian countries, like Vietnam, already have sufficient providers at the undergraduate level in many fields.

For the future, this annual Australian international trade law conference would be useful for New Zealand practitioners who want to expand practice into some part of the international trade law area. The 1993 Conference obtained strong support from Australian practitioners and firms active in the field, so it represents an excellent venue in which to make contacts. □

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1 For example, in the July 1993 issue of this *Journal*, "Foreign Direct Investment, Business Immigration and Legal Services", by G Walker & K McConnell. In the same month's editorial, *China Visit I*, Mr Downey made passing reference to the question of establishing a legal presence in China. *The Independent* of 8 October 1993, at p 27, ran a story "Roger's disciples export the Rogernomics revolution: Chapman Tripp leads the field in the export of legal services". *Council Brief*, November 1993, at p 6, provided a page-long report by Kensington Swan lawyer and the then Wellington Chamber of Commerce president Don Breaden, "Lawyer visits Vietnam and finds that business opportunities abound."

2 Some in Australia entertain the possibility that APEC could develop as a regional trading bloc eventually creating economic and legal harmonies similar to what we now speak of as "EC law."

3 Many services, including some types of legal services, are not viewed as in some way ancillary to other business activity. Rather, they are believed to contribute in an independent way to economic growth in international trade. (Legal work then, is not always parasitical – resting on the misfortune of others). Unlike some "retail" services like health and some education, whose output is sold mainly to consumers, business-oriented legal services find their place within the general business services group which includes such areas of expertise as accounting, engineering, advertising, and information and computing. Business services, with business law as a subset, are seen as inputs into the production of other goods and services.

4 Noteworthy for their up-to-date nature, are its *Legal Services Country Profiles*, written in February 1993, on China, Fiji, Hong Kong, Indonesia, Japan, Korea, Malaysia, Papua New Guinea, the Philippines, Singapore, Taiwan, and Thailand. These booklets, of 15-20 pages, can all be

continued on p 200

Pendulum arbitration — The answer to exaggeration in commercial rent review disputes

By Ron Macdonald FRICS, AFIV, MPMI, Registered Valuer, Director of Valuations: Jones Lang Wootton Ltd, international property consultants

ADR (Alternative Dispute Resolution) is currently the buzz word around the legal fraternity as an alternative to litigation in commercial rent review disputes.

There is no doubt that in recent times both landlords and tenants have become increasingly frustrated by the traditional arbitration process. It is no longer the cheap and cheerful solution to disputes. In recent years there has been a trend to use legal counsel with valuers acting as expert witnesses. It is possible for the hearings to become extremely protracted and all the time the clock is ticking and the client is paying.

Traditionally umpires or arbitrators focus on comparability, with the ultimate rental determined by comparison with evidence put forward, with suitable adjustments to take account of the differences between the evidence and the property in question. The overriding emphasis is on the evidence and the need to prove a rental value by analogy.

However at various times over the past few years there have been some sub-markets where there has been a dearth of evidence because of a lack of transactions. In such markets the massive overhang of property which is unlet because of a lack of demand is an excellent pointer to rental value levels. However this "evidence" tends to be ignored in an arbitration process because it does not form actual transactions.

In such circumstances more emphasis should be placed on the valuer's opinion based on his or her ability to draw on these market factors. Clearly this has not been happening in arbitrations and it is one of the factors which has led to frustration on the part of tenants who believe they have suffered at the hands of an arbitration process which has not kept pace with a falling market. As we enter a new growth phase in market rentals no doubt we may hear similar complaints from landlords in the not too distant future.

In any event both landlords and tenants are tired of the tremendous gap between valuers acting for the different parties and the tendency to take a blatant advocate's stance.

Alternative Dispute Resolution (ADR) is becoming much more widespread, particularly in the construction sector. ADR can take the form of conciliation or mediation. In essence it involves the parties themselves (not their representatives) resolving the outcome with the aid of a suitably qualified expert. It can provide a quick and cheap solution in the right circumstances.

The process can be entirely on a "without prejudice" basis and the parties can revert to traditional remedies at any time. Landlords and tenants can agree to mediation, even if there is no provision for it in their lease. However care must be taken in departing from the rent review process already established in a lease as it may affect any sureties (personal guarantees) on the grounds that the rent was not fixed in the appropriate manner.

ADR techniques, and in particular mediation, may well start to find their way into commercial lease rent review clauses as an alternative to the arbitration process. Realistically it will not happen overnight and the availability of trained mediators is obviously a pre-requisite. Widespread changes to the traditional arbitration in rent review clauses will ultimately depend on the stance taken by landlords and representative groups such as BOMA and PMI.

Another, possibly more straight forward solution, which I believe would find favour with both landlords and tenants would be the introduction of a pendulum arbitration clause into the rent review procedure.

Under the pendulum arbitration method the landlord and tenant agree to abide by the arbitrator's decision in favour of only one of the parties. The arbitrator does not have the option to decide on a figure somewhere between the claims of the two parties. The method is also known as the "final offer selection" or "straight choice" arbitration. To my knowledge it has been rarely used in the rent review process and I have only heard of it being used once in New Zealand.

Because the arbitrator must choose the valuation of one party or the other, valuers are more likely to produce a middle-of-the-road assessment in terms of the final offer before submitting to arbitration.

The real benefit is that the process is speeded up and the need to proceed to formal arbitration will probably not eventuate. This is because from the outset the gap between the claims of the two parties will be narrower, paving the way for a compromised settlement before a formal arbitration is necessary.

The results will be similar to the traditional arbitration but at a much reduced cost in terms of both money and valuable management time. □

American decision of *Moore* (II)

By Susan Pahl, Department of Commercial Law, University of Auckland

Biotechnology continues to be a source of moral and therefore legal problems. It is only because there are recognisable moral issues that legal issues arise at all. In this article Susan Pahl considers the Californian case of Moore *covering the use of tissue from a diseased spleen. The patient had consented to the operation; but without his knowledge or consent portions of the spleen, and later other tissues, were used for research that had no relation to Moore's medical treatment. The Supreme Court of California while reversing the State Court of Appeal on an allegation of conversion, held that Moore was entitled to bring an action on breach of fiduciary duty and lack of informed consent. This article, and a preceding one, published at [1994] NZLJ 147, discuss the issues of informed consent and of conversion.*

There are compelling arguments in favour of people being able to sell the products of their bodies. The definite risk of exploitation could be minimised by protective legislation. Certainly the option seems vastly superior to the alternative set down by the *Moore* case in the Supreme Court of California [*Moore v Regents of the University of California* 51 Cal 3d 120, 793 p 2d 470, 271 Cal Rptr 146 (1990)] where Moore could not own his diseased spleen but others could obtain it deceitfully and gain almost unimaginable financial benefit from that deceit.

Conversion arguments in Supreme Court

This article discusses, critically, the decision of the Californian Supreme Court in the *Moore* case, which reversed the Californian Court of Appeal decision discussed last month. The article concentrates on the conversion arguments in the Supreme Court.

The conversion issue was discussed at length in the judgments, with the majority and minority Judges taking opposing views of the issue. Writing for the majority, Justice Panelli refused to extend the categories of conversion, saying that no Court, in a reported decision, had ever imposed civilian liability for the use of human cells in medical research. In a footnote, he said that

> the absence of such authority cannot simply be attributed to recent developments in technology [since] [t]he first human tumor cell line, which still is widely used in research, was isolated in 1951. (*Moore*, supra, fn 15)

He did not, however, point out that the exact question had never before come before the Courts and that the Supreme Court majority judgment would, in fact, determine the path of the law. Panelli J said that "[t]o establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession". (*Moore*, 488) The Judge continued that, since Moore clearly did not retain possession of his cells, to be successful in conversion he had to establish that he had retained an ownership interest in them. (*Moore*, 489) In asserting that Moore did not retain an ownership interest, Panelli J set out three arguments.

Arguments against ownership interest

The first of these was the lack of judicial authority. Panelli J discussed the line of "privacy" cases used by the majority in the Court of Appeal to assert that "[i]f the Courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a name or a face". (*Moore*, 490) Panelli J countered this by saying that the lymphokines developed by the defendants have the same molecular structure in every human being and are "no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin". (*Moore*, 491) In saying this, Panelli J is ignoring what is clearly evident from the facts; that the Mo-cell line could not have been developed without Moore's cells and the defendants went to great lengths to obtain these simply because they were unique to Moore.

Discussing the other privacy analogy used by the Court of Appeal which asserted that patients have the right to refuse medical treatment, Panelli J said that (*Moore*, 493)

> one may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of "privacy" and "dignity" into the square hole of property in order to protect the patient since the fiduciary duty and informed-consent theories protect those interests directly by requiring full disclosure.

Panelli J did not point out that the remedies for breach of fiduciary duty and failure to obtain informed consent would in no way enable Moore to share in the profits from the cell line and, therefore, as far as the defendants were concerned were not truly punitive.

Discussing the majority judgment in his dissenting judgment, Mosk J said that it was hardly surprising that no reported decision supported Moore's claim, either directly or by analogy, since "[t]he issue is as new as its source – the recent explosive growth in the commercialisation of biotechnology". (*Moore*, 506)

Panelli J next discussed, less fully, Californian statute law, saying that ownership of tissue was problematic in light of patients' limited control over their excised cells and that the Supreme Court should look for guidance to the legislature rather than to the law of conversion. Mosk J was somewhat scornful of this approach, saying that it was out of place in the

highest Court in the State: (*Moore*, 507)

> The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community in which it serves. It is constantly expanding and developing in keeping with advancing civilisation and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country .... Although the legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the Courts, adjudicating on a regular basis the rich variety of individual cases brought before them .... Especially is this true in the field of torts.

Panelli J's final argument was that the cell line could not be Moore's property. It was factually and legally distinct from Moore, as it would not be possible to obtain a patent for the cell line were this not the case. Mosk J was not impressed by this argument. He said that the reason for establishing the cell line was not to improve the cells themselves but to extend their life indefinitely. The distinct nature of Moore's cells was their ability to produce valuable proteins in higher than normal quantities, and it was this characteristic that the defendants sought to exploit. The argument that Moore had no ownership in the cell line since it had been patented was irrelevant, since the wrong took place before the patent was obtained. Mosk J therefore concluded that in his opinion the majority had wrongfully ruled that there was no action in conversion.

Broussard J partially dissented and partially concurred with the majority. He said that the majority opinion failed to maintain its focus on the specific allegations before the Court which made the case distinctive from normal cases where donated organs or cells are used as the raw materials for research. (*Moore*, 498-499) In this Judge's eyes the crucial fact was that the defendants interfered with the plaintiff's rights before the tissue was removed from his body. (*Moore*, 500-501)

> If this were a typical case in which a patient consented to the use of his removed tissue for general research purposes and the patient's doctor had no prior knowledge of the scientific or commercial value of the patient's organs or cells, I would agree that the patient could not maintain a conversion action. In that common scenario, the patient has abandoned any interest in the removed organ and is not entitled to demand compensation if it should later be discovered that the organ or cells have some unanticipated value. I cannot however agree with the majority that a patient may never maintain a conversion action for the unauthorised use of his excised organ or cells, even against a party who knew of the value of the organ or cells before they were removed and breached a duty to disclose that value to the patient. Because plaintiff alleges that defendants wrongfully interfered with his right to determine prior to the removal of his body parts, how those parts would be used after removal, I conclude that the complaint states a cause of action under traditional, common law conversion principles.

In his discussion of the conversion point, Broussard J said that the majority cannot have intended to say that a removed body part can never constitute property, since that would mean that, if the cells were stolen from the UCLA laboratory, there would not be an action for conversion. Broussard J contended that what the majority really mean is not that a body part is not property, but rather that a patient retains no ownership in a body part once it is removed from his or her body. The issue is, therefore, Broussard argued, "whether a patient has a right to determine before a body part is removed, the use to which the part will be put after removal". (*Moore*, 501)

In contending that a patient does have the right to make this determination, Broussard J first cited statute law and then the common law of conversion. He said that conversion traditionally protected an individual "not just against improper interference with the right of possession of his property but also against unauthorised use of his property or improper interference with his right to control the use of his property". (*Moore*, 502) He then briefly discussed the majority's arguments, pointing out, as had Mosk J, that while no judicial decision supported Moore's claim, there was no reported decision which rejected such a claim. Discussing the majority's argument that the patented cell line could not be Moore's property, Broussard J said that this did not (*Moore*, 503)

> explain why plaintiff may not maintain a conversion action for defendant's unauthorised use of his own body parts, blood, blood serum, bone marrow and sperm. Although the damages which plaintiff may recover in a conversion action may not include the value of the patent and the derivative products, the fact that the plaintiff may not be entitled to all the damages which his complaint seeks does not justify denying his right to maintain any conversion action at all. Similarly, although the question whether plaintiff's cells are "unique" may well affect the amount of damages plaintiff will be able to recover in a conversion action, the question of uniqueness has no proper bearing on plaintiff's basic right to maintain a conversion action; ordinary property as well as unique property is, of course, protected against conversion.

Broussard J therefore concluded that there was a cause of action for conversion.

The crucial point to recognise from the majority judgment is that the Court made a policy decision not to extend liability for conversion. Faced with making a decision on an area of the law totally without direct precedent, the Court decided that it would do more harm than good to extend liability. The balance of Panelli J's judgment discussed the reasons why, which are summarised as

> [f]irst, a fair balancing of the relevant policy considerations counsels against extending the tort. Second, problems in this area are better suited to legislative resolution. Third, the tort of conversion is not necessary to protect patients' rights. For these reasons, we conclude that the use

> of excised human tissues in medical research does not amount to a conversion. (*Moore*, 503)

Of the four Judges concurring, only Arabian J wrote a judgment. The short judgment showed his main reason for concurring was on policy grounds. (*Moore*, 497)

> Plaintiff has asked us to recognise and enforce a right to sell one's body tissue for profit. He entreats us to regard the human vessel — the single most venerated and protected subject in any civilised society — as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.

In his dissenting judgment, Mosk J discussed, at some length, the reasons for the majority's refusal to extend conversion liability to human body parts. The majority concluded "[that] exchange of scientific materials, which is still relatively free and efficient, will surely be compromised if every cell sample becomes the potential subject matter of a law suit." (*Moore*, 495)

Mosk J did not agree with this argument on the basis that, since there had been the ability to patent human cell lines, the rush to patent for exclusive use had been rampant. In addition, as scientists had become entrepreneurs in this area, economic agreements between universities and the industry had already inhibited free flow of information between researchers in any event. The Judge also said that where cell cultures and cell lines were still freely exchanged for purely research purposes, it was not unreasonable to expect the originator to keep records showing the source's informed consent to the extent of its use. After all, the keeping of meticulous records was part of the requirements of research.

Mosk J felt that there were two overwhelming policy arguments against the defendants being able to win this case. (*Moore*, 495)

> [O]ur society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. One manifestation of that respect is our prohibition against . . . indirect use of the body by its economic exploitation for the sole benefit of another person. The most abhorrent form of such exploitation, of course, was the institution of slavery. Lesser forms, such as indentured servitude or even debtor's prison have also disappeared. Yet their spectre haunts the laboratories and boardrooms of today's biotechnical research-industrial complex. It arises whenever scientists or industrialists claim, as defendants claim here, the right to appropriate and exploit a patient's tissue for their sole economic benefit — the right, in other words, to freely mine or harvest valuable physical properties of the human body. Research with human cells that results in significant economic gain for the researcher and no gain for the patient offends the traditional mores of our society in a manner impossible to quantify. Such research tends to treat the human body as a commodity — a means to a profitable end. The dignity and sanctity with which we regard the human whole, body as well as mind and soul, are absent when we allow researchers to further their own interests without the patient's participation by using a patient's cells as the basis for a marketable product.

Mosk J's second ground for objection was that it was inequitable and unfair to allow the researchers to benefit totally from the Mo-cell line without being obliged to give its source, Moore, a share. (*Moore*, 495)

> Recognising a donor's property rights would prevent unjust enrichment by giving monetary rewards to the donor and researcher proportionate to the value of their respective contributions. Biotechnology depends upon the contributions of both patients and researchers. If not for the patient's contribution of cells with unique attributes, the medical value of the bioengineered cells would be negligible. but for the physician's contribution of knowledge and skill in developing the cell product, the commercial value of the patient's cells would also be negligible. Failing to compensate the patient unjustly enriches the researcher because only the researcher's contribution is recognised.

The majority's second reason for refusing to extend the conversion cause of action was that it felt this was a decision best left to the legislature. Mosk J considered that this did not relieve the Supreme Court of its obligation to provide a remedy in the meantime. He also pointed out that in the United States, it was currently possible to sell human tissue, ie: blood.

The majority's final reason was that they were not prepared to recognise a cause of action in conversion because there was no pressing reason to do so. Moore had alternative remedies for breach of fiduciary duty or failure to obtain informed consent. Mosk J, however, did not consider an action for failure to obtain informed consent to be a satisfactory alternative remedy. (*Moore*, 495)

Significantly, both Panelli J, for the majority, and Mosk J, dissenting, showed a tendency in their judgments, when discussing the policy issues in connection with conversion liability for human tissue, to quote extensively from articles written on the issue. Not surprisingly, Mosk J relied on arguments set out in articles in favour of commerciality whereas Panelli J quoted those opposed. It is to be wondered, though, how much the majority was influenced by the large number of articles published after the Court of Appeal decision all of which, so far as the writer has been able to ascertain, are critical of the Court of Appeal decision and which speak at length on the far ranging effects on society were the decision allowed to stand, and ownership of one's own body parts to become possible!

The Supreme Court decision meant the effective end of Mr Moore's attempt to net a little of the potentially vast profits made by the researcher and biotechnology company in the cell line derived from his diseased pancreas. Underlying the majority judgments is the sentiment that, although Dr Golde was culpable in the way he obtained the necessary material, Moore, who after all was alive to bring the claim because of the medical care provided to him by Dr

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Books

Judicial Review

By Ian McLeod

Published by Barry Rose, Law Publishers of Chichester, 1993, xxvi + 220 pp + 16 pp appendix. Price £30

Reviewed by G D S Taylor, of Wellington

Another book on administrative law?

Yes, but a very different one from others published recently. First, it is not published by a mainline publisher.

Mr McLeod, a solicitor in England and Member of the Department of Law at the London Guildhall University, has sought "to produce a modern and practical account of the principles underlying the process of judicial review". Desirably, from the point of view of practitioners, his wish was "to make the book practical, . . . particularly . . . [for] the needs of busy and often under-resourced practitioners". New Zealand lawyers should be the last to be suspicious of law books printed privately. The excellent handbooks on agreements for sale and purchase and company receiverships and liquidations by the now Justice Blanchard demonstrate the value of publications not made through the main legal publishers. The late Professor Julius Stone's books were initially published on private imprint, too.

Secondly, this is not a book which delves into the detailed principles of judicial review. It does not try to be any substitute for Wade, de Smith (a fifth Edition of which is forthcoming) or Craig in England. Nor, for the reasons stated later in this review, can it be any substitute in the Antipodes for Aronson and Franklin, *Review of Administrative Action* or my own *Judicial Review*. There are principles stated, but they tend to be stated briefly, often sourced to Wade. The main burden of the book involves discussion of the cases. The cases are almost always set out with a potted statement of facts, a summary of the statute involved and conclusion, and usually one or more quotations from the judgments. The choice of cases is from recent English cases. Indeed, there are only five cases emanating from countries outside England, and all of those are leading Privy Council cases.

The author's concentration on summarising cases presents both an advantage and a disadvantage. The disadvantage is that the book tends to become fragmented and it is difficult to see a coherent line through the material covered. The advantage is that the book readily becomes a source book for precedents on the facts.

The book contains no footnotes. Full references to cases are given in the Table of Cases and the text only gives the year of judgment and name of case. This makes for uncluttered reading appropriate to a book largely consisting of case notes. The level of proof-reading is good and the text at what appears 11 point is eminently readable.

This is not to say that McLeod provides a "Nutshell" casebook on judicial review. There are insights found throughout the text, many of which practitioners in New Zealand will find valuable.

But by adopting such an insular vision of judicial review as McLeod does, he has neglected much valuable material from around the Commonwealth. This material would both have enlightened his insights and provided firmer foundations for practitioners in preparing cases in England. Leading High Court of Australia or New Zealand Court of Appeal judgments would, it is suggested, have been much more useful even to English practitioners than a plethora of English High Court instances. Be that as it may, Mr McLeod is doubtless only reflecting what his market (English practitioners) wants.

It is only to be expected that the book gives prominence to matters which are of significance in English judicial review but not in other countries. A notable instance is the Public Law-Private Law divide enunciated by Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124. Twenty-five pages or about 15% of the book are devoted to this topic. Procedure, including locus standi and the relator action receive only fourteen pages. Other chapters are the constitutional context of judicial review, judicial review and the doctrine of ultra vires, remedies, the *Wednesbury* principle, jurisdictional error, giving reasons for decisions, consultation, delegation, fettering discretion by contract and estoppel, and natural justice. Natural justice receives thirty-five pages and consultation (which Mr McLeod views really as part of relevant and irrelevant factors) receives another five. The appendix consists of Order 53 of the Rules of the Supreme Court, ss 29-31 of the Supreme Court Act 1981, and extracts from the European Convention for the Protection of Human Rights and Fundamental Freedoms. The book contains a three page Table of Contents, a sixteen page Table of Cases and a six page Index. Given the fragmented nature of the book by reason of the detailed case notes, the Table of Contents and Index are inadequate for even an experienced judicial review practitioner to find exactly what he or she is looking for swiftly.

The problem of finding what one is looking for is not really assisted by some of the more idiosyncratic classifications of material. Thus, Mr McLeod sees the *Wednesbury* principle as involving relevance and unreasonableness. In effect he adds to Lord Diplock's tripartite division of grounds of review by adding relevance (which Lord Diplock would have included within illegality). Having established a major classification of relevance and irrelevance, all aspects of abuse of discretion other than unreasonableness and fettering discretion are treated as aspects of relevance. Again, jurisdictional error contains substantive discussions of errors of law and errors of fact as

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Workers compensation: A May Day quiz

By Jeffrey Miller

Reprinted from The Lawyers Weekly *(Canada), April 29, 1994.*

If you think collective agreement is:

(a) redundant (how can people agree on something if they don't do it together?),
(b) an oxymoron (ditto),
(c) both (ditto),
(d) none of the above (well, you're entitled),

. . . you're in the right place.

This, after all, is the age when Groucho Marx is the thinker and Karl the comedian, while Marks and Spencer don't particularly care who's who, as long as whoever it is shops by them instead of Wal-Mart.

And now that the sap has risen (since the Easter quiz), what can you do but conjoin play with work by taking the May Day Quasi-Legalistic Quiz?

Hey, everybody's entitled to a little break! It's in your contract – or at least the Employment Standards Act.

(1) Why do airplane pilots yell "May Day!" when they're having a bad work day in the ozone layer?

(2) What are the famous last words of *The Communist Manifesto?* (*Hint:* Keep in mind why May Day can be an especially big deal in socialist jurisdictions.)

(3) Who is Murphy and what is his law?

(4) Whoopsy! You sure you haven't confused Murphy's Law with Parkinson's Law? Distinguish.

(Extra point if you remember the converse to Parkinson's Law.)

(5) Tsk, tsk. Did you get both of the above confused with the Peter Principle? Distinguish, keeping in mind that this is a May Day quiz (*hint, hint*).

Bonus point if you can explain how Socrates exemplifies the principle.

(6) What was it about maypoles that stirred Puritans to vandalism, battery, and arson; ie, to tear the poles down, attack celebrants thereat, and even burn down the house of the author Thomas Morton, who had erected one?

(7) What was the occupation of M'Alister, of the famous ginger beer case, *Donoghue v Stevenson?* Of Stevenson?

(8) As a spring harbinger, May Day traditionally had a lot more to do with makin' whoopee than money, but the holiday now confounds the two.

Speaking of "Makin' Whoopee" (the song) and confounding cardinal sins, remember the lines:

He doesn't make much money,
Only five thousand per.
And some Judge who thinks
he's funny,
wants to give six to her?

What does the Judge respond when the husband asks, concerning this maintenance order, "Judge, what if I fail?"

(9) Here's a recent case that conjoins both May Day themes.

Complainant is a graduate student who has arrived in B[ritish] C[olumbia]. to begin PhD work.

En route to a remote location, she has consensual sex with an adjunct professor on her faculty who is also a supervisor of her summer work. She has elected to travel with this man rather than with the other students.

The man arranges single rooms without consulting complainant, but at this point she does not complain or actually resist his advances.

In fact, when there are two beds in the room, she joins the colleague on his bed voluntarily. A sexual relationship persists during the first week at the site.

The matter comes before the B.C. Human Rights Commission, where the complainant seeks $17,000 to $20,000 for sexual harassment.

Result, keeping in mind complainant is a 26-year-old woman who has lived on her own and travelled internationally?

(10) According to our friend Neil, the labour lawyer, this Top O'the Pops ditty is probably the only song in history to contain the words, "He may have to litigate."

What is the prospective litigant's occupation, and what should you, as prospective impecunious defendant, do in your defence?

(*Hint:* Maybe you should apply for legal aid, but that is *not* the right answer.)

ANSWERS

(1) Because the words in this context have absolutely nothing to do with May Day. They're an English adaptation of the French, *M'aidez!*, "Help me!"

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general sub-sets of jurisdictional error.

But the focus of review must return to the case notes. Different people will see different things in cases, but generally this reviewer has no quarrel with the notes of the cases given, many of which are admirable summaries. But what value are they to the New Zealand lawyer? Statutory provisions are different and the way judicial review cases will be decided will differ with the particular sections involved. This is true not only of using any precedent from outside New Zealand, but also in using New Zealand precedents other than on the very same section.

The value of the book lies in these case notes, many of which would be likely never to be found by the New Zealand practitioner or only by systematically looking up footnote references. This reviewer learned more than a little from reading Mr McLeod's *Judicial Review.* He is grateful to have it on his bookshelves now for reference. It is suggested that other practitioners who are engaged in many judicial review cases will also find it valuable to have the book available. For the small outlay involved in this book, it is considered to be worth having as a resource. □

(2) "Workers of the world unite!" – which is the PC translation of the more common, "Workingmen of all countries, unite!"

(3) This was a double-whammy trick question. For one thing, Murphy has *three* laws. (Bonus point if you said this.)

The most famous is "If anything can go wrong, it will go wrong."

The other two seem corollaries to this rather than laws in their own right, which perhaps explains their relative obscurity: "Nothing is as easy as it looks" and "Everything takes longer than you think it will."

There have been many unsuccessful attempts to identify Murphy.

When philologists William and Mary Morris put out a call for suggestions, one correspondent speculated that Murphy was really Disraeli, the British prime minister, because he wrote, "What we anticipate seldom occurs, what we least expect generally happens."

Another correspondent wrote that Murphy, an American, went out for a walk in the country one evening, being careful to stay on the left side of the road, facing oncoming traffic.

"He was struck and killed by an English driver who had just arrived in this country."

Given that Disraeli died in 1881, he probably was not the driver.

(4) In 1957, British history professor and novelist C. Northcote Parkinson published a book whose most famous dictum was, "Work expands to fill the time allotted to it or, conversely, the amount of work completed is inversely proportional to the number of people employed."

There is no evidence what side of the road he drove on while visiting America.

(5) In the book *The Peter Principle*, Laurence Peter and Raymond Hull write, "In a hierarchy, every employee tends to rise to the level of his incompetence." This is a law we have yet to see broken.

Socrates is exemplary in that he "was an incomparable teacher, but found his level of incompetence as a defence attorney."

(6) Linked with ancient fertility rites, the poles were phallic symbols. Talk about patriarchy!

(7) M'Alister was Ms Donoghue's maiden name, which is given in the official style of cause.

She was an office worker (and she claimed a decomposed snail plopping onto her ice cream gave her gastritis).

If you said Stevenson was the cafe owner, you forgot the main issue in the case – liability of the manufacturer/distributor.

Stevenson bottled the ginger beer (and alleged snail).

Minchella owned the cafe and served the ginger beer.

(8) *"The Judge said, 'Boy,*
You'll go to jail.
You'd better keep her,
I think it's cheaper
Than makin' whoopee.' "

(9) For complainant, $5,000 for emotional injury, $14,976 lost wages, $594 extra tuition for school time lost due to emotional upset.

See *Dupuis v British Columbia (Ministry of Forests),* (unreported, B.C. Council of Human Rights, Dec 23, 1993.)

(10) According to "Don't Worry, Be Happy," by Bobby McFerrin:

The landlord says your rent is late.
He may have to litigate.
Don't worry, be happy.

Score one point for each of "Don't Worry, Be Happy," "land-lord," and "don't worry, be happy."

HOW YOU WENT 'ROUND THE MAYPOLE

12-16 right answers:

You've wasted all workday on this silly quiz, when you weren't daydreaming about sex.

(See Parkinson's Law, *supra,* question four.)

6-11 right answers:

About average, which suggests you're not quite incompetent enough yet to make partner this year.

(See the Peter Principle, *supra,* question five.)

0-5 answers:

Try again next May Day, and congratulations on your appointment to the Court of Appeal.

(See the Peter Principle, *supra,* question five.) □

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Golde, was not the helpless, entirely wronged plaintiff who seems to be a prerequisite to Courts making new law in claims of this type. Mr Moore simply sought an entirely unanticipated windfall which the Court was reluctant to provide. For that reason, the case is unlikely to end the issue of whether there can be ownership by an individual of his or her own tissue or products derived from it. □

1 For example, Panelli J refers to "Source Compensation For Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits" (1989) 64 *Notre Dame L Rev* 628 referred to in *Moore*, ibid at 494 and 496, Danforth, "Cells, Sales and Royalties: The Patient's Right To a Portion of the Profits" (1988) 6 *Yale L & Pol'y Rev* 179 referred to, ibid, at 496. That article argues in favour of legislative intervention. Mosk J quotes from the article. Murray, "Who Owns the Body? On the Ethics of Using Human Tissue For Commercial Purposes (1986) Jan-Feb) IRB: A Review of Human Subjects Research, an article by a Professor of Ethics and Public Policy saying the public sense of fairness would be offended if sources were not compensated.

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purchased for A$50. The China *Profile*, for example, is very instructive on how to go about attempting to set up a legal presence there. Under certain Provisional Regulations, in force from 2 July 1992, some 12 overseas law firms have been authorised to establish offices in Beijing, Shanghai and Guangzhou. There is no booklet on Vietnam. Is this to avoid ruffling US feathers, in light of the latter's own trade embargo?

5 For example, within the Department of Foreign Affairs & Trade, the Australian International Development Assistance Bureau (AIDAB) is undertaking a mining legislation project and offering support for improved building regulations in Vietnam, where it now has an embassy.

6 There is a Protocol to the CER Trade Agreement specifically dealing with trade in services, but it is no impediment as far as cross recognition of occupations is concerned. (The services New Zealand currently "inscribes" concern aviation, communications, post and shipping; and for Australia, additionally, banking, broadcasting, health insurance and Government procurement contracts.) In fact Article 9.2 states that "Each Member State shall encourage the recognition of the qualifications obtained in the other Member State, for the purpose of licensing and certification requirements for the provision of services."