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Professional discipline

A profession is defined somewhat loosely in the *New Shorter Oxford Dictionary* (1993) as a vocation or calling, being especially one that requires advanced knowledge or training in some branch of learning or science relating specially to law theology or medicine. But every practitioner knows that there is more to being a member of the legal profession than merely passing some specified examinations. The law is a learned profession it is true, but it is also a disciplined profession, with a set of ethical standards that are higher than the mere provisions of the criminal law. Sadly some members fail on both counts. The point is nevertheless of importance that the ethical standards of the profession are enforced by the profession itself through disciplinary procedures. It is essentially this that marks the difference between being a member of the Law Society and being a member of a trade union or of the Business Round Table.

The point about the nature of a profession, as distinct from mere occupational licensing, was well made by the late C Northcote Parkinson, who is best known for Parkinson's Law about work expanding to fill the time available. In his book *Left Luggage* published in 1967 he wrote:

> Seekers of professional status have voluntarily limited the area of competition. Whereas the fishmonger might conceivably wish to drive all other fishmongers out of business, the dentist has accepted the idea that the other dentists are almost equally useful to the community. He joins with them in asserting the respectability of his calling and theirs, as also in barring from practice all those not properly qualified. Grocers or tailors may war with each other until half of them are bankrupt, but there is no comparable rivalry among chartered accountants or veterinary surgeons.
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> One might expect to find that the aim of these quasi-professional associations is to raise or maintain their members' income. The fact is, however, that their discussions centre more often upon entrance qualifications, educational programmes, examinations and prizes for excellence and current research into the arts or sciences with which they are concerned. With their interest in professional status goes a sense of responsibility towards the public and towards the pursuit of knowledge .... There are many actions which a professional etiquette must make impossible and these are broadly the deeds which seem ungentlemanly. The member of a professional association has a respect for the public and a still greater respect for himself.

It is true that the profession has degraded itself somewhat by succumbing to the current fashion for the ethos of competition, but nevertheless there is still real meaning for lawyers – as for doctors and others – in what Parkinson wrote. In an address in 1993 entitled "Professions at risk", published at [1993] NZLJ 104, the Rt Hon Justice McKay expressed the view that the hallmarks of a profession could be summed up in the two words – integrity and service.

His Honour was very concerned to distinguish being a member of a profession properly so-called from mere occupational licensing which he saw as a common misunderstanding – particularly by politicians. Justice McKay concluded his address as follows:

> As members of the two major professions [of law and medicine] who value the traditions of integrity and service, we need to ensure that the true value of professional bodies is widely communicated, and their benefits to the public widely understood. There is a role for our respective professional bodies in vigilance and in communication. At the personal level, we must ensure that integrity and service are the hallmarks of our own professional lives, and that we are worthy of the respect which our professions have traditionally enjoyed.

In England The Law Society has been thrown into disarray by the development of the competitive spirit within the profession. The abolition of the scale fee has not badly affected the large metropolitan firms, but it has had serious consequences for what are called the High Street practitioners. One consequence, contrary to the traditional convention, was a contested election for the offices of President and Vice-President last year. The candidates supported by the Council of The Law Society were conclusively defeated.

The victors, Messrs Mears and Sayers, made it clear that they were standing not only against the official candidates, but also in opposition to the Secretary-

General John Hayes and the staff in Chancery Lane. The conflict, or at least tension, continues with the Secretary-General not seeking a renewal of his contract; and with Mr Mears stating his determination to seek a second year in office. This seeking of a second term is again contrary to the comfortable arrangements pertaining until now.

In part at least this situation developed because of the extent of defalcations occurring and the consequent embarrassment, both professional and monetary, to honest practitioners. Disciplinary proceedings have also been an issue and the two appear to be closely related, or at least so it is alleged. The question of disciplinary proceedings was certainly one of the issues canvassed by Mr Mears in his successful election campaign.

A recent case *Sidney v Auckland District Law Society* [1996] BCL 32, is of considerable significance concerning the principles of professional discipline. The decision was that of a Full Court comprising Barker, Tompkins and Cartwright JJ. The matter came before the Court by way of appeal from the decision of the Law Practitioners Disciplinary Tribunal. There had been charges of professional misconduct such as misuse of withholding tax moneys, failing to obtain or register securities, private borrowing from clients in an improper manner and so on. The issue before the Court was described at the beginning of the judgment as follows:

> The appellant, a practising barrister and solicitor, faced 16 charges of professional misconduct brought by the respondent, the Auckland District Law Society. At a hearing before the New Zealand Law Practitioners Disciplinary Tribunal ("the Tribunal") on 11 July 1994, three of the charges were withdrawn. To the remainder, the appellant pleaded guilty.
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> The Tribunal ordered, first, that the appellant be suspended from practice as a barrister or solicitor for 3 years from 30 May 1994; secondly, that he should not practise as a solicitor on his own account, whether in partnership or otherwise, until further order of the Tribunal, thirdly, that he be censured, and fourthly, that he pay to the New Zealand Law Society costs of \$3,775 and the respondent, costs of \$20,000. An application for suppression of name was declined. The appellant had earlier been suspended by the Tribunal on an interim basis on 31 May 1994.
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> The appellant subsequently applied to the Tribunal for an order permitting him to be employed by a solicitor as a clerk or otherwise. In a decision delivered on 25 October 1994, the Tribunal declined that application.
>
> The appellant has appealed to this Court against the order of the Tribunal declining his application for sanction to be employed; alternatively, he seeks the sanction of this Court to such employment.

The decision is of interest in many ways. It has practical implications in terms of the status of the Disciplinary Tribunal, it makes clear the concurrent jurisdiction of the High Court in disciplinary matters regarding sanctioning employment as a clerk or otherwise in the legal field. In this particular case the Court did sanction employment, but subject to very stringent conditions.

The judgment is particularly valuable in its reference to and emphasis on the judgment of Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 2 All ER 486. This judgment is quoted with approval at considerable length. A point that relates directly to the question of the nature of professional practice is the following:

> The second purpose [of imposing a penalty] is the most fundamental of all; to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires ....
>
> Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. ... All these matters [previously listed] are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. *Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.*" (Emphasis added)

It is unfortunate, but inevitable, that the public perception of the legal profession is formed in part, sometimes in great part, by publicity about the dishonest or negligent members. It is important that the profession itself maintain high standards of professional conduct, and consequently of professional pride. In 1989 E W Thomas QC, as he then was, wrote an article, published at [1989] NZLJ 121, on his experience as a member of the Disciplinary Tribunal which he had chaired for five years. He concluded by saying:

> Service on the Tribunal exposes one to the unfortunate and disreputable side of the profession. Criminal and other practices which cannot be condoned are repeatedly established. Yet, these are the acts of the "bad apples". Such conduct does not reflect the integrity, competence and dedication of the profession as a whole. I am pleased to find, now my term on the Tribunal is done, that I am still as proud as I ever was to be a member of the legal profession.

P J Downey

Case and Comment

Commercial whale-watching:

Ngai Tahu Maori Trust Board and Others v Director-General of Conservation and Others [1995] 3 NZLR 553 (CA)

The judgment concerns Ngai Tahu's appeal against the decision from a hearing in the High Court delivered 23 December 1994. That decision granted a declaration that the Director-General of Conservation, purporting to have acted pursuant to the predecessor of the Marine Mammals Protection Regulations 1992 (SR 1992/322) under the Marine Mammals Protection Act 1978, should have consulted Ngai Tahu interests before granting a permit which by the time of the appeal had expired, but dismissed the applicants' claim to be entitled by virtue of the Treaty of Waitangi or by the application of the principles of the Treaty, to a period of approximately five years from the commencement of their business, or to be able to require that the Director-General issue no new permits, in respect of the commercial watching of sperm whales, without their consent.

The Court of Appeal, in a unanimous decision delivered by the President, considered ss 5 and 6 of the Marine Mammals Protection Act 1978 wide enough to enable submissions based on the Treaty of Waitangi and the taking into account by the Minister, on granting a permit, of Treaty considerations.

Sections 5 (7) and 6 of that Act read –

> 5 *Application for permit*
>
> ...
>
> (7) In considering any application for a permit, the Minister shall have regard to –
> (a) The need to conserve, protect or manage any marine animal:
> (b) Any international agreement to which New Zealand is a party:
> (c) Any submissions received pursuant to subsection (5) of this section.
>
> 6 *Grant of Permit* – The Minister, in his discretion, may grant a permit, and his decision shall be final.

There being nothing in any of the relevant regulations to exclude such submissions and considerations, the Court accepted that the Conservation Act 1987 which reads –

> 4 Act to give effect to the Treaty of Waitangi – This Act shall be so interpreted and administered to give effect to the principles of the Treaty of Waitangi.,

required the Marine Mammals Act and Regulations to be administered and interpreted to give effect to those principles.

Judicial authority for the view that prior to 1840 Maori had a highly developed and controlled fishery over the whole coast (the Court referred to *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 646-7) and that Maori had "customary or aboriginal title or Treaty rights" giving the Crown fiduciary duties extending to its treatment of these rights, was noted. (The Court relied on *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301, 306 and the authorities there cited.) The Court affirmed Neazor J's finding in the High Court that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 did not affect Ngai Tahu's whale-watching claims. The issue was whether the right to conduct commercial boat tours to view large whales off-shore and, at times well out to sea, could fairly be brought within the scope of

> the Treaty or aboriginal title.

The Court of Appeal considered the claim either that no permit be granted without Ngai Tahu consent or that such consent not be unreasonably withheld "too wide".

Of relevance however, was the fact that in paragraph 3.10.14 of the *Ngai Tahu Sea Fisheries Report* 1992 (Wai 27; 5 WTR) the Waitangi Tribunal stated that while off-shore whalers were able to take whales without interference from Ngai Tahu, there was no evidence that agreements negotiated with individual whalers in respect of shore whaling involved or implied any permanent waiver of rights. Such rights were consistent with Ngai Tahu tino rangatiratanga over their sea fisheries.

Noting that commercial whale-watching is a very recent enterprise founded on the modern tourist trade and

> distinct from anything envisaged in or any rights exercised before the Treaty,

the Court of Appeal rejected Ngai Tahu's claim to a veto. (Reference was made to *Te Runanganui o Te Ika Whenua Inc v Attorney-General* [1994] 2 NZLR 20, 24-5.) It acknowledged, however, that

> a right of development of indigenous rights is indeed coming to be recognised in international jurisprudence but any such right is not necessarily exclusive of other persons or interests.

While a commercial whale-watching business could be considered neither a taonga nor "the enjoyment of a fishery" within the contemplation of the Treaty, it was

> so linked to taonga that a reasonable Treaty partner would recognise that Treaty principles apply ... the principle requires active protection of Maori interests. To restrict this to consultation would be hollow. (Reliance was placed on *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.)

Given the Treaty duty to recognise the "special interests" that Ngai Tahu had developed in the use of their coastal waters, the President opined –

a period of complete protection sufficient to justify the development expenditure incurred by Ngai Tahu may be part and parcel of this.

Ngai Tahu were held to be entitled to succeed to the extent that the judgment under appeal was to be vacated and replaced by a reference back to the Director-General and a declaration that –

> subject to the primary consideration of the protection of the whales, the Director-General of Conservation should take into account ... protection of the interests of Ngai Tahu in accordance with Treaty of Waitangi principles.

Two related matters, the first in respect of te tino rangatiratanga; the second, in respect of self determination, provoke comment.

Te tino rangatiratanga
The protests at Pakaitore and Takahue have publicised the Maori view that sovereignty, translated as kawanatanga (translated by Kawharu as "complete government"),[1] in Article I of the Treaty but as te tino rangatiratanga in Article II, was not ceded.

This, the most recent and only Court of Appeal decision after those protests, affirms the traditional view. By the first article –

> there was ceded to the Queen absolutely ... Sovereignty ...

It followed that the first Article must cover –

> power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources.

As a consequence

> the rights and interests of everyone in New Zealand, Maori and Pakeha alike, must be subject to that overriding authority.

By the second article, there was –

> guaranteed to Maori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess.

The Court concluded its discussion of the Articles of the Treaty tersely

> That Article must extend to such sea fisheries as the Tribes possessed.

Implicit in the concept of te tino rangatiratanga is what can be termed Maori sovereignty or, as Kawharu[2] puts it, "the unqualified exercise [by Maori] of their chieftainship over their lands, villages and all their treasures". The discussion which follows tests the concept of Maori sovereignty against an analysis of relevant case law. The brief analysis concludes that the application of common law principles to the Treaty of Waitangi prescribes not the absolute subsuming of Maori customary law into the Westminster concept of parliamentary sovereignty as traditionally thought but only a partial integration and a reciprocal realignment of common law and Maori customary law rights and duties.

Case law
Judicial and academic writing rely for the proposition that treaty rights cannot be enforced in a Court of law without legislative incorporation, on a passage from the judgment of Viscount Simon LC who delivered the opinion of the Judicial Committee of the Privy Council in *Hoani Te Heu Heu Tukino v Aotea* [1941] AC 308, 360 (referred to hereafter as *Hoani Te Heu Heu Tukino*). Viscount Simon LC declared:

> so far as the appellant invokes the assistance of this court, it is clear that he cannot rest his claim on the Treaty of Waitangi and that he must refer the court to the same *statutory recognition* of the right claimed by him. [Emphasis added]

The words emphasised are absolutely in accord with the ratio decidendi of *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347 (referred to hereafter as *Ontario*) where, this time, Lord Atkin delivered the opinion of the Judicial Committee of the Privy Council:

> It is essential to keep in mind the distinction between (i) the formation and (ii) the performance of the obligations constituted by a treaty using that word as comprising an agreement between two or more sovereign states. Within the British Empire there is a well established rule that the making of a treaty is an executive act while *the performance of its obligations* if they entail an alteration of the existing law *requires legislative action*. [Emphases added]

Both passages are also absolutely in accord with the principle of law laid down by Lord Atkinson for the Judicial Committee of the Privy Council in *Secretary of State for India v Bai Rajbai* LR XLII Indian Appeals 229, 237 (referred to hereafter as *Bai Rajbai*) –

> The relation in which they stood to their native sovereigns before this cession and the legal rights they enjoyed under them are save in one respect irrelevant matters. They could not carry in under the new regime the legal rights they enjoyed if any which they might have enjoyed under the old. The only legal rights they could have as against their new sovereign were those which the new sovereign *by agreement express or implied* or by legislation chose to confer upon them. Of course this implied *agreement* might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognised these ante cession rights of the Kasbatis and has elected or *agreed* to be bound by them that the consideration of the existence, nature or extent of these rights becomes a relevant subject for enquiry in this case. [Emphases added]

Summary
Bai Rajbai says that old legal rights (the existing law) become enforceable in the new regime on proof of incorporation either by legislation or by agreement.

Ontario says that legislative incorporation is necessary in respect of alterations to the existing law. Legislation is not necessary in respect of old legal rights (the existing law).

Ontario elucidates *Bai Rajbai*: Legislative incorporation is necessary in respect of alterations to the existing law; evidence of an agreement serves to incorporate old legal rights (the existing law).

Hoani Te Heu Heu Tukino elucidates the concept of an alteration to the existing law, a right conferred by treaty.

Hoani Te Heu Heu Tukino concerned inter alia the appellant's claim that the statutory charge imposed on his land pursuant to s 14 of the Native Purposes Act 1935 was ultra vires of the legislature of New Zealand in so far as it derogated from the rights conferred by the Treaty of Waitangi. He was thus required to refer the Court to some statutory recognition of his claim.[3]

The basis of the appellant's claim was not the existing law, his old legal rights. The basis of his claim was the doctrine of pre-emption, a right conferred by the Treaty. A right conferred by treaty alters the existing law. The doctrine of pre-emption conferred a new right on Maori, the right to sell. The effect of the conferring of the new right on Maori was to deprive other citizens of a right previously exercised by them. Imposed on these citizens was the obligation to sell to the Crown when formerly they had the right to sell to whomsoever they chose.

Conclusion

It is submitted that the 1841 Charter establishing the Colony[4] supplies the evidence of the agreement necessary and sufficient, according to *Bai Rajbai*, to incorporate Maori customary law. That incorporation and the consequential legal enforceability of the promise expressed in Article II of the Treaty of Waitangi is dependent not upon the acknowledged capability of Maori customary law to cede sovereignty but upon the actuality of that cession. The question which is to be answered according to the application of Maori customary law principles, appears to be not whether cession simpliciter is cognisable but whether cession in return for a guarantee of te tino rangatiratanga is cognisable at Maori customary law.

Self determination

The foregoing discussion posits that

- a cession of sovereignty induced by a promise of te tino rangatiratanga is cognisable at Maori customary law; and
- te tino rangatiratanga was incorporated in 1841.

The effect of a century and a half of failure on the part of the judiciary and academics to acknowledge such recognition is that the issue of self-determination implicit as much in the guarantee of "full, exclusive and undisturbed possession of their Lands and Estates, Forests and Fisheries and other properties" (the English version) as in the concept of te tino rangatiratanga (the Maori version), is in 1995 separate from the issue of sovereignty in respect of resources.

If the 150-year time gap informs the equitable doctrine of aboriginal right or title, it is the additional concept of legal enforceability in the notion of "incorporated te tino rangatiratanga" which renders the now necessarily separate concept of self determination beyond the scope of the doctrine.

This note does nothing more than acknowledge the complexity of the issue raised. It concludes with a brief outline of the Court of Appeal's identification in this case of the "special interests" of Ngai Tahu. The identification of these "special interests" is seen at one and the same time as the Court's extension of the doctrine of aboriginal title in an attempt to embrace the complexity of the issue of self-determination and an endorsement of the treaty principles it enunciated in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

Having identified the "special interests" of Ngai Tahu

- the beneficial use or exploitation of coastal waters for viewing whales has some similarity to fishing or shore whaling;
- the whale watching activities are essentially tribal;
- Ngai Tahu were the pioneers of whale watching off Kaikoura;

The Court of Appeal warned:

> The precedent value of this case for other cases of different facts is likely to be very limited.

The problem with such an extension of the concept of aboriginal title or doctrine is its inherent arbitrariness. The Court reaffirmed in this case its decision in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 24:

> However liberally Maori customary title and treaty rights may be construed, one cannot think they were ever conceived as including the right to generate electricity by harnessing water power.

To purport to determine rights according to what "a reasonable Treaty partner would recognise" is to perpetuate colonialism. A presumption of ownership, it is submitted, more aptly conveys the concept of self-determination inherent in the concept of "incorporated te tino rangatiratanga".

Elisabeth Garrett
Lincoln University

1 Sir Hugh Kawharu's translation is reproduced in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 662-3.
2 Ibid.
3 The appellant in *Hoani Te Heu Heu Tukino* referred the Court to s 73 of the New Zealand Constitution Act 1852. This section read: It shall not be lawful for any person other than Her Majesty, her heirs or her successors *to purchase or in any way acquire or accept from the aboriginal natives land* of or belonging to or used or occupied by them in common as tribes or communities, *or to accept any release or extinguishment of the rights* of such aboriginal natives *in any such land* as aforesaid; and no conveyance or transfer, or agreement for the transfer, of any such land, either in perpetuity or for any time or period either absolutely or conditionally, and either in property or by way of lease or occupancy and no such release or extinguishment as aforesaid shall be of any validity or effect unless the same be made or entered into with, and accepted by Her Majesty, her heirs or successors ... [Emphases added] Regrettably for the appellant in this case, this section was repealed by the Native Land Act 1893.
4 Chapman J in *R v Symonds* [1847] NZPCC 387, 390 refers to the Charter in terms of its "solemn guarantee of the native title". The Charter, *Parliamentary Papers* May 11 1841 31 reads: Provided always that *nothing* in these our letters patent *shall* affect or be construed to *affect the rights of any aboriginal natives* of the said colony of New Zealand *to the actual occupation or enjoyment of their persons, or the persons of their descendants of any lands in the said* colony now actually occupied or enjoyed by such natives. [Emphases added]

APLA General Assembly, Bangkok, November 1995

Conference Report

By P J Downey, Editor, New Zealand Law Journal

Early in November 1995 the Asia-Pacific Lawyers Association held its General Assembly in Bangkok, Thailand. The theme of the Assembly was "2000 and Beyond". The main emphasis of the papers given at the Conference was commercial in nature with particular attention being given to intellectual property issues in international trade. It is clear that this issue is of great significance in the burgeoning markets of Asia.

The delegates attending came from a very wide area – including the United States and the Commonwealth of Independent States which was formerly known as the Soviet Union. Among the other countries represented were lawyers from Australia, Canada, Indonesia, Denmark, Greece, Korea, Malaysia, Singapore, New Zealand, Pakistan, Japan, Philippines, Sri Lanka, China, Spain, India, South Africa, Kuwait and of course Thailand.

The Executive President of APLA and the Chairman of the Conference was Mr Anek Srisanit of Thailand. In his opening remarks Mr Srisanit said that the legal profession, and APLA in particular, in promoting the development of law on an international basis had to translate legal concepts into a coherent framework that would be compatible with the contemporary business environment. The Assembly would give an opportunity to articulate new ideas and review recent developments. It was, he said, particularly important to develop a sophisticated legal framework within the newly flourishing economies of Asia and the Pacific.

This point was picked up and developed by Mr David S Wong of Singapore in the keynote address. This speech, like the others at the Conference was marked by two special positive attitudes. It was brimming with the self-confidence that marks the Asia-Pacific region, and it showed a recognition of the continuing expansion of international trade as a spur to economic development at an escalating pace. It was interesting to hear David Wong expressing enthusiasm for countries to adopt legal concepts and precedents from legal systems other than from their own narrow jurisdiction. He poured scorn on those who wanted to preserve their own nationalistic legal principles.

It was depressing to compare this outgoing attitude with the crabbed view now embraced by our small-minded politicians and by many of our Judges, that we have to have our own distinctively separate New Zealand jurisprudence, as illustrated for example in the determination to abolish appeals to the Privy Council. The dominant thesis of the APLA Assembly was that legal nationalism was anachronistic and that the emphasis, in commercial law particularly, had to be the facilitation of international trade in goods and ideas through the adoption of shared legal principles. In the legal field, New Zealand will be going backwards if it is retreating into a self-centred, self-regarding, self-satisfied, nationalistic jurisprudence.

In addition to concern with intellectual property issues, the Assembly devoted sessions to the workings of the Stock Exchange, to Energy, and to the complex political and legal issue of Globalisation v Protectionism. The papers, and the discussion varied in quality of course, but the overall effect was to share problems and discuss solutions. Two of the papers, on intellectual property matters and the global trade issue, are published immediately following this introductory article.

One of the more interesting papers given was that by Professor Rais Touzmohammed of Moscow. His subject was Intellectual Property Law in Russia. As he noted at the beginning of his paper it has only been in the 1990s that the vocabulary of his country's legislation has "been enriched by this term". It is now enshrined in the Russian Constitution of 1993; and today Russia is a party to several international conventions in the intellectual property area. There have been concomitant developments in domestic law too. All this has led, the Professor said, to an understanding in principle that the law is concerned with rights in what he called the non-material sphere, and he indicated that this meant a profound change in legal thinking in Russia.

Professor Touzmohammed was one of the more interesting personalities at the Assembly. His English was fluent, idiomatic, and witty. When he learned I was from New Zealand he spoke warmly of his friend Ed Hillary and said they had been climbing together in the Pamir mountains. I showed him the NZ$5.00 banknote with Sir Edmund's portrait on it. He was delighted and said with a laugh "I knew he must have been an important man!"

The Assembly lived up to the expectations the Executive President had expressed at the beginning. It was also appropriate that the Conference was held in Thailand for the reasons given by Mr Srisanit:

> The past decade has seen a rapid explosion in world economies with many new countries joining the trading arena, most prominently in this region. Certain industries have taken over from historical monopolies which has resulted in an urgent call for a legal response to enable industrialists, businessmen and consumers to work within a framework which promotes and supports their business objectives. Hence this 1995 conference naturally focuses on exciting new developments in intellectual property, energy and the stock exchange. Thailand seeks to progress from a traditional agrarian-based economy to one furnishing the requirements of a flourishing business community.

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APLA General Assembly, Bangkok, November 1995

Property of the mind at the millennium:

Intellectual Property projections for the 21st century

By Rory J Radding, Esq, Pennie & Edmonds, New York, United States of America

This article is a paper given at the Asia-Pacific Lawyers Association General Assembly held in Bangkok early in November 1995. The general theme related to the legal implications of developments in the region with the approach of a new millennium. In this paper Mr Radding from the United States considers particularly the legal implications of technology changes. He sees registration of patents, trademarks, and copyright, where this registration is currently provided for, probably needing for rights to inhere instantaneously as happens already with copyright in many countries. The continuing development of international trade will also need some sort of international Court for intellectual property rights.

I Back to the future

Law follows society and hence its technological advances. To glimpse into our Intellectual Property Law crystal ball today requires an assessment of what technologies may exist in the 21st century. This is easy to say, but not easy to do. Currently, intellectual property law covers patents, trademarks, copyrights, trade secrets, and unfair competition. What it will include or exclude in the 21st century and what new laws may supplement or supplant current law is uncertain. What is certain is that changing technologies will require changing laws.

A 20th-century conference held in 1895 might not have mentioned airplanes, radio, antibiotics, nuclear energy, electronics, computers or space exploration and their protection under intellectual property laws. One hundred and fifty years ago the industrial revolution was literally still gathering steam. Those were the days before the birth of Edison, before Darwin's *On the Origin of the Species*, before the germ theory of disease, before the invention of cheap steel, before the discovery of x-rays, before Mendel's laws of genetics and Maxwell's equations of electromagnetism.

The poet Paul Valéry wrote decades ago that "The future is not what it used to be", and it would not be hard to share in his disappointment today. As children, many of us were assured that we would one day live in a world of technological marvels. And so we do – but, by and large, not the ones foretold. Films, television, books and World's Fairs promised that the twilight of the 20th century and the dawn of the 21st would be an era of helpful robot servants, flying jet cars, moon colonies, easy space travel, undersea cities, wrist videophones, paper clothes and disease-free lives. What went wrong?

Few of the promised technologies failed for lack of interest. Nor was it usually the case that they were based on erroneous principles, like the perpetual motion machines that vex patent offices. Quite often, these inventions seemed to work. So why do bad things happen to good technologies? Why do some innovations fall so far short of what is expected of them, whereas others succeed brilliantly?

From the 1950s through the early 1970s, most artificial-intelligence researchers were confident of their ability to simulate another organ, the brain. They are more humble these days: although their work has given rise to some narrow successes, such as medical-diagnostic expert systems and electronic chess grandmasters, replicating anything like real human intelligence is now recognised as far more difficult.

The more fundamental problem with most technology predictions, however, is that they are simplistic and, hence, unrealistic. A good technology must by definition be useful. It must be able to survive fierce buffeting by market forces, economic and social conditions, governmental policies, quirky timing, whims of fashion and all the vagaries of human nature and custom.

To survive, a commercial technology must not only work well, it must compete in the marketplace. During the 1980s, many analysts thought industrial robotics would take off. Factory managers discovered, however, that roboticising an assembly line meant more than wheeling the old machines out and the robots in. In most cases, turning to robots would involve completely rethinking (and redesigning) a manufacturing plant's operation. Robots were installed in many factories with good results, particularly in the automobile industry, but managers often found that it was more economical to upgrade with less versatile, less intelligent but more cost-effective conventional machines.

Others thought silicon-based semiconductors would be replaced by faster devices made of new materials or with new architectures, such as superconducting switches. The large research and development effort associated with silicon, however, has continued to refine and improve the existing technology. United States law complied and created the Semiconductor Mask Work law. The result is that silicon will probably remain the semiconductor of choice for most products for at least as long as the current chip-making technology survives. Its rivals are finding work, too, but in specialised niche applications.

Sometimes the worth of one technology does not really become clear until other small but crucial inventions and discoveries put them in perspective. Personal computers looked like mere curiosities for hobbyists for many years. Not until the first spreadsheet programs were invented did personal computers stand out as useful business tools. Again United States law complied, with a new Copyright Act in 1978 and Supreme Court decisions extending patent protection to computer software. CD-ROMs did not start to become common accessories of PCs until the huge size of some programs, particularly reference works and interactive games, made the optical disks convenient alternatives to cheaper but smaller capacity floppies. United States law is still struggling with the issues multimedia creates.

The new millennium begins in less than five years. The next few decades will be when the technologies that now exist and look most promising either flourish or wither on the vine. It is projected that information and communication technologies will unite the world – there will be no need for newspapers, we will use paper thin computer flat screens to display our morning news. Faster transportation will whisk people from New York to Tokyo in three hours. In the field of medicine, we may have eliminated disease, learned how to turn cells on and off, and find useful microscopic machines running inside our veins and arteries to regulate pressure, temperature and cholesterol deposits. New materials may be devised that can talk! Energy will finally be safe, plentiful and inexpensive. These are some of the optimistic dreams and visions for the 21st century. But what is the reality of what we can reasonably expect in the future?

The truth is that as technologies pile on technologies at an uneven pace, it becomes impossible to predict precisely what patterns will emerge. Can anyone today truly foresee what the world will be like if, for example, genetic engineering matures rapidly to its full potential? How can the intellectual property laws, or any law for that matter, cope with unforeseen technologies that may change relationships and how people interact?

An example of what we might expect is already here in the form of cyberspace – the ever present Internet. Are the intellectual property laws sufficient to address all the new problems and issues being raised each day by use of the Internet and the creation of multimedia works?

When William Gibson first coined the term "cyberspace" in his science fiction novel *Neuromancer*, he prophesied a noncorporeal or "virtual" reality generated by computers in which people could interact, conduct business, and entertain themselves.

In the next century, almost five billion people in the world will be exposed, through multimedia, to the "wonders", the pain and suffering, the access to expert medical assistance as well as the "junk mailers" from the isolated regions of the world to the sophisticated avenues of the financial capitals of the world. There has been much written about the benefits of going digital. See, for example, *Being Digital* by Nicholas Negreponte, the head of MIT's Media Lab, who says we must leave the world of atoms behind and embrace the benefits of a world filled with bits and bytes. There also has been some written by those who are somewhat sceptical and concerned that we will lose the ability to smell a rose in full bloom, to enjoy human interaction and to use all five of our senses to experience life. (See *Silicon Snake Oil* by Clifford Stoll.)

In any event, the United States has recently recognised in the Commerce Department's *Report on Intellectual Property and the National Infrastructure* the need to adapt current laws to the world of international multimedia transmission:

> The establishment of high-speed, high-capacity electronic information systems makes it possible for one individual, with a few key strokes, to deliver perfect copies of digitized works to scores of other individuals – or to upload a copy to a bulletin board or other service where thousands of individuals can download it or print unlimited "hard" copies. The emergence of integrated information technology is dramatically changing, and will continue to change, how people and businesses deal in and with information and entertainment products and services, and how works are created, reproduced, distributed, adapted, displayed, performed, owned, licensed, managed, presented, organised, sold, accessed, used and stored. This leads, understandably, to a call for adaptation of – or change in – the law.

Thomas Jefferson stated:

> I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy ….

II Can law cope with the change in technology?

Whoever is correct about the sociology of the superhighway, several legal and business concerns arise. Multimedia combines text, data, sound, graphics, photos, animation, moving pictures and computer software, among other things. What is the interaction of the intellectual property law, the broadcasting laws, the transmission laws, the contract laws, to name a few? How do the people who create the information and data, the content providers, receive compensation for their efforts? How do the transmission and distribution providers such as the telephone companies or the cable companies receive compensation for laying the millions of miles of fibre optics and sending into low, mid and high altitude orbit hundreds of millions if not billions of dollars of telecommunications satellites? How can the consumers pay for all of the bits and bytes of information that will stream into their homes and into their lives? What intellectual property laws (as well as other laws) will protect the content providers from infringement? How will the content providers enforce whatever rights they obtain? Where does infringement occur? What country's laws will govern those rights and their enforcement – the law from where the transmission originates or is it the law where the transmission is received? If someone utilising the Internet in Bangkok takes information which originates from Washington, DC as well as information that originates from Paris, France, where should the creators of that information bring suit and how effective will that lawsuit be to obtain an enforceable injunction and damages? Moreover, if intellectual property protection is too lax, there may be inadequate incentives to produce new electronic works; conversely, if protection is too strict, it may impede the free flow and fair use of information. A compromise must be found somewhere between those who suggest that all information should be free and those who advocate laws against the electronic equivalent of browsing at a magazine rack.

Extending existing copyright and patent law to apply to digital technologies can only be a stopgap measure. Law appropriate for the paper-based technology of the 18th century will not be adequate to cope with the digital technology of the 21st; already the proliferation of litigation over software patents and even over the shape of computer-screen trash cans makes the need for wholesale revisions apparent.

A Copyright law

Today, at least in the United States, lawyers are trying to use, what I believe are outdated copyright laws to cover bits of information sent over the Internet. For example, the Clinton Administration just proposed changes. Rather than a new overhaul of the law, they suggest:

> In a few areas, however, [the Copyright law] needs to be amended to take proper account of the current technology. The coat is getting a little tight. There is no need for a new one, but the old one needs a few alterations.

They propose that making hundreds of electronic copies of a magazine article or your favourite Beatles record is illegal, even if the material is on a computer network. (See *Intellectual Property and the National Infrastructure*, September 1995.) Copyright law would apply to materials flowing through computer networks. Under the changes proposed, the law would specify that electronic transmissions – just like printed books, records and home videos – would "fall within the exclusive distribution right of the copyright owner". Bruce Lehman, Commissioner of Patents and Trademarks, said the recommendation, if implemented, would not affect how home computer users and others now legally make electronic copies of data provided by computer services or the global computer network Internet, as long as the copies are for their private use. Still, the report does not address the critical issue of enforcement of copyright laws and ways companies can best protect their products, services and other information from electronic eavesdroppers. The recommendations in the report seek to tinker with existing copyright laws to address the challenges of the digital age, when people can make one or thousands of perfect copies of anything – movies, books and musical records – with a few commands on a computer keyboard. Regardless of whether the amendments are adopted, some United States Courts have stretched the copyright laws to on-line bulletin board operators making them liable for copyright infringement. In the case of *Playboy Enterprises Inc v Frena*, 839 F Supp 1552 (MD Fla 1993), the owner of *Playboy* magazine sued an operator of a subscription computer bulletin board service for distributing unauthorised copies of *Playboy*'s copyrighted photographs through its bulletin board. The operator claimed that his customers uploaded the photographs onto the bulletin board. (Uploading is the process of transferring information in the form of text, images, or sounds from a personal computer to the bulletin board.) Even though the operator did not upload the images on the bulletin board, he "supplied a product containing unauthorized copies of a copyright work". The Court held that the operator infringed *Playboy*'s exclusive right to display and distribute its copyrighted photographs, even though the operator may have been unaware of the copyright infringement. (See also, *Sega Enterprises, Inc v Maphia*, 857 F Supp 679 (1994).)

Similar to bulletin board operations, on-line shopping network providers may be held liable if the materials uploaded onto their advertising network contain unauthorised copyrighted material. For example, if a magazine publisher puts a piece of an article from a previous issue of the magazine on an on-line advertising service without the permission of the author of the article, the publisher and the on-line service provider may be liable for copyright infringement. Thus, regardless of how the Copyright Act is amended, if you or your client provides or licenses a service on-line, you must be aware of what materials are put on the on-line service.

Of even more significance is that countries around the world are in various stages of legal maturity. Mature countries, such as the United States, most of the countries of Europe, Japan, as well as Australia, have a significant body of historical perspective and utilisation of the copyright laws to cover many different forms of technology. As noted above, Commissioner Lehman is further tinkering with copyright laws previously adapted to a computer age. It was only within the last twenty years that the United States even permitted copyright protection of computer software. It was only within the last couple of years that the United States Patent Office prescribed rules and regulations on how computer software patent applications should be examined. The law generally follows and does not lead society especially in adapting to new forms of technology. Mature countries thus are quickly attempting to adapt the copyright laws as well as other laws to the new problems created by the Internet. Other countries are not as fortunate.

B Trademark law

One clear example of a recent worldwide problem of adapting laws caused by the Internet is trademark infringement of domain names. Much like a telephone network, a computer network consists of two or more computers connected using packets of data in such a way as to be able to share information and "talk" to each other. At its simplest, the Net is the largest of all computer networks. Because there is no central registry tracking all connections to the Net, it is impossible to know exactly how many computers and users have access. Experts estimate the number is growing at a rate of 100,000 computers a month. To locate information on the Net a domain name is necessary. A domain name is a company's address or telephone number on the Net. It is the name under which a company sends and receives mail and can be identified on the Net. A problem is reserving a company name or mark that is not its own as its Internet address. The domain name is usually a combination of the designation chosen by the entity applying for the name (almost anything is acceptable as long as it has not been already taken), followed by a generic abbreviation identifying the nature of the entity. A domain name can be reserved even before joining the Net. As of May 1994, only 33 per cent of Fortune 500 companies had registered a variant of their company name as a domain name on the Net, while 14 per cent had already lost the opportunity to do so because someone else had registered their name, and 50 per cent remain unregistered.

At least two trademark infringement actions concern domain name infringement – one involving MTV, the other STANLEY KAPLAN, which was subsequently resolved. In other cases, SPRINT had successfully but only temporarily reserved its competitor's name, MCI, and the MCDONALD'S name was held by a journalist who wanted an Internet access for a New York City public school in exchange for the address. InterNIC (and the other regional registries) follow a first-to-file rule, with virtually no examination to determine whether use of the proposed name would violate anyone else's proprietary rights. The PTO's Administrator for Policy and Procedure recently advised the entire Trademark Examining Groups that the portions ".com", ".edu", ".gov" in domain names do not add anything significant to the appearance or commercial impression for likelihood of confusion purposes under the United States Trademark Act. These designations are to be ignored when comparing marks. There is widespread abuse of domain name registration.

In August of 1994, an individual in Washington DC was successful in registering 18 domain names including "esquire.com", "herz.com", and "trump.com". He claimed to have registered these domain names out of curiosity. When his story made the front page of the *Washington Post*, the individual voluntarily relinquished his domain names.

Only a year ago, companies such as Sara-Lee, Nabisco, Anheuser-Busch and Kellogg had not registered their names. Television networks, presumably telecommunications experts, have also in some instances lost the race to InterNIC. Although NBC has registered its name, the domain name "abc.com" was registered by ABC Design Company in Seattle. A consultant in Minnesota was the first to register "cbs.com", while "fox.com" was snatched up by a company, ironically, called Flexible Online eXchange.

Other domain names that have been the subject of recent controversy include: "pizza.com", "coke.com", "nasdaq.com", "wired.com", "startrek.com", "windows.com", "kaplan.com", "mtv.com", and "mcdonalds.com". Conflicts surrounding the last two of these domain names have been the most widely publicised. They have also been the source of many interesting and novel trademark issues.

mcdonalds.com

In August 1994, Joshua Quittner, a columnist for *Wired* magazine, wrote a story in which he highlighted the frenzy of domain name registration at the InterNIC. He discussed how the small agency has neither the staff nor the inclination to check names for trademark infringement. In an attempt to demonstrate just how easy it was for someone to register a potentially infringing name, Quittner successfully registered the domain name "mcdonalds.com". Before registering the name, Quittner made numerous attempts to warn representatives at McDonald's that their name was available for anyone, including Burger King, to take for themselves. Apparently, McDonald's was not interested. Soon after, Quittner registered the name on his behalf and began using the address *ronald@mcdonalds.com*

Quittner was well aware that his use of the "mcdonalds.com" domain was probably infringing on McDonald's tradename. However, since there has been no legal precedent on the issue, he decided to see if McDonald's would take any action. Unlike many other people who registered potentially infringing names with the hope of profiting financially in the future, Quittner had no such motives. He agreed to give the name back to McDonald's if it would set up a "fat, juicy T1" Internet connection line for a group of students in PS 308 in Bedford Stuyvesant, Brooklyn.

mtv.com

In May 1993 Adam Curry, a former video disc jockey on MTV, registered the domain name "mtv.com" with the InterNIC, "partly because it was a cool address to have, and it was available". Curry set up and paid for his own World Wide Web Internet site *http://mtv.com* so that he could distribute and exchange information about the music industry. "mtv.com" featured a daily entertainment report, a gossip column, concert schedules, music charts, interviews with celebrities, music reviews, and samples of music. This electronic address quickly became one of the Internet's most popular, with over 35,000 people visiting daily. Although access to the site was offered free of charge, music bands were charged $100 to post samples of their music and their biographical information.

MTV sued Adam Curry alleging trademark infringement, unfair competition and deceptive trade practices, and seeking injunctive as well as monetary relief. (*MTV Networks v Curry*, (SDNY October 28, 1994).) MTV asserted that the domain name "mtv.com" along with the information distributed by the Internet site, would create the impression that Curry's personal venture was sponsored, authorised, or otherwise affiliated with the MTV Network. MTV also claimed that this likelihood of confusion was furthered by Curry's long affiliation with

MTV and by his distribution of MTV-owned material, including dialogue between MTV's cartoon characters Beavis and Butthead, and MTV outtakes. In seeking monetary damages, MTV claimed that Curry profited as much as $1 million from the infringing use of its trademark by charging bands that may have erroneously thought that they were dealing with MTV. In his answer, Curry claimed to have made no money from the site.

Curry moved to a new address "metaverse.com", added a disclaimer to "mtv.com" that he was not affiliated with MTV, and removed all references to MTV from his Internet site. He also agreed to stop using his on-line service in a confusing manner. However, he continued to assert rights in the domain name "mtv.com" which was legitimately registered through InterNIC. Despite Curry's actions, MTV has continued to pursue its name on the grounds that "mtv.com" is their property.

The InterNIC has indicated that if there is a trademark dispute over a domain name, it will stop the use of the domain name until the dispute is resolved or unless the domain name owner can show that it has a trademark registration. This self-imposed rule raises new issues: what about someone in France who has a trademark registration for mcdonalds.com and who advertises on the Internet?

C Economic issues

Are the telephone companies that provide telephone lines for the Internet simply common carriers or are they licensees under the right of distribution? What is the charge for use of the Internet? Some say a usage basis like the telephone, others say flat-fee structures, while others say congestion pricing. However, even accounting for user consumption could raise the cost of using the Net – the very act of collecting the necessary information could raise the operating cost of the Net. At the moment, individual usage is usually not even measured, much less charged for. Counting all those packets just means more work for some overloaded computer. The most obvious sort of usage pricing – a charge per packet – would consume more computer capacity than is needed to transmit the packets in the first place. A simpler way to charge may be to allow each packet to carry a "priority". High-priority packets – live transmission such as a voice or video – would flow through the network without delay; low-priority packets, such as e-mail, would wait for a lull. Internet providers could charge more for high-priority providers. However use of the Internet is priced, this superhighway will only complicate the attempts by content providers who are already struggling to obtain royalties for use of their works in CD-ROMs and multimedia.

D The world's dilemma

Various countries, particularly of Asia, only within the last five years adopted intellectual property laws which they are still struggling to enforce as currently written. How are those countries to cope with new laws that now must be used to cover new problems created by multimedia and the Internet which the laws of mature countries such as the United States do not even cover? For example, China is still coping with the problems of traditional copyright laws in the counterfeiting of CDs as well as the traditional areas of trademark counterfeiting. You also have countries like Indonesia recently changing their laws to a more Western style but requiring better trained Judges for proper enforcement. Some countries of South America which have a history of intellectual property abuse and counterfeiting do not even have appropriate laws that can be stretched in an attempt to cover the emerging problems of multimedia and transmission over the Internet.

The best approach, apparently, since there is no way of having a complete overview of where we will be in even one year in the diverse countries of the world, let alone five or ten years, is to take a wait and see attitude and to take the problems that arise one step at a time. Attempts to adapt laws today to cover current problems may be obsolete in one year as the technologies change and the problems change.

III Conclusion

What will the intellectual property laws be in the 21st century? How will they be enforced? What will Court systems look like? Will the world abandon Court disputes in favour of arbitration? With the everchanging technologies it is difficult to foresee. Perhaps as the Internet evolves and millions of people are exposed to vast amounts of information, a multimedia work may be created which is totally interactive and thereafter constantly modified by several different individuals in disparate parts of the world and then sent on its way along the Internet to be further refined and improved by others. Maybe this constant innovation will require a new intellectual property law that will grant rights instantaneously in each version so there is no need to wait two years for a patent to be granted or to apply for copyright registration in several countries simultaneously. Perhaps patent, trademark and copyright offices will be obsolete!

To further goals to protect individual creativity and promote innovation, each country of the world may join to propose and adopt a world Omnibus Innovation Act which will create a new type of intellectual property law with enforcement in an International Court of Intellectual Property located in Bangkok, Thailand with argument by virtual reality on the Internet for millions of people to see. Great problems create great challenges and great solutions. Only time will tell how the property of the mind will be protected after the millennium.

My crystal ball is now getting a little cloudy and my time is running out, but what is very clear is that the 21st century will be a period of ever more rapid technological change and, hopefully, the Intellectual Property laws and the lawyers who try to use and enforce those laws will be able to keep pace. We will just have to wait and see. ❑

Authority

The general story of mankind will evince, that lawful and settled authority is very seldom resisted when it is well employed. For men are easily kept obedient to those who have temporal dominion in their hands, till their veneration is dissipated by such wickedness and folly as can neither be defended nor concealed.

Dr Johnson
The Rambler

APLA Meeting, Bangkok, November 1995

Globalisation of contract law: Rules for commercial contracts in the 21st century

By Whitmore Gray, Emeritus Professor of Law, University of Michigan, and Visiting Professor of Law, Fordham University

This is a paper given at the Asia-Pacific Lawyers Association meeting held in Bangkok in November 1995. The author describes the principles of international commercial contracts published in 1994 by the International Institute for the Unification of Private Law. Professor Gray sees a new era of harmonisation of contract law. An appendix gives an abstract of a contract law decision given by an Austrian Court in 1994.

Merchants have traditionally been reluctant to submit their disputes to the Courts of a country foreign to them. They feared a bias against them on the part of the local Judge, but they were also apprehensive about any dispute resolution procedure that involved the application of unfamiliar law. Even if their domestic lawyer had some familiarity with the foreign law in question, an additional lawyer in that country would have to be consulted to get an authoritative prediction as to what a Court might decide.

In our modern commercial era, many parties keep international contract disputes out of the Courts committing them to arbitration. While arbitration proceedings often fail to live up to their advertised advantages of speed and economy, most lawyers think the need is for better arbitration procedures, not for going back to the Courts.

The second need, finding contract law rules of high quality to use in the dispute resolution process, has been much more difficult to satisfy. While individual countries have "modernised" some of the form and substance of their contract rules, they are still idiosyncratic, and are difficult for foreign lawyers to work with. How is a foreign lawyer to advise his or her client on a choice of law negotiation without a thorough knowledge of the foreign law? Of course, even if the foreign law is finally found to be acceptable, or even "good", the client may feel there is too much loss of face in agreeing to it. In a surprisingly large number of contracts, the parties do not choose any law, or they direct the adjudicators to apply "general principles of [international] commercial law". While this may have simplified the negotiations by eliminating arguments over which party's law would be named, many lawyers have described to the author over the years their frustration with this technique. If "general principles" are chosen, at the time of an arbitration an extensive investigation into international commercial practices is required, and often research into various foreign statutory rules and patterns of Court decisions as well. A common comment is that in many cases the adjudicator has felt that he or she was, in effect, left free to apply the rule the adjudicator liked best ie often any rule that could be used to justify the *result* the adjudicator liked best.

The early merchants often had their own supra-national rules. In England, Lord Mansfield theoretically "incorporated" the law merchant into the English case law, but as a result it became domestic law and lost any supra-national, unified character. The Scandinavian countries unified their sales law across national boundaries by statute. Following World War II, the International Institute for the Unification of Private Law (UNIDROIT) in Rome, originally an offspring of the League of Nations, provided in the 1960s the impetus and support for the Hague Conventions on International Sale of Goods. However, they were ratified by only a few countries, and the United Nations Committee on International Trade Law (UNCITRAL) took up the torch and eventually produced the Vienna Convention on International Sale of Goods (CISG). Now widely adopted, it provides not only a legislated framework where applicable, but a mode which could be used helpfully for modernising domestic contract law. It embodies thoughtful choices of the "best", "modern" rule to be applied to common contract problems, choices made by representatives of a wide range of countries with divergent economic circumstances and legal traditions. The CISG provides a model of both form and substance, and has the additional advantage of having official versions in all the UN official languages.

The most recent arrival on the contract law scene, however, has even brighter prospects for use in the coming century. The UNIDROIT Principles of International Commercial Contracts, published in 1994, are the next step in the evolutionary process described above. Building on, though not just copying, UNCITRAL's CISG, the UNIDROIT Working Group expanded the scope beyond sales of goods to all commercial contracts. Taking advantage of an extended period for drafting, legal specialists representing civil law, common law and socialist systems elaborated a set of rules tailored to the needs of a wider range of typical international commercial transactions, rules which would embody what were perceived to be the best solutions even if those solutions were not yet widely adopted by leading commercial countries. Their stated objective was

> to establish a balanced set of rules designed for use throughout the world irrespective of legal traditions and the economic and political conditions of the countries in which they are to be applied. This goal is reflected both in their formal presentation and in the general policy underlying them. (Principles of International Commercial Contracts, p 12 (UNIDROIT, Rome 1994).)

Translations into a growing number of languages are already available, and it may be assumed that this new "lingua franca" of contract rules will be used by those who teach as well as by practising lawyers. One early use may be to incorporate the UNIDROIT Principles in a contract in place of the choice of law clause referring to "general principles of international commercial contracts" mentioned above. Another use may be as an aid to interpreting domestic legislation or Court practices which takes into account "general usuages or principles in international commercial contracts." or even as an aid to interpreting the CISG. [The Viennese decision reproduced below provides an actual example of this use.] Finally, the UNIDROIT Principles provide a fine basis for modernising the domestic legislation of any country. Not only are the rules sensible and well-phrased, but their use will make any country's legislation seem more recognisable to foreign investors and merchants evaluating the local climate for doing business. The resources are already in place for locating all the interpretations of the CISG by various tribunals, and no doubt will also be extended to cover the UNIDROIT Principles. We finally are poised on the edge of a new era of harmonisation of contract law, where we will all be able to benefit from each others' experiences, developing better and more easily recognisable rules of law. ❑

Date: 15-06-1994
Country: Arbitral Award
Adjudicating Court: Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien
Number: SCH-4366
Parties: Unknown

Abstract

In 1990 and 1991 an Austrian seller and a German buyer concluded contracts for the sale of rolled metal sheets. The initial contracts provided that the goods were to be delivered "FOB Hamburg", by March 1991 at the latest. Later, due to the buyer's financial difficulties, the seller allowed the buyer to take delivery in instalments according to the possibilities of resale, and the buyer had to pay promptly after receiving each invoice and cover all storage costs. The buyer took delivery of some of the goods without paying, and refused to take delivery of other goods. Pursuant to an arbitration clause, the seller commenced arbitral proceedings, demanding payment of the price. The seller further asked for damages, including those deriving from a substitute sale of the undelivered goods.

The sole arbitrator held that since the parties had chosen Austrian law, the contracts were governed by CISG as the international sales law of Austria, a contracting State (Art 1(1)(b) CISG).

With regard to the goods delivered but not paid, the sole arbitrator found that the seller was entitled to payment of their price (Arts 53 and 61 CISG). Regarding the cover sale made by the seller, the arbitrator observed that the seller had the right to make a cover sale, and presumably even a duty to do so because of the duty to mitigate damages (Art 77 CISG). The seller would be entitled to the difference between the contract price and the substitute sale price.

The sole arbitrator further held that interest on the price accrued from the date payment was due (Arts 78 and 58 CISG). Since the parties' agreement required the buyer to pay after receiving each invoice, interest accrued from the date of such receipt, which should occur within 10 days after issuance of each invoice.

The sole arbitrator held that the interest rate is a matter governed but not expressly settled by CISG. Therefore, it must be settled in conformity with the general principles on which the CISG is based (Art 7(2) CISG). Referring to Arts 78 and 74 CISG, the arbitrator found that full compensation is one of the general principles underlying CISG. In relations between merchants, it is expected that the seller, due to the delayed payment, resorts to bank credit at the interest rate commonly practiced in its own country with respect to the currency of payment. Such currency may be either the currency of the seller's country, or any other foreign currency agreed upon by the parties. The arbitrator observed that this solution is stated also in Art 7.4.9 of the UNIDROIT Principles of International Commercial Contracts. The interest rate awarded, therefore, was the average prime rate in the seller's country (Austria), with respect to the currencies of payment (US dollars and German marks).

Original in German unpublished

Independent Judges

The persons entrusted with the great interests of the state may, even without any corrupt view, sometimes imagine it necessary to sacrifice to those interests the rights of a private man. But upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power.

– Adam Smith
The Wealth of Nations (1776)

Fiduciary relationships in commercial settings:

some thoughts on recent New Zealand cases (Part II)

By Matthew D J Conaglen and Robert Hollyman, Judges' Clerks, Court of Appeal of New Zealand

In the first part of this article, published last month at [1996] NZLJ 13, the theoretical basis of the fiduciary relationship was established. In this part the authors discuss practical applications of the fiduciary concept.

Curial application

Armed with this theoretical outline, we now turn to discuss some practical applications of the fiduciary concept. We begin with a discussion of two landmark cases from foreign jurisdictions: the decision of the Canadian Supreme Court in *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SCC) and the High Court of Australia decision in *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41, 96-97 (HCA). We will follow that with a discussion of a few more recent New Zealand cases.

LAC Minerals Ltd v International Corona Resources Ltd

The defendant (LAC) had approached the plaintiff (Corona) with a view to a joint venture mining operation. With this in mind, Corona revealed the results of exploratory drilling that it had undertaken on its property. It was clear from the results that the land adjacent to Corona's property was likely to be rich in gold and other mineral bearing deposits. LAC then purchased the adjacent property itself, and mined the land on its own account. The mine proved extremely lucrative, producing profits in excess of $Can 700 million. Corona alleged, inter alia, that the purchase of the property was a breach of fiduciary duty by LAC.

The Supreme Court of Canada was divided on the question of whether LAC could properly be described as occupying a fiduciary position. Sopinka J, for the majority (McIntyre and Lamer JJ concurring on this point), held that this relationship lacked the necessary factor of vulnerability, and therefore was not a fiduciary relationship. His Honour also made the point that there is an alternate remedy for this wrong in breach of confidence.

La Forest J, with whom Wilson J concurred, decided the case differently. As we have outlined above, his Honour thought that vulnerability is a factor which is indicative, but not determinative, of a fiduciary relationship. His Honour relied heavily on a finding that Corona was in a position of vulnerability given its small size relative to LAC. His Honour held that, even although there was no ongoing fiduciary relationship between the parties, LAC owed Corona a fiduciary duty with respect to the confidential information. This duty obliged LAC to refrain from acquiring the property because to do so would involve using the information to the detriment of Corona. ((1989) 61 DLR (4th) 14, at 44 (SCC).)

It seems to us that LAC was in fiduciary relationship vis-à-vis Corona with respect to the confidential information.[1] The nature of confidential information is such that when it is shared a situation of vulnerability arises. That vulnerability can properly be labelled fiduciary vulnerability because the confidant is in a position to use the information either to the detriment of the confider, or to his own benefit, without the confider having any practical ability to superintend such uses.[2] The confidant is therefore obliged not to use the information in any way without the fully informed consent of the other party. In this case this meant that LAC could not have used the information in any way, and therefore effectively could not have purchased the property, without Corona's involvement.

An interesting point which this case brings into relief is the possibility of individual fiduciary duties existing within a particular relationship without the entire relationship being fiduciary. It is possible for one commercial party to disclose confidential information to another, thereby creating fiduciary vulnerability and a fiduciary relationship within the context of the overall commercial relationship. This will have consequent fiduciary duties, although these will relate solely to the confidential information, without affecting the application of traditional commercial law doctrines, such as freedom of contract, to the rest of the relationship. This concept was a necessary premise of the minority holding and can be identified in other cases.[3]

Hospital Products Ltd v US Surgical Corporation

The defendant (HPL) was a company which acted as the sole distributor for Australia of surgical staplers manufactured by the plaintiff (USSC) in the United States. The distribution agreement was found to be subject to United States law, and therefore subject to §2-306(2) of the Uniform Commercial Code, which obliged "[USSC] to use best efforts to supply the goods and [HPL] to use best efforts to promote their sale." HPL began to manufacture its own surgical staplers which it then marketed alongside those of USSC, and further, it deferred filling orders for USSC staplers so it could fill them with its own. USSC sued, claiming a constructive trust over HPL's assets.

In the High Court of Australia, all five Judges held, although for different reasons, that there was a contractual term that the dealer would devote his best efforts to developing the market for the plaintiff's product in Australia. In effect this is what we have discussed above under the rubric of a good faith duty. Mason, Wilson, Deane and Dawson JJ held the good faith duty to be an express term of the contract, whilst Gibbs CJ, with whom Wilson and Dawson JJ agreed obiter, held the duty to be imposed by §2-306(2) of the Uniform Commercial Code.

Despite having come to these conclusions Mason and Deane JJ went on nevertheless to analyse more fully the relationship between the parties and to hold that there existed a *limited* fiduciary relationship. They suggested that it was consistent to hold HPL to a qualified fiduciary standard in its dealings with USSC whereby HPL was permitted to act in its own interests so long as it had due regard to those of USSC. (*Hospital Products*, above at 97-101, per Mason J.) However, Mason J also went on to hold that HPL "was under a duty not to make a profit or to take a benefit by virtue of its position as a fiduciary without the informed consent of USSC". (at 103, per Mason J.)

With respect, these findings seem self-contradictory. Mason J on the one hand held that HPL was permitted to act in its own interests, and on the other held that HPL was under a duty not to make a profit. Even given the qualifications Mason J placed on these bald statements, a requirement of informed consent still cannot be equated with due regard to the interests of a putative beneficiary. Further, we cannot see how Mason J's formulation of HPL's limited fiduciary duty differs from a duty of good faith, nor what it adds to suggest that the relationship was also fiduciary. To suggest that it is fiduciary can only further confuse the fiduciary concept.

In an exclusive distributorship situation such as that in this case, the parties have placed themselves in a situation where their interests are in conflict, and so the pursuit of each party's individual interest must be tempered with regard to those of the other. To classify such a situation as fiduciary is procrustean, although the relationship between the parties does seem to fall somewhere higher along the continuum than the pure contract law end. Rather, a duty of good faith seems most appropriate to such relationships, at least as a general presumption.

Artifakts Design Group Ltd v N P Rigg Ltd [1993] 1 NZLR 196

The plaintiffs (Artifakts) were a stationery company producing, inter alia, corporate diaries which were marketed by the defendant (Rigg). Artifakts discussed with Rigg a design for a new family health diary, incorporating improvements to the corporate diary. Rigg indicated that it would not be interested in marketing the new diaries due to the probable increase in price. Despite expressing a clear intention not to become a producer of diaries, Rigg later began to produce diaries, including a family health diary incorporating the improvements earlier floated by Artifakts. Artifakts sued for, inter alia, breach of copyright, misuse of confidential information, and breach of an implied obligation under the "exclusive representation agreement" into which the parties had entered.

This case provides a good illustration of the practical application and the utility of the good faith duty. Although Williams J held that there were infringements of copyright, which of itself could have resolved the issues, he went on to consider more fully the relationship between the parties, basing his decision in part on *Hospital Products*. He held that this was a simple distributorship, and that it was not subject to any greater duties than those provided by an implied "best endeavours" obligation, which we have termed a duty of good faith. It was not a fiduciary relationship because "there was no special vulnerability". (*Artifakts Design Group Ltd v NP Rigg Ltd* [1993] 1 NZLR 196, 231.)

The duty of good faith is particularly appropriate in this circumstance because, although the plaintiff could not have been said to be sufficiently vulnerable for there to be a fiduciary relationship, the very nature of distributorship agreements involves a compromise of the interests of both parties if the relationship is to be successful. It seems to us that in such cases the implication of a duty of good faith complies with the test set out by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363, 376. In the words of Lord Simon of Glaisdale (at 376), such a term is reasonable and equitable, and necessary to give business efficacy to a contract of this nature. (See also *Artifakts*, above, at 227-230 per Williams J.) The duty should therefore be implied wherever to do so will give effect to the relationship between the parties. Other than that, the Courts should be reluctant to interfere with freedom of contract.

Finally, it should also be noted that Williams J held that the information was not confidential. There could not therefore be any fiduciary duty in regard to the confidential information.

Watson v Dolmark Industries Ltd [1992] 3 NZLR 311

This case provides an interesting comparison to *Artifakts* in that it was, in our view, a case equally appropriate for the implication of a duty of good faith.

The defendants (Dolmark) were manufacturers and sole distributors in New Zealand of plastic storage trays which the plaintiffs (Watson) were marketing in Australia. In breach of the contract Dolmark suppressed its sales figures in order to avoid payment of royalties to Watson. Using that income, Dolmark also began to manufacture its own (slightly different) plastic trays. The plaintiff alleged, inter alia, breach of contract and breach of fiduciary duty.

In the Court of Appeal, the President held that the relationship between Watson and Dolmark was fiduciary. He based this on a reading of *Reading v R* [1949] 2KB 232, 236 per Asquith LJ, and *In re Hallet's Estate* (1897) 13 Ch D 696, which establish the principle that "a bailee stands in a fiduciary relationship with his bailor". (at 708-709 per Jessel MR.) As we have already stated, it seems to us that the settled classes, including bailments,[4] amount to no more than presumptions of fiduciary vulnerability and still require a meticulous examination of the circumstances. Gault J similarly held that the relationship was a fiduciary one, since Watson was "in another country in circumstances leaving her dependent upon [Dolmark's] *good faith*". [1992] 3 NZLR 311 at 318 (CA) (emphasis added).

It is important to note that Cooke P and Gault J did not hold that Dolmark was unable to use the moulds for its own benefit. Cooke P explained that Dolmark owed a duty:

> [T]o deal with [the moulds] for the benefit of [Watson] (by way of royalties, though not of course for her exclusive benefit) or for purposes authorised by [Watson] ... and not otherwise. (at 315.)

This can be justified using fiduciary principles, on the grounds that the beneficiary has given his informed consent to the remuneration of the fiduciary. However, it is also consistent with a finding that Dolmark owed Watson a duty of good faith.

In this light it is interesting to note Gault J's use of the term "good faith" in his judgment. The attention of the Court was obviously not drawn to the possibility of a duty of good faith which, in light of Gault J's observation, may have been a more appropriate description of the relationship between the parties in these circumstances. To return to the continuum discussed above, we agree with Gault J's view that "the relationship between the two parties extended beyond mere authority to use the moulds subject to the payment of a royalty" (at 318), but it seems to us that the relationship should not have been put as high as fiduciary:

> The supplier could not, in [an exclusive distributorship arrangement] reasonably expect the distributor to sacrifice its interests to his own. (Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1, 14.)

An early United States example of this is *Tillett v Deering, Milliken & Co Inc* 88 NYS 2d 148 (1948) (SC NYC). This involved a contract under which the plaintiffs were entitled to royalties on any sales by the defendant of fabrics styled and designed by the plaintiffs. Even although the extent to which the defendant would produce and sell the plaintiff's fabrics was entirely within the defendant's discretion, Walter J held that there was nevertheless an implied obligation to act in good faith.[5]

The similarities to *Hospital Products*, which we discussed above, should not be ignored. As in that case, the interests of both of the parties were in conflict, but that conflict should not be resolved by the complete subordination of the one to the other. The freedom to pursue one's own interests, which is necessary to such distributorship arrangements, is easily accommodated by a duty of good faith, but not so simply understood within the conceptual framework of a fiduciary relationship.

Ultimately, it seems that we may be talking about exactly the same kind of relationship as that found by Cooke P and Gault J, although under a different guise. However, a duty of good faith may be a more conceptually clear way of expressing the exact nature of the relationship between the parties, which would therefore relive some of the tensions distorting the fiduciary concept.

A final point which bears noting before we move from discussion of this case stems from the judgment of Anderson J. His Honour held:

> A failure to pay royalties would be a breach of contract. A deliberate and fraudulent scheme to use the dies with the intention of not paying royalties and of concealing the fact of such use and misleading [Watson] as to her entitlement is more than a breach of contract ... It is a breach of fiduciary duties arising from the relationship.

With respect, neither the nature of the breach nor the motivation for the breach of a contractual duty should in any way impact upon the delineation of the nature of that duty. A fraudulent breach should lead to an action based in fraud rather than a finding of fiduciary duties.

Liggett v Kensington

Goldcorp Exchange Ltd (Goldcorp) operated a business whereby customers "purchased" a quantity of gold bullion which Goldcorp then stored for them. Although Goldcorp claimed to have sufficient stock to cover its contractual obligations, it did not, yet it did maintain enough stock to satisfy the day-to-day demands made by customers. When, in the way of such things, Goldcorp was placed in receivership by the first debenture holder (BNZ), the claimants to whom no allocation of bullion had yet been made claimed a proprietary interest in the remaining unallocated bullion. This would give them priority over BNZ.

In the Court of Appeal, the President and Gault J held that Goldcorp was in a fiduciary position vis-à-vis the claimants. The individual rationales for the imposition of this fiduciary relationship have already been discussed.

On appeal to the Privy Council, their Lordships opined that the relationship between the parties could not be properly described as fiduciary:

> Their Lordships have not heard in argument any submission which went beyond suggesting that by virtue of being a fiduciary [Goldcorp] was obliged honestly and conscientiously to do what it had by contract promised to do. (*Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385, 400 per Lord Mustill (PC).)

The circumstances of the relationship between Goldcorp and the claimants were fundamentally contractual.[6] One might perhaps discern in their Lordship's opinion the possibility of a duty of good faith. In respect of the claimants to whom bullion had not been allocated, this surely cannot be the case. The only obligations owed by Goldcorp were first, to allocate bullion to individual contracts of sale, and second, to hold that bullion in safe storage as bailee. In such a case it is entirely unnecessary to impose any form of a duty of good faith. The contractual duties would not be changed at all by an implied duty to act with due regard to the interests of the claimants and not to do anything inimical to those interests. Given that such duties are not necessary to the efficacy of the contract they cannot be implied under the *BP Refinery* test.

Fusion of remedies in New Zealand

It has been suggested that one of the reasons for the misapplication of the fiduciary concept, as La Forest J mentioned in *LAC Minerals*, at p 30, has been the desire to access the more beneficial remedies which attach to breaches of equitable doctrines:

> [O]ne must not overlook the practical consideration which so often is of the greatest concern – remedy. For so long as our classification process draws sharp distinctions between the remedies each several class makes available, the class with the greatest remedial amplitude will inevitably be the one to which resort is had, howsoever questionable this might be. ... Would the undue interest we currently have in the fiduciary principle be much diminished if the remedies we were prepared to make available [for breach of other legal duties] ... were liberalized, were permitted to relive more effectively than they currently do ...? (Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1, at 56.)

In New Zealand, there should, in theory at leat, no longer be any "undue interest" in the fiduciary concept, since remedial flexibility is now well established:

> [N]ow that common law and equity are mingled, the Court has available the full range of remedies, including damages or compensation and restitutionary remedies such as an account of profits. What is most appropriate to the particular facts may be granted .... *Mouat v Clark Boyce* [1992] 2 NZLR 559, 566 per Cooke P (CA);

One might expect, therefore, that questions about the fiduciary concept would have abated. There remains, however, a problem in that the conundrum is not resolved that easily. Remedial flexibility is not the magic key to avoiding the need to understand the fiduciary concept and the other concepts which occupy the continuum we have discussed. It is necessary to clarify the concepts, and to understand them properly, in order to be able properly decide upon the "appropriate" remedy. In the words of Professor Kennedy, the distinctions may be dead but they will rule us from the grave.[8]

The relationship between the conceptual basis for an obligation and the remedy for breach of that obligation should be patent and is not severed by the existence of remedial flexibility. Even if one espouses the modern trend towards considering solely an idea of "obligations" between the parties, rather than considering the historical denominations of those obligations, it must surely still be relevant to consider closely the nature of those obligations. As Sir Robin Cooke has said:

> At the present day the historical derivation of the cause of action is less important than an identification of the substance of the right. (*Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22, 26 (CA).)

That said, it seems to us that in deciding upon an appropriate remedy for breach of those rights it cannot be futile to consider previous thoughts on the substance of similar obligations. In order to determine what remedy will be most appropriate in a given set of circumstances, it is still necessary that a set of remedial principles be consistently applied. The modern severance of the historical link between right and remedy was not intended to create a tabula rasa upon which those principles would be inscribed. At least as a starting point, the most sensible source of such principles is the reasoning which underlay the imposition of different remedies in previously decided cases. It is self-defeating to deny oneself the use of such an extremely valuable resource. The historical link between right and remedy must be replaced by a modern link between the substance of the infringed right and principled reasons for the imposition of a certain remedy.

Conclusion

The fiduciary concept has been one with which the judiciary, practitioners, and academics have grappled for decades in search of a practical but theoretically sound understanding. This article was aimed at discussion of several recent New Zealand cases, but in order sensibly to do so we have attempted to draw what we see as the central theme of fiduciary relationships from past cases and writings. It seems clear to us that contract law and fiduciary principles cannot be seen in a dichotomy. For a full understanding it is necessary to recognise that they lie on a continuum. The continuum must include at least a concept of good faith, and perhaps also other concepts such as unconscionability.

A full understanding of the concepts and their position on the continuum will lead to better and more reasoned argument in Court. This in turn will enable the Courts to refrain from having to stretch the concepts in order to meet the facts of individual cases which will then permit more conceptually sound judgment. With sound judgment comes a greater likelihood of the proper application of remedies to the circumstances of particular cases. In this context it is important to make a few points regarding duties of good faith. The remedies which are available for breach of such a duty are identical to those for breach of contractual or fiduciary duties.

If, therefore, counsel put forward submissions urging the existence of a duty of good faith, they will not be selling their clients short of desirable remedies. Indeed, they may well have an easier task in convincing the Courts of the merits of their case than if they should attempt to argue the existence of a fiduciary relationship. If this is so, they are more likely to obtain the remedies that they request.

It seems to us that the cases which we have discussed clearly show a need for counsel to consider their own particular cases in light of the continuum. Reasoned argument in Court should reveal the merits, and resolve the shortcomings, of the thoughts adumbrated in this article. Whatever the outcome, we hope that we "have stirred these points, which wiser heads in time may settle". (*Coggs v Bernard* (1703) 2 Ld Raym 909, 920; 92 ER 107, 114 per Holt CJ.) ❑

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1 McDougall, "The Relationship of Confidence" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1993) 157, 164, 165, 168.

continued on p 58

The scope of s 21 of the New Zealand Bill of Rights Act 1990:

Does it provide a general guarantee of property rights?

By Andrew S Butler, BCL (NUI, Dub), LLM (York, Canada); Lecturer, Faculty of Law, Victoria University of Wellington; Barrister & Solicitor of the High Court; Researcher, European University Institute, Florence.

In this article, the author considers whether s 21 of the New Zealand Bill of Rights Act 1990 provides a general guarantee for property rights. He argues that, while the state of the current case law might favour such a role for s 21, there is good reason for the provision not to have such a broad function. Instead, s 21 should be confined to breaches of privacy committed by law enforcement agencies.

The author thanks Ellen France of the Crown Law Office, Wellington and Paul Rishworth of the Faculty of Law, University of Auckland for assistance in obtaining materials from New Zealand.

I Introduction

Section 21 of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") reads:

> **21. Search and seizure** – Everyone has the right to be secure against unreasonable search and seizure whether of the person, property, or correspondence or otherwise.

This paper considers whether this provision can be regarded as a general protection against interference with private property rights. (In a coda to this article, I discuss other potential avenues for asserting that the Bill of Rights protects against property deprivation.) First, we examine the practice and authority to date on the issue. This shows a preponderant tendency in favour of a broad property protection role for s 21. Second, we examine the arguments in favour of a broad approach to s 21 which would see its use as a general protection of property guarantees. These are two-fold: the wording of the section and authority from the United States of America.[1] Third, the arguments against a broad scope for s 21. These are three-fold: a purposive interpretation of the guarantee which emphasises the context within which it is found, Canadian authority and international practice. This narrower approach would limit s 21 to a role of privacy protection (and most likely confine it to the context of state law enforcement investigations). Ultimately, it is my view that while the arguments are closely balanced, the Courts should favour a narrow scope for the provision.

II Practice and precedents to date

Let us turn first to a consideration of authority and practice to date.

First, there are a number of dicta expressed at a general level which would appear to support a broad approach to the scope of s 21. In the leading case of *R v Jefferies* [1994] 1 NZLR 290, 302 Richardson J stated that the right, "reflects an amalgam of values: *property*, personal freedom, privacy and dignity" (followed in *R v A* [1994] 1 NZLR 429, 433 (CA, per Richardson J); *R v Sanders* [1994] 3 NZLR 450, 474 (CA, per Fisher J); *R v Barlow* (CA 144/95, 26-5-95 per Richardson J p 16) while Thomas J (p 319) observed that:

> Essentially, s 21 is concerned to protect those values or interests which make up the concept of privacy. Privacy connotes a variety of related values; *the*

continued from p 57

2 See Part I of this article at text accompanying note 9.

3 See, eg, *Hospital Products*, above, at 123 per Deane J (HCA); and *CED Distributors (1988) Ltd v Computer Logic Ltd (in rec)* (1991) 4 PRNZ 35, 44-45 per McKay J (CA).

4 See Palmer, *Bailment* (2nd ed 1991) 170, 190-191; and see *Kirkham v Peel* (1880) 43 LT 171, 172 per Jessel MR; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 2 All ER 152, 163 per Staughton J; and *Re Andrabell* [1984] 3 All ER 407, 413-414 per Peter Gibson J.

5 *Tillett v Deering, Milliken and Co Inc*, at 152 (1948) (SC NYC), citing *Kirke La Shelle Co v Paul Armstrong Co* 188 NE 163 and *Simon v Etgen* 107 NE 1066, 1067. See also *Rickel v Schwinn Bicycle Co* 192 Cal Rep 732 (1983) (CA).

6 See Part I of this article relating to *Liggett and Kensington* [1993] 1 NZLR 257, 282 (CA) and *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385, 400.

7 See also *Day v Mead* [1987] 2 NZLR 443 (CA); *Aquaculture Corporation v NZ Green Mussel Co Ltd* [1990] 3 NZLR 299, 301 *per* Cooke P (CA); Maxton, *Equity Update: New Zealand Law Society Seminar* (1993) 3-7; Maxton, "Some Effects of the Intermingling of Law and Equity" (1993) 5 Canta LR 299, 310-311; see also in Australia *Warman International Ltd v Dwyer* (1995) 69 ALJR 362, 368 (HCS)

8 Kennedy, "The Stages of the Decline of the Public/Private Distinction" 130 Univ of Penn LR 1349, 1353 (1982); we are indebted to Andrew Nicholls, Judges' Clerk to the Chief Justice of New Zealand, for bringing this article to our attention.

> *protection of one's property against uninvited trespass, the security of one's person and property*, particularly against the might and power of the state; the preservation of personal liberty, freedom of conscience, the right to self-determination and control over knowledge about oneself and when, how and to what extent it will be imparted, and recognition of the dignity and intrinsic importance of the individual (emphasis added).

In *R v Barlow*, Hardie Boys J noted that on the case before him s 21 was not of application as "no issues of privacy or *property rights*" were involved (emphasis added).

It has to be recalled, however, that each of these cases concerned search and seizure in the context of law enforcement actions by state officials. No issue as to a general property protection rights was raised by the facts and accordingly the dicta are not determinative of the issue. Further, in his judgment in *Jefferies* Richardson J stated that the purpose of the reasonableness inquiry of s 21 was to assess, "the intrusion by officers of the State, concerned with the detection and prosecution of offending, on the immunity of citizens from arbitrary and unlawful searches [and seizures] of their property and persons." These dicta suggest that while property is an aspect of the values protected by s 21, that protection is only triggered when the interference or deprivation takes place in the context of law enforcement actions undertaken by state officials. If this is the true scope of s 21, then the provision is far from the source of a general property protection guarantee.

However, if we move from the general to the specific, we see that in a number of High Court cases it has been *assumed* that the ambit of s 21 goes well beyond privacy values and embraces property rights simpliciter. Among the most important of these cases are: *Alwen Industries v Comptroller of Customs* (1993) 1 HRNZ 574 (HC) and *Falkner v Gisborne District Council* (unreported, AP1/95 Gisborne, Barker J, 26 July 1995). In addition, the report of the Attorney-General to Parliament pursuant to s 7 of the Bill of Rights on the Napier City Council (Control of Skateboards) Empowering Bill is of importance.

In *Alwen*, Blanchard J had to consider the interpretation of the Customs Act 1966, s 284. This provision allows the Comptroller to return goods seized as forfeit on the deposit with the Collector of a sum equal to the duty-paid value. The plaintiffs were unable to provide a money sum equal to the value of the seized goods, but were in a position to offer securities equal to the amount involved. The Collector declined the offer of securities on the ground that the Act gave him no power to accept alternatives to money. For the plaintiffs it was contended that s 229 of the Act was of assistance. That provision allows for the use of securities to ensure the payment of duties and for compliance with the Act. Reading s 229 into s 284, it was argued, would mean that securities were an acceptable method for securing the return of the goods.

On judicial review, Blanchard J held that while the Collector's view might have been persuasive prior to the enactment of the Bill of Rights, ss 6 and 21 of the latter required a different approach. In particular, in light of the mandate to read statutory powers in a manner consistent with the Bill of Rights (s 6) his Honour held that s 229 and s 284 should now be read as allowing security in lieu of a money sum; not to do so would permit an unreasonable seizure. And why would the seizure be unreasonable? According to Blanchard J the inability of the plaintiffs to have access to the goods would seriously prejudice the conduct and viability of their business. In coming to this conclusion his Honour stressed "the present state of disruption of the business" of the plaintiffs (p 587).

The importance of this conclusion is that the seizure was not condemned as a high-handed intrusion on privacy nor was the retention of the goods in any way a deprivation of personal effects or documents which would go to the "biographical core" of the plaintiffs (*R v Plant* [1993] 3 SCR 281 (SCC)). Rather, it was a case purely and simply of interference with property, devoid of any liberty or privacy concerns. But the absence of a privacy/liberty aspect does not appear to have been taken by counsel for the Comptroller and it seems as if all involved in the case, Judge and counsel alike, assumed that s 21 had application as a general property guarantee.

In *Falkner* the High Court had to consider a residents' challenge to the decision of the respondent District Council and Minister to abandon coastal protection works. Abandonment of the works would result in the erosion of the applicants' properties over time. For the applicants it was contended, inter alia, that the decision was a breach of s 21 in that "a policy of managed retreat would result in an effective 'seizure' of property because land lost to the sea vests in the Crown". Further, the absence of compensation from the Crown rendered this seizure unreasonable for the purposes of s 21. While Barker J cast doubt as to whether there could be said to be a seizure, there was no suggestion in the judgment that s 21 was rationae materiae inapplicable. Thus, implicitly, counsel and the Judge operated on the assumption that s 21 was applicable to property protection issues.

Finally, to complete the picture of the practice in relation to s 21, reference must be made to the Report of the Attorney-General to Parliament on the compatibility of the Napier City Council (Control of Skateboards) Empowering Bill 1991 (Formal Report under Section 7 of the New Zealand Bill of Rights Act 1990 In Relation to the Napier City Council ..., 15 August 1991). The Bill (through cl 3) authorised the making of bylaws by the City Council for the confiscation of skateboards. The Report (prepared for the Attorney-General, by the Department of Justice) concluded that the clause would permit "unreasonable seizure" of skateboards and would therefore be contrary to s 21 of the Bill of Rights. As the learned authors of the Bill of Rights chapter of the 3rd edition of *Adams' Criminal Law* point out, "the meaning attributed to s 21 in the Napier City Council Bill situation would extend the section outside the evidential context to property rights in general". (Robertson (ed) *Adams' Criminal Law*, Wellington: Brooker's, 1992-1995, ch10.8.04(d) as at 21/9/94.) Interestingly, the Bill did not proceed, the inconsistency with the Bill of Rights being cited by the Select Committee as a reason against its passage (522 NZPD 6589, 4 March 1992).

To sum up, the available evidence provided by precedent and practice indicates that s 21 might well have a broad property protection function. Though the general language of some Court of Appeal dicta is capable of being read down and limited in its application by the nature of the cases in which the comments were made, a number of High Court cases reveal an assumption that property deprivation simpliciter falls within the ambit of s 21. Practice at the Department of Justice seems to be similar. But importantly, in none of these instances has a challenge been made to the assumption that s 21 has such a broad ambit. And this means, in turn, that should a Court be squarely faced with the argument, there is nothing necessarily binding on the issue.

III Arguments in favour of a broad interpretation

The strongest argument that s 21 provides a general guarantee against the deprivation of property is the plain language of the section combined with the broad and generous approach to interpretation of the Bill of Rights mandated by the Court of Appeal (*Flickinger v Crown Colony of Hong Kong* [1990-92] 1 NZBORR 1, 4, [1991] 1 NZLR 429 (CA); *Noort v MOT; Curran v Police* [1990-92] 1 NZBORR 97, 139, 141 (Cooke P), 151, 153 (Richardson J, McKay J conc), 163 (Hardie Boys J), 171 (Gault J)). The wording of the section is clearly broad enough to bring within its purview activities which interfere with the enjoyment and possession of property. Those caught by the Bill of Rights must not undertake any search of nor seize property; and, the word "seizure" in its natural meaning encompasses a deprivation of a thing, whether permanent or temporary,[2] total or partial.

Of course, an argument could conceivably be made that seizure refers to the physical taking of an item and therefore if the purpose of the impugned law or action were merely to disentitle a person to the ownership of the thing (or otherwise to deprive the owner of possession and/or ownership *but in a non-physical manner*) s 21 would not be triggered. However, such a distinction between physical and non-physical deprivation would be unlikely to find much favour with a Court which has continually stressed that in its approach to the interpretation of the Bill of Rights artificial distinctions are not acceptable, and that the correct approach is one which is both broad and generous. (Moreover, if electronic eavesdropping amounts to a search and seizure – as the Court of Appeal appears to have concluded – then it would be impossible to sustain the argument that only physical intervention satisfies s 21: see *R v AS* (1993) 1 HRNZ 374 (CA); *Queen Street Backpackers v Commerce Commission* (CA274/93, 21-6-94) though contra the observations made in *R v Barlow* supra.)

The second plank of those who support a broad scope for s 21 is the jurisprudence developed under the Fourth Amendment to the United States Constitution. It is an argument which builds upon the plain meaning approach, in that reliance on the (favourable) United States material rests on the assertion of a deliberate textual equivalence.

The Fourth Amendment is already well known to Bill of Rights practitioners: it is the subject of a number of the major United States constitutional cases relied upon in New Zealand to interpret our s 21 (see eg *Katz v United States* 389 US 347 (1967)). The Amendment reads in relevant part,

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated ....

In its modern cases, the Supreme Court of the United States had stated that the focus of the Amendment was privacy not places. Initially, the significance of this was to extend the ambit of the Amendment's protection beyond trespass to goods and persons and to protect unreasonable intrusions on a person's privacy interests. (Indeed, in *Katz* the emphasis on privacy was crucial as that case involved interception of a telephone booth conversation during which no property interest of the appellant was implicated.) But some lawyers took the view that if privacy were the central value of the Amendment then the Amendment might not protect property values divorced from privacy or liberty interests. Exactly such a submission was made (but rejected) in the recent case *Soldal v Cook County* 121 L Ed 2d 450, 13 S Ct 538 (1992).

That case concerned the forcible and unlawful removal of the Soldals' trailer from a trailer park for non-payment of rent (the trailer being the family home). Police officers attended the removal to ensure that the Soldals did not interfere. As it happened, the landlord had no eviction order; hence, the removal was unlawful. The police were aware of this deficiency, but even still supervised the eviction. The Soldals sought to sue the police department for facilitating a breach of their right not to be subjected to unreasonable search and seizure.

In the lower Courts it had been held that the literal wording of the Amendment was broad enough to encompass the facts of the case. However, those Courts held that since the police did not at any stage enter the trailer, rummage through the appellants' possession, nor interfere with their liberty in the course of the eviction, the Fourth Amendment had no application. The case only involved a deprivation of property simpliciter and this was not enough to bring it within the purview of the Amendment: there had to be some element of intrusion upon privacy or liberty for the Amendment to apply. (The lower Courts also expressed a reluctance to allow the Fourth Amendment to apply on the ground that it would then have application to almost all cases of repossession thereby federalising a state law matter: see pp 458-459.)

White J for a unanimous Supreme Court held that the Fourth Amendment was triggered. The main reason advanced by White J for rejecting the approach of the lower Courts was straightforward: the plain language of the Amendment cut against any narrow reading which would restrict it to privacy cases alone. His Honour cited with approval the earlier judgment of the Court in *United States v Jacobsen* 466 US 109, 113 (1984) which had held that,

> A "seizure" of property occurs where there is some meaningful interference with an individual's possessory interests in that property.

Such a definition of seizure was clearly broad enough to provide for a general guarantee against the deprivation of property simpliciter. Second, his Honour observed,

> [O]ur cases unmistakably hold that the Amendment protects property as well as privacy. ... We thus are unconvinced that any of the Court's prior cases supports the view that the Fourth Amendment protects against unreasonable seizures of property only where privacy or liberty is also implicated. (pp 459 and 461 respectively.)

The point of the cases such as *Katz* was that "property rights are not the sole measure of Fourth Amendment violations". (p 460) Indeed, his Honour noted that the Court in *Katz* had taken the view that while the Amendment protects individual privacy against certain kinds of governmental intrusion, "its protections go further, and often have nothing to do with privacy at all". (p 460, citing to *Katz* at 350) Moreover, White J observed that the Amendment had had application to civil matters and that the prior case law had not confined the Amendment to law enforcement matters. (p 462)

The importance of the American material lies in the fact that the wording of the New Zealand provision was intended to depart from the Canadian provision (which, as we shall see shortly, is silent as to what is to be protected from unreasonable search and seizure) and follow the Fourth Amendment. The authors of the 1985 White Paper (*A Bill of Rights for New Zealand – A White Paper* (Wellington: Government Printer, 1985) noted at paragraph 10.151

> unlike the Canadian Charter, Article 19 [the present s 21] contains an express but not an exhaustive list of what is to be secure against unreasonable search or seizure. In this respect it is closer to the American Bill of Rights. The Fourth Amendment specifically refers to persons, houses, papers and effects.

On the basis of this express modelling of s 21 on the Fourth Amendment, a strong argument can be made that *Soldal* represents the correct approach to the interpretation of s 21. This is particularly so as most of the cases upon which the *Soldal* interpretation of the Fourth Amendment relies precede the Bill of Rights by many years.

However, it is possible to explain away this reference to the Fourth Amendment. On a close reading of the White Paper it would seem that the purpose of the authors was that privacy be the central concern of the then Article 19. The purpose of modelling Draft Article 19 on the Fourth Amendment was to be specific as to what sorts of situations might involve a breach of privacy. This was particularly important, because (as the drafters noted) there was at that time (and it is still the case) no comprehensive right to privacy receiving statutory or common law protection. Thus, stipulating the environments in which privacy was to be protected was an important indicator to the Courts of the extent to which privacy was to have application. On this view, the purpose of the reference to property in s 21 is not to state that property per se is deserving of protection but rather to state that an intrusion on privacy which occurs in a property setting is caught by the section. Thus, the purpose of the reference to correspondence, person, property, and whatever is to show that the reasonable expectation of privacy can be enjoyed in a wide variety of settings and in relation to a wide variety of matters including property. But on this view, the protection of privacy is still the central purpose of the section. Moreover, on this view the reference to the Fourth Amendment was merely designed to show the inspiration for a more detailed enumeration of the environments in which the right to privacy could be expected to be invoked and not the expression of an intention to recognise a general right of property protection. Furthermore, the only reference to the thrust of the American case law on the Fourth Amendment is to *Katz* and to the reasonable expectation of privacy test. No intention is expressed anywhere that the provision is designed to provide a general property guarantee.

IV The arguments against

There are three arguments which can be advanced against a broad scope for s 21 of the Bill of Rights.

The strongest of the arguments against a broad scope for s 21 is the contextual argument. The Court of Appeal has repeatedly stated that when interpreting the Bill of Rights it is imperative to adopt a purposive approach. This approach ensures full scope is given to the Bill of Rights, but at the same time it is designed to prevent any of the Bill of Rights' provisions overshooting their proper scope. (*Noort*, supra, 153 (per Richardson J, McKay J conc) and *R v A* supra, p 393) This approach requires the interpreter to have regard to the purpose and the function of the guarantee. In turn, one of the most important aspects of the interpretative process is placing the guarantee in context. In particular, in his judgments, Richardson J has repeatedly stated this to be fundamental to the interpretative process.[3] The context within which s 21 is found is clearly one related to procedures surrounding the criminal process. The section is the first in the catalogue of guarantees which sets conditions upon the manner in which a subject of the criminal process is to be treated. Moreover, the heading of that part of the Bill of Rights in which s 21 is located, "Search, Arrest, Detention", reinforces the criminal procedure milieu in which it is intended to operate. Surely no-one will argue that arrest and detention are normally categorised with property guarantees?

Admittedly, this argument is not absolutely watertight. For, included in those provisions grouped under the heading "Search, Arrest, and Detention" is s 27. That provision guarantees the right to justice; it has little to do with criminal procedure as such being a general guarantee of the right to correct procedures and substantive justice in one's dealing with administrative bodies and tribunals. Nonetheless, the point still stands that it is odd to divine a general property guarantee in a provision clearly aimed at the criminal process.

The second argument in favour of a narrower approach rests on the assertion of a textual equivalence between our s 21 and s 8 of the Canadian Charter of Rights and Freedoms 1982 ("the Charter").[4] Section 8 of the Charter reads simply:

> **8.** Everyone has the right to be secure against unreasonable search and seizure.

The only difference between this provision and our s 21 is that the Charter section fails to specify the sorts of situations in which the reasonable expectation of privacy will arise. We have seen that the drafters of the White Paper equivalent of s 21 purposely decided to include a reference to the sorts of situations in which the right would arise, following the example of the Fourth Amendment to the United States Constitution. However, a reading of the entire section of the White Paper (see paras 10.144-10.161) given over to a discussion of Draft Article 19 shows that the drafters were mainly concerned with the protection of reasonable expectations of privacy. Indeed, nowhere does the White Paper suggest that the purpose of the guarantee is to provide a general guarantee of property; rather the guarantee is designed to protect privacy, even if it is in this regard somewhat incomplete (see para 10.144). Admittedly, one of the situations which triggers our s 21 is interference with property, yet the Canadian Courts have also held the guarantee of s 8 to apply in situations where a reasonable expectation of privacy in respect of the enjoyment of private property has been interfered with.

If equivalence is accepted, reliance can be placed on the recent decision of the Ontario Court (General Division), *re Unishare Investments Ltd and The Queen* (1994) 18 OR (3d) 603. There, MacPherson J held that s 8 was not a general guarantee against the deprivation of property. The reasoning employed by the learned Judge is of importance to the issues raised in this paper.

The facts of the case are reasonably straightforward. Section 3(1) of the City of Toronto Act 1990 (No 2) empowered police officers and bylaw enforcement officers to, inter alia confiscate and remove flowers, if a street vendor did not possess a permit to sell. The plaintiff corporation (which sold flowers to vendors) challenged the validity of the provision on the grounds that it permitted an unreasonable search and seizure contrary to s 8 of the Charter in that there were no warrant requirements and so on.

Having granted the corporation standing to challenge the statutory confiscation provision, his Honour moved to the s 8 argument. First, his Honour held that (p 608):

> the case law establishes clearly that not all "things" or property are protected by s 8 of the Charter. Rather, property is protected under s 8 only if the seizure of the property intrudes into, or tramples on, the interests and values protected by s 8.
>
> The most important of the protected interests or values is privacy in a law enforcement context. In case after case, the Supreme Court of Canada has stated that s 8 protects the bodily integrity and privacy of people, not their property, unless the property being searched or seized relates directly to a privacy interest.

His Honour then set out various relevant passages from decisions of the Supreme Court to prove his point. (His Honour referred to *Hunter v Southam* [1984] 2 SCR 145, 159; *R v Dyment* [1988] 2 SCR 417, 426; *R v McKinlay Transport* [1990] 1 SCR 627, 641-642; *R v Colarusso* [1994] 1 SCR 20, 60 and 63.) Though acknowledging that not all of these passages were watertight precedents in support of his position,[5] his Honour concluded that the cases indicated a preponderant concern with privacy. Moreover, as his Honour reasonably enough noted, most of the cases cited by him had given the Court an opportunity, if it had wished to take it, to accede to the proposition that s 8 provided a general guarantee against interference with property simpliciter. This opportunity the Court had not taken up.

Second, his Honour distinguished the *Soldal* case. For the plaintiffs it was submitted that the s 8 of the Charter and the Fourth Amendment were comparable. His Honour rejected this argument from textual equivalence. First, his Honour noted that the United States Constitution contains a number of explicit protections for property rights. Thus, in addition to the specific reference to property in the Fourth Amendment ("... houses, papers and effects ..."), the Fourteenth Amendment protects "life, liberty or property" (as does the Fifth Amendment). In contrast, s 8 made no reference to property, while the Charter equivalent of the Fourteenth Amendment (s 7) only protects "life, liberty and security of the person". Second, his Honour noted that the Supreme Court in *Irwin v Quebec* [1989] 1 SCR 927 had observed that property had been intentionally excluded from s 7.

Third, his Honour noted that s 8 appeared in that section of the Charter which concerns legal rights; this positioning suggested that the scope of the guarantee was much narrower than that of the Fourth Amendment.

No privacy interest

Turning to the facts of the case, there was no privacy interest implicated because confiscation of the flowers did not involve "invasion of a home, office or any private property" (p 610). Nor did the seizure result in access to bodily samples or confidential information. As a result the seizure, being one of property deprivation simpliciter, did not trigger s 8 and the plaintiffs' action failed.

Much of the reasoning applied by MacPherson J is of application to the New Zealand situation. First, apart from s 21, there is no specific reference to property in the New Zealand Bill of Rights (though note that s 27 does refer to a person's "rights, obligations and interests" which might be broad enough to embrace property protection – on this see the coda to this article). Second, as noted earlier, the intention of the drafters of the Bill of Rights was that Draft Article 19 would protect a reasonable expectation of privacy; nowhere was there mention of a general property guarantee. Third, while our s 21 intentionally departed from s 8 of the Charter in that some of the specific environments in which the right to privacy was intended to apply are enumerated, as explained above, that enumeration does not have to be read as implying that an interference with property rights simpliciter is covered by s 21. In this respect, the Charter material is likely to be of more assistance. Fourth, MacPherson J's reference to the positioning of s 8 within the legal rights section of the Charter mirrors the argument advanced above that it is unlikely that a provision aimed at general property protection will be found in a section of rights dedicated to search arrest and detention.

However, not all of the reasoning employed in *Unishare* is transferable to the New Zealand context. First, there is not total absence of reference to property in our Bill of Rights. Indeed, the very section the interpretation of which is in dispute contains an explicit reference thereto. Second, there is the reference to the Fourth Amendment in the White Paper. Though this can be plausibly explained away (see above) it is not as easy for a New Zealand Judge to do so as it was for MacPherson J.

The third dimension of the argument for a narrow construction of s 21 relies on the fact that the distinction between property protection as a part of privacy protection and a general property protection is to be found in the international instruments which the Bill of Rights is designed to affirm.[6] Specifically, no provision in the International Covenant on Civil and Political Rights 1966 provides a general guarantee against the deprivation of property. (That said, deprivation of property does figure to some extent in the jurisprudence of the Human Rights Committee, where the deprivation triggers another right. Thus, for example, property (dis)qualifications may be suspect under art 26 which bans discrimination.) Moreover, reference could be made to the experience under the European Convention on Human Rights and Fundamental Freedoms. Under the Convention attacks against the deprivation of property are brought under Art 1 of Protocol 1 of the Convention which contains an explicit property protection guarantee, not under Arts 6 (which guarantees fair trial rights in the determination of civil rights and obligations and/or criminal charges) or 8 (which protects against interferences with private life etc.). Under the Convention law enforcement encroachments on the privacy of an individual have tended to be brought under Arts 6 or 8, a claim of interference with property simpliciter being brought under the Protocol.

It could be said that reliance on the international material is inappropriate. Both the Covenant (Art 5.2) and the Convention (Art 60) explicitly state that the text of those documents is not to be relied on as a method of reading down national protections of human rights which have been written more broadly. This is because the international instruments set the floor, but not the ceiling of human rights protection; they are statements of minimum rights and so should not be relied upon to narrow any wider protection offered by domestic legal systems where those exist. In turn, to use the Covenant and Convention to read down the scope of s 21 would be illegitimate.

Accordingly, I rely on the reference to the Covenant and Convention to make two simple points. First, international instruments do perceive there to be a difference between privacy protection and property protection. Such a distinction in a New Zealand setting would not therefore be out of step with the international approach. Second, if s 21 is interpreted as being confined to privacy protection such an interpretation would not result in New Zealand evading the international responsibilities solemnly undertaken when adhering to the Covenant.

V Conclusion

Section 21 of the Bill of Rights is expressed in broad terms, capable of sustaining an argument that it provides a general guarantee against the deprivation of property. Precedent and practice to date support such a role for s 21. Further, the case law of the Supreme Court of the United States is also supportive. However, it is my view that such a broad role for the provision is inappropriate.

Two arguments convince me that s 21 is not intended to have application as a general property guarantee. The strongest is that the contextual milieu of s 21. It appears as one of a catalogue of rights contained in a section on search arrest and detention, clearly matters primarily of law enforcement. This location militates against a general property protecting role for s 21. Again, I repeat that I accept that this argument is not watertight. Section 27 (right to justice) has little to do with "search arrest or detention", yet is found under that heading. Notwithstanding this weakness, I am still convinced that to interpret s 21 as the source of a general guarantee of property rights would be inappropriate given the milieu in which it is found. Second, there is the absence of a reference in the White Paper to the scope of s 21 extending to general protection of property rights simpliciter. It seems an extraordinary proposition to say that a right such as the right to property was intended to be protected by s 21 but that this intention was so obvious that no reference needed to be made to this fact in the drafting of s 21. Rather, to my mind, the absence of reference to the right to property yet the constant reference to privacy indicates that privacy is the true focus of s 21 and that a person intent on invoking that provision must demonstrate the presence of some such interest before the section is triggered. This interpretation, while out of step with United States case law, is in line with Canadian authority. And, moreover, if adopted this interpretation would not result in New Zealand defaulting on its obligations under the International Covenant (the affirmation of which is one of the expressed goals of the Bill of Rights).

VI Coda

In this coda, I wish to address, very briefly, two points. First, in this article I have not discussed other provisions which could support the protection of property interests simpliciter, but they exist. For example, s 9 of the Bill of Rights protects against the imposition of unreasonable or disproportionate treatment or punishment. An argument could easily be crafted to support the proposition that a particular deprivation of/interference with property rights (without compensation) breaches s 9. Alternatively, there is s 27 of the Bill of Rights. That provision guarantees various (as yet largely unexplored) rights to justice when a public authority makes a determination in respect of a person's rights or interests. Again, a good lawyer would have little difficulty in framing a statement of claim in such a way as to make property deprivation fall within the coverage of the words of the section.[7] In this brief essay I cannot deal with these provisions in detail. Thus, while I am firmly of the view that s 21 ought not to be used to protect property deprivation simpliciter, I have not considered in detail the argumentation available under other provisions. This must await another day.[8]

Second, my argument has been that s 21 is confined to law enforcement. This argument may make some people who would be sympathetic to the general thrust of this article uneasy. For it suggests that (a) s 21 has no application outside of the law enforcement context and, therefore, cannot serve as a general privacy guarantee against the government (thus, for example, the disclosure of confidential information by a governmental department would not be caught by s 21 because law enforcement is not involved); and, (b) as a corollary, s 21 cannot be the well-spring of a constitutional privacy tort applicable to the activities *between private parties* (because such parties do not engage in law enforcement activities).[9]

As to the first, those who would prefer to see s 21 serve a more general privacy protection role will have to provide an interpretation which persuades interpreters that the criminal context ought not to confine the reasonable expectation test. In this regard the dicta of Robertson J in *R v A* (supra, p 373) demonstrate that that task will be no easy matter:

> The Act does not take about privacy in a generic sense. In its interpretation of the statute the Court is bound to interpret those concepts which were included and not encompass wider (albeit laudable) considerations.

As to the second concern, in truth I am one of the last commentators on the Bill of Rights who needs to be persuaded of the value of rights and freedoms being applicable to the activities of private parties (see my articles, "The New Zealand Bill of Rights and private common law litigation" [1991] NZLJ 261 and "Constitutional Rights in Private Litigation: A Critique and Comparative Analysis" (1933) 22 Anglo-Amer L Rev 1). Though the milieu does suggest that s 21 is confined to law enforcement, a plausible argument could be made that if the true objective of s 21 is privacy protection one must acknowledge the tremendous potential for private persons to invade that right. Indeed, some overseas countries have applied search and seizure protections outside of the law enforcement context, and our own Court of Appeal has made (oblique) observations to similar effect (see *Sharma v ANZ Banking Group (NZ) Ltd* [1990-92] 3 NZBORR 183 (CA)).

Those who wish to adopt the thrust of the argument advanced in this article yet retain the possibility of s 21 acting as a broad privacy guarantee, will have to place less reliance on the contextual milieu to justify the conclusion that property rights simpliciter are not protected. Instead, they will have to place emphasis on the lack of reference to property protection in the White Paper and supplement this with reference to the international and Canadian material. ❑

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1 The arguments considered in this article are typically legal, based on the application of interpretative methods. There is a vast literature on the need to recognise (or not recognise as the case may be) the right to property as an aspect of individual liberty. Space dictates that no reference can be made to this debate. Readers may find useful S Coval, J C Smith & S Cavall, "The Foundations of Property and Property Law" (1986) 45 CLJ 457.

2 In *Alwen* supra, counsel for the Collector submitted that once the forfeited goods had been secured in a warehouse they could no longer be regarded as seized, the later referring to the act of taking as opposed to permanent deprivation. To strengthen this argument counsel noted that the Customs Act 1966 used the words "seize" and "secure" in this fashion. Blanchard J correctly rejected this argument as going against the generous approach to interpretation of the Bill of Rights required by the Court of Appeal (see pp 19-20 of the judgment).

3 In some cases it could be said that his Honour's efforts in this regard are excessive. For example, the author cannot agree with the application of this approach in Richardson J's judgment in *Barlow*, supra.

4 Apart from this provision there is no other section which readily lends itself to the protection of property interests in general. (However, s 12 does provide against cruel and unusual treatment and it is conceivable that an outrageous taking of property might trigger this section.)

5 For example, in *Hunter*. Dickson J stated (p 159) that he "would be very wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right to privacy ..." and in *Dyment* La Forest J said (p 426) of *Hunter* that the case "underlined that a major though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s 8 is the protection of the privacy of the individual ...".

6 The distinction is also to be found in comparable constitutional texts. Apart from the Canadian example discussed above, there is the new Constitution of the Republic of South Africa, s 13 of which protects the right to privacy (including the right not to be subject to the seizure of private possessions) and s 28 which protects against the deprivation of rights in property (see especially s 28(2)).

7 Indeed, in *Mangawero Enterprises v Attorney-General* [1994] 2 NZLR 451 (HC) the plaintiffs sought a declaration that the Attorney-General had failed to comply with the requirements of s 7 of the Bill of Rights, in that he had not reported various aspects of the Forests Amendment Bill 1992 (subsequently enacted as the Forests Amendment Act 1993) to be inconsistent with the Bill of Rights. Part of that Act was aimed at depriving owners of interests in land without compensation. The plaintiffs invoked s 27(3) of the Bill of Rights to challenge the actions of the Attorney and Parliament. The claim was ultimately unsuccessful as the High Court held that the Attorney-General's duty to report s 7 was not amenable to judicial review and that the Act once passed into law was entitled to the protection of s 4 of the Bill of Rights.

8 However, I would note that neither section makes explicit reference to property interests; that s 9 appears in a section headed "Life and Security of the Person" (on this view use of s 9 in, say, Proceeds of Crime Act or Fisheries Act forfeiture proceedings might be inappropriate) and that the White Paper contains no suggestion that either section is designed to protect property interests per se (though the Commentary to the then Draft Article 20(1) – the present s 9 – does refer to the possibility of a Court reviewing "any type or mode" of punishment).

9 Of course, in relation to the point concerning the application of s 21 to private litigation there would be the additional obstacle of the public law nature of *Baigent* Bill of Rights liability.

Monarchy and democracy

Bogdanor's case is that far from being merely the ceremonial part of the constitution identified by Bagehot a century ago, the constitutional monarchy is central to the efficient functioning of the unwritten constitution. "Constitutional monarchy is a form of government that ensures, not conservatism, but legitimacy .... The fundamental case for constitutional monarchy is that, under it, the head of state is free of party ties".

He thinks the monarchy has always found the capacity to modernise. The imperial monarchy of Victoria was transformed into the family monarchy of the two most recent Georges. ...

Bogdanor's thesis is that monarchy and democracy are natural allies, stability and change finely balanced to the benefit of all. It is therefore ironic that today both monarchy and politics face more pressure for change, and more popular scepticism, than at any time this century.

David Miliband
The Guardian Weekly
7 January 1996

Correspondence

Dear Sir,

I write to express a view on the New Zealand Royal Honours system. The Prime Minister's Advisory Committee on the Royal Honours system. has forwarded its Report to the Prime Minister. The Committee's general recommendations were that there be an honours system which rewards merit and achievement, that this be a royal honours system, and that a new balance should be struck in the system with more emphasis on its New Zealand characteristics. These general recommendations are based on broad support as reflected in the submissions to the Committee, and are to be welcomed.

The main specific recommendation which the Committee put forward for achieving its general objectives was to replace a broad range of British state honours with a New Zealand Order of Merit of five levels without titles, which would exist alongside existing New Zealand awards such as the Order of New Zealand and the Queen's Service Order. I believe that the Committee's specific recommendation is disappointing, and does not achieve its stated aims.

First, the proposed non-titled Order of Merit does not provide adequate reward for those of outstanding merit and achievement, nor does it adequately reflect a royal honours system. Further, as the Committee itself acknowledged, the titles of Sir and Dame are old and well-known, they illustrate part of our heritage, and the public distinction they confer on those who hold them is great. The point about titles is that, far from casting an elitist shadow over others, they add a lustre to the honours system. They allow the people of New Zealand to share in a public and ongoing way the honour and achievement of people like Dame Kiri Te Kanawa and Sir Edmund Hillary. The Committee's recommendation that such recognition be achieved through the use of initials after the name and the wearing of badges, lacks credibility. It cannot seriously be expected that such post-nominals or badges would be used except on the most formal of occasions. The challenge of an egalitarian society like New Zealand is to provide equal *opportunities* for all while providing incentives and abundant rewards for those who achieve. It would be unfortunate if our new honours system was characterised by blandness or seen to fall within what the Committee referred to as the "tall poppy syndrome".

Secondly, the new Order of Merit does not appear to strike a proper balance with more emphasis on New Zealand characteristics. The proposed five tiers of the Order are Principal Companion, Distinguished Companion, Companion, Officer and Member. There are no Maori or other indigenous titles or names proposed, and the new system appears to be a pale reflection of the present system of Companions, Officers and Members of the British Empire. By contrast, as the Committee itself acknowledged, the titles of Sir and Dame are part of a tradition which many in New Zealand valued, and the Committee noted that its ultimate recommendation against those titles was made with a sense of regret.

I would therefore suggest that the honours committee go back to the drawing board and refashion its specific proposals in the light of its admirable overall goals. It could achieve the retention of titles in an unproblematic way: as occurred with the enlarged Order of Australia in 1976, there could be a new first level of Knight and Dame in the Order of New Zealand. Alternatively, the first level of the New Zealand Order of Merit could be that of Knight and Dame instead of Principal Companion. Further, it could think of imaginative ways of incorporating our indigenous heritage in an explicit way.

I believe that New Zealand deserves an honours system that is characterised, not by bland modernity, but by generous recognition of outstanding achievement and the reflection of our rich and colourful heritage.

Professor Peter Spiller

Publisher's Announcement

EDITORSHIP OF THE NEW ZEALAND LAW JOURNAL

Butterworths of New Zealand Ltd, publishers of *The New Zealand Law Journal*, wish to announce a change in the Editorship of *The New Zealand Law Journal*.

Mr P J Downey OBE is retiring as Editor of *The New Zealand Law Journal*, and will be succeeded by Mr Bernard Robertson.

Mr Pat Downey's distinguished tenure as Editor of *The New Zealand Law Journal* commenced in May 1983, and its conclusion with publication of the March 1996 issue will have spanned nearly thirteen years.

During much of this time Mr Downey was also Legal Publishing Director of Butterworths until retiring from that position in 1992 by which time he was busily engaged as the founding General Editor of *The Laws of New Zealand*.

We feel sure readers of *The New Zealand Law Journal* will join with the publishers in thanking Mr Downey for a long and distinguished contribution to legal journalism in this country, and wishing him well in retirement from this position, although his involvement with Butterworths and *The Laws of New Zealand* will continue. ❑

Canada hosts Commonwealth Law Conference

By Elizabeth Cordeau

Vancouver, Canada – Renewed focus on human rights – the changing role of the Commonwealth, the global marketplace – the legal system in today's society – effective law firm marketing – these are some of the issues that members of the Commonwealth legal community, lawyers, academics and Judges, will discuss as they meet harbourside at the 11th Commonwealth Law Conference and Canadian Bar Association Annual Meeting (August 25-29, 1996) at the Vancouver Trade & Convention Centre. This thought-provoking international legal forum is a joint meeting of the Commonwealth Lawyers Association and the Canadian Bar Association.

3,000 participants

Over 3,000 delegates and guests from across Canada and around the Commonwealth are expected to participate in this five-day event. Issues range from international trading blocks and child labour to public law, judicial independence and law practice management. The conference will feature over 150 speakers from 52 Commonwealth countries. Keynote addresses will be given by broadcaster, historian and author, **Michael Ignatieff**; management consultant and author, **Dr Edward De Bono**; **Penelope Leach**, one of the world's leading authorities on child development and **Stephen Owen, QC**, Deputy Attorney-General of British Columbia and international consultant on development and human rights issues.

Practice in the '90s

The series of plenary and panel sessions is sure to provide new insights on the role of the Commonwealth and its lawyers in today's challenging environment. The conference has six program streams; business across borders, human rights, public law and private rights, the legal profession, law and practice, and law practice management. "The recent developments in Nigeria, South Africa and Hong Kong are extremely important on the world stage, as well as to the legal profession", says **Kathleen Keating**, Conference Co-Chair. "We wanted to give delegates an opportunity to learn more about what's happening in those countries, as well as focus on the practical aspects of law as a profession and a business. We're very pleased with the quality of topics and speakers we have lined up in achieving this objective".

Concurrent special interest programs include meetings hosted by the Commonwealth Association of Armed Forces Lawyers, The Chartered Institute of Arbitrators, the Association of Legislative Counsel, the Commonwealth Law Reform Agencies and the Canadian Corporate Counsel Association. All special interest sessions are open to all delegates. Rounding out the conference activities is a Trade Show featuring the latest in law-related technology and services, including the popular Internet Zone, which will be fully on-line during the meeting. A business centre will connect delegates with home or office throughout the conference.

Spectacular Vancouver

The 11th Commonwealth Law Conference takes place in one of the world's most beautiful cities – Vancouver, British Columbia. Conference organisers have developed social and guest programs that are suited to the solo business traveller as well as the vacationing family. Post-conference tours to Alaska, the Canadian West Coast and the Canadian Rockies are available to delegates who want to combine vacation time with conference time, and a number of day trips throughout southern British Columbia are planned for the week. Whether it's Victoria, Whistler, golfing or fishing – there's something for everyone's taste and budget. A complete children's program is also available for travelling families; at a cost of up to Cdn$285, depending on the program, children will be entertained to their heart's content for four days.

Conference special events include opening ceremonies at General Motors Place, Vancouver's newest state-of-the-art recreation facility. Also on the program are law firm receptions, home hosted dinners with members of the Vancouver Bar, young lawyers' events and a magnificent closing dinner on the shores overlooking Vancouver's skyline and Stanley Park. The city's multi-cultural flavour and friendly, west-coast style will add sparkle to your visit and give you a chance to relax and play tourist in a spectacular setting.

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The meeting is open to all lawyers. Members of the Commonwealth Lawyers Association or Canadian Bar Association can take advantage of the Early Bird Registration deadline (February 28, 1996) and pay Cdn$605. After that, the rate increases to Cdn$712. Guests fees are Cdn$332. **Canadian Airlines** and **Air Canada** are official travel sponsors and offer discounts to Conference travel partners, Carlson-Wagonlit Travel or Blair Travel UK. Quote code 19167 (Canadian Airlines) or code CV960039 (Air Canada) for special prices.

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Reclaiming economic, social and cultural rights:
The Bangalore Declaration and Plan of Action

By Paul Hunt, Senior Lecturer in Law, University of Waikato

In this article Mr Paul Hunt describes the declaration and plan of action adopted at a Conference in Bangalore to give direct local effect to the Conventions on economic, social and cultural rights. This was in respect of a meeting of the International Commission of Jurists. The author acknowledges the implementation of these rights raises conceptual, ideological and practical issues that are not amenable to swift solution, but he thinks that the provisions of the Bangalore Declaration are steps in the right direction.

One of the most striking features of contemporary human rights is the juridical marginalisation of economic, social and cultural rights. At both the national and international levels, human rights standards and procedures focus on civil and political rights, while economic, social and cultural rights tend to be absent or peripheral.

In different national jurisdictions, a variety of institutions, procedures, and constitutional arrangements – free and fair elections, Bills of Rights, habeas corpus, Human Rights Commissions, Ombudsmen and so on – has evolved over generations to promote and protect civil and political rights. Although these devices remain inadequate and flawed, they are considerably more widespread and sophisticated than legal arrangements designed to implement economic, social and cultural rights.

The New Zealand Bill of Rights Act, for example, is replete with civil and political rights, such as freedom of expression, the right to a fair trial and the prohibition against torture. Broadly speaking, economic, social and cultural rights, such as the rights to education and health services, are noticeable by their absence. Sir Geoffrey Palmer, the main architect of the legislation, was always firmly against their inclusion.[1]

Of course, there are jurisdictions in which human rights devices extend to both categories of rights. But, in practice, even these exceptional cases devote most of their resources to civil and political rights.

New Zealand's Human Rights Commission is a case in point. Its statutory mandate embraces civil, political, economic, social and cultural rights. In recent years, it has taken the initiative in relation to some economic, social and cultural rights issues, such as its report of May 1995 on income and asset testing of elderly people.[2] While the Commission deserves credit for initiatives of this type, there is no doubt that most of its resources continue to be devoted to issues more closely associated with civil and political rights.

The same discrepancy between the two categories of rights is also apparent at the international level. Although only in its infancy, international human rights law is evolving procedures which, in some circumstances, effectively protect civil and political rights. Consider the numerous cases heard by the UN Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights. By contrast, comparable international procedures for the legal protection of economic, social and cultural rights are almost non-existent.[3]

The discrepancy between these two groups of rights (sometimes tagged first-generation and second-generation rights) is not only institutional and procedural, but normative. In relation to civil and political rights, a considerable body of jurisprudence has evolved which elaborates what these rights mean. Although incomplete and sometimes inconsistent, the jurisprudence is detailed. Much is known, for example, about the contemporary meaning of the right to a fair trial.

The same cannot be said for most economic, social and cultural rights. In many cases, their normative content remains obscure. We know relatively little, for example, about the content of the rights to work, health and shelter.

From one point of view, this second-class treatment of second-generation rights is surprising. After all, the founding document of international human rights – the Universal Declaration of Human Rights – makes no distinction between the two categories of rights. Further, the United Nations has repeatedly affirmed that all the rights enshrined in the international Bill of Rights are interdependent and indivisible.[4] Nonetheless, the different treatment afforded to the two categories of rights persists.

Moreover, the institutional and jurisprudential neglect of economic, social and cultural rights is especially grave today as economic policies throughout the world expose vulnerable communities and individuals to increasing hardship and exploitation.

Against this background, the International Commission of Jurists (ICJ) recently organised a conference on "Economic, Social and Cultural Rights and the Role of Lawyers" in Bangalore, India.

The ICJ is one of the world's most reputable human rights non-governmental organisations, ranking alongside Amnesty International. It is committed to the rule of law, safeguarding human rights and upholding the independence of Judges and lawyers.

Based in Geneva, the ICJ has some seventy national groups – including the New Zealand Section of the ICJ, headed by Justice A A T Ellis. The ICJ's status derives from this national membership, the ability of its secretariat led by Adama Dieng and the prestige of its forty or so Commissioners – all eminent jurists selected from around the world. Their number include Sir Robin Cooke, Justice Arthur Chaskalson (President of South Africa's Constitutional Court), Justice Enoch Dumbutshena (former Chief Justice of Zimbabwe), Justice Claire L'Heureux-Dube (Judge of the Supreme Court of Canada), Justice Michael Kirby (President of the NSW Court of Appeal), Dato Param Cumaraswamy (formerly President of LAWASIA) – all of whom participated in Bangalore – and other distinguished jurists.

One of the ICJ's distinctive features is its broad human rights mandate. Unlike Amnesty, the ICJ's brief is not confined to certain civil and political rights issues – torture, fair trials, prisoners of conscience, the death penalty and so on. Its mandate extends to all human rights, including economic, social and cultural rights. Historically, the ICJ has tended to devote more resources to civil and political rights than economic, social and cultural rights. Nonetheless, from time to time it has worked on this neglected category of rights – take, for example, its contribution to the Limburg Principles which were promulgated by a meeting of independent human rights experts in 1986.[5] Thus, the ICJ is one of very few well-established human rights Non-Governmental Organisations equipped to organise a high-level international conference on economic, social and cultural rights.

Opened by India's Chief Justice and Minister of State for External Affairs, the meeting was attended by over one hundred lawyers from around the world. Three days later, after the presentation of numerous papers and lengthy debate, the conference closed by adopting the Bangalore Declaration and Plan of Action.[6]

Although not legally binding, the Declaration and Plan of Action is an historic document. For the first time, an international meeting of lawyers acknowledged, and determined to redress, their profession's traditional neglect of an integral component of the international Bill of Rights.

According to the Declaration:

> equal attention and urgent consideration should be given to the implementation, promotion and protection of economic, social and cultural rights as well as civil and political rights.

It deplores the "professional failure and indifference which has often marked, in the past, the response of lawyers" to economic, social and cultural rights. The Declaration concludes:

> The lack of involvement of lawyers in the realisation of more than half of the field of human rights, vital to humanity, is no longer acceptable.

With a more practical focus, the Plan of Action sketches what can be done by lawyers to ensure economic, social and cultural rights become part of mainstream human rights promotion and protection. The suggestions come in three categories: individual, national and international. What follows are a few illustrations from the numerous suggestions set out in the Plan of Action.

Some illustrations

Individuals are urged to ensure that their professional organisations include economic, social and cultural rights within their human rights strategies. The mandate of the New Zealand Law Society's Human Rights Subcommittee, for example, is confined to "civil and political rights (those areas being areas in which lawyers have a special interest and expertise)". Given the Plan of Action, it would seem timely to revisit this limitation on the Subcommittee's mandate which reflects the traditional human rights approach rejected in Bangalore.[7]

At the national level, the Plan of Action suggests increased sensitisation to the obligations enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Shortly, New Zealand will submit its second report to the treaty-body charged with monitoring ICESCR. Occurring only once every five years, this report provides an opportunity to raise awareness about the government's international obligations concerning economic, social and cultural rights.

The Plan also suggests that economic, social and cultural rights could be formulated "in precise and justiciable terms" rendering them "susceptible to legal enforcement". Judges are encouraged "to domestically apply international human rights norms in the field of economic, social and cultural rights".[8] It is acknowledged that the implementation of economic, social and cultural rights demands both "legal skills and imagination".

At the international level, the Plan of Action urges the application of pressure to secure more Asian/Pacific ratifications of ICESCR. This region has a notoriously poor record in relation to ratification of international human rights instruments, including ICESCR. The Plan also advocates renewed efforts towards the adoption of an Optional Protocol to ICESCR which would provide a complaints mechanism for alleged violations of the Covenant.[9] Finally, recognising the wider international economic context, the Plan urges that more attention should be given to issues such as the amount of resources devoted to arms purchases and debt repayments.

Of course, the Declaration and Plan of Action is not going to end the juridical marginalisation of economic, social and cultural rights. The implementation of second-generation rights raises conceptual, ideological and practical issues which are not amenable to swift solution. Nonetheless, Bangalore is a step in the right direction. The Declaration and Plan of Action confirms that the juridical difficulties traditionally associated with the implementation of economic, social and cultural rights have been overstated.[10] It encourages us to address the "other" half of human rights. ❑

1 Note, however, that the final report of the Select Committee responsible for examining the Bill of Rights proposal favoured the inclusion of economic, social and cultural rights as non-enforceable entitlements. *Final Report of the Justice and Law Reform Committee on the White Paper on a Bill of Rights for New Zealand* (1988) I.8C, at 4.

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Will minority shareholders be protected by the Companies Act 1993 in a takeover?

By Susan Watson, Lecturer in Commercial Law, University of Auckland

The author of this article is hesitant, not to say suspicious of the view that the new Companies Act 1993 will provide greater protection for minority shareholders in a takeover situation. She recognises that the new legislation allows small shareholders greater opportunities to monitor company operations. She sees the adopting of the Takeovers Code however as providing better protection for minority shareholders.

One of the "givens" in the takeover law reform debate which has "bedeviled both governments and [their] advisers for far too long"[1] seems to be that the new Companies Act increases the range of remedies available to beleaguered minority shareholders in a takeover. But is that in fact the case? This article examines the possible effect of the adoption of the traditional remedies into the legislation and then looks at the effect of the 1993 Companies Act on the use of defensive tactics by incumbent management in a takeover and the protections the Act provides for minority shareholders against a hostile bidder.[2]

Common law actions

Within the common law, there are three types of action possible for disaffected shareholders. These are a personal action, a representative action or a derivative action. A personal action can only be brought when there is a wrong done to the personal rights of a shareholder. An example would be when the shareholder's vote in a meeting is not recorded or a dividend is declared but not paid to the member. A representative action is when one member sues on behalf of all others who have suffered the same wrong. It is a collective personal action. The final type of action is a derivative action. Here, a wrong is done to the company. An individual shareholder sues on behalf of the company because wrongdoers are in control of the company and are preventing it suing in its own name. These three common law actions, set out in the Companies Act 1993, form the basis of significant actions available to shareholders.

It is possible for a current or former shareholder of the company to bring a personal action against a director for breach of a duty owed to him or her as a shareholder. To avoid the floodgates being opened to actions of this type, common law has always restricted these actions to wrongs which infringe on the personal rights of the shareholder as an individual, as opposed to his or her rights as one of the shareholders of the company. At common law, personal actions have been permitted on a case by case basis. There is no real pattern in the cases unless you argue first that they protect the more substantive rights of shareholders and, secondly, that they do not allow a remedy for consequential losses to the minority shareholders, but only deliberate deprivation of individual shareholders' rights.

The approach is confirmed in the new Act, where it is said that a personal action cannot be brought by shareholders to recover any loss in the form of a reduction in the value of the shares in the company or a failure of the shares to increase in value by reason only of a loss suffered or gain forgone by the company (s 169(2). The Act clarifies to some extent the position on personal actions by making it clear what breaches by directors will *not* be grounds for these actions (s 169(3). Those are the duty of directors to act in good faith and in the best interest of the company, the duty to exercise powers for a proper purpose, the prohibition on reckless trading, the

continued from p 68

2 *Report on Income and Asset Testing of Elderly People Requiring Permanent Residential Disability Care* (Human Rights Commission, 1995).

3 Mention should be made of the exceptional case of the ILO. Effectively, its international mechanisms are designed to protect economic, social and cultural rights. There are, however, significant differences between the ILO's mechanisms and international procedures for the protection of civil and political rights.

4 For an example of the use of "interdependent and indivisible" in a United Nations instrument, see article 6(2) of the Declaration on the Right to Development, adopted by the General Assembly in 1986.

5 For the Limburg Principles see *Human Rights Quarterly* 9 (1987) 122-135.

6 The Bangalore Declaration and Plan of Action is due to be published in a forthcoming issue of the ICJ Review.

7 As a member of the Subcommittee, I acknowledge my responsibility for the mandate as currently drawn.

8 In this regard, see Dr Rodney Harrison, "Domestic Enforcement of International Human Rights in Courts of Law: Some Recent Development" [1994] NZLJ 256 and Paul Hunt and Professor Margaret Bedggood, "The International Law Dimension of Human Rights in New Zealand" in *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*, (eds Grant Huscroft and Paul Rishworth, Brooker's, 1995).

9 Such a proposal first came before the UN in the early 1990s; see *The Right to Complain about Economic, Social and Cultural Rights* (eds Fons Coomans and Fried van Hoof, SIM, 1995).

10 See Paul Hunt, "Reclaiming Economic, Social and Cultural Rights" (1993) 1 *Waikato Law Review* 141.

duty not to agree to a company incurring certain objections and the restrictions on the use of company information.

Certain duties are stated to be owed specifically to shareholders as individuals. These are the duties of directors to supervise the share register; to disclose interests and to disclose share dealings.

The personal actions available to shareholders are not limited to these duties alone. To whom particular duties not specifically dealt with in the section are owed is likely to be decided by our Courts on an incremental basis with regard being given to existing common law cases. It will also be possible for shareholders to bring personal actions against the *company* for breaches of duties owed to them by the company (s 171). The nature of these duties is not stated but would include failure by the company to pay a dividend to a shareholder. The duty to act in accordance with the Act or constitution is not specifically stated to be a duty owed to the company or to individual shareholders. This can be interpreted as a deliberate omission by the legislature, allowing the Courts to determine in each individual case whether the clause in a company's constitution or the section in the Act should involve a duty owed by directors or the company to the shareholders as a group or as individuals. Laudable though this flexibility is, it does create an area of uncertainty in the law. It may also create a potentially wider range of personal remedies for shareholders for breaches of duties owed to them than existed at common law.

As stated above, a representative action is a collective personal action. Such actions are authorised under the Act where, in circumstances where a group of shareholders have the same or substantially the same interest in relation to the subject matter, the Court may appoint one shareholder to represent all the shareholders against the directors or the company (s 173). The personal and representative actions could be of use to shareholders where there is specific wrongdoing by the incumbent management in the company. Again, though, with the possible exception of s 169, there is no expansion of the common law remedies which have been of limited use to minority shareholders in the past.

Derivative actions

A derivative action is an action brought by one shareholder on behalf of the company for a wrong done to the company by the directors. The necessity for actions to be brought in this manner arose from the established common law rule in *Foss v Harbottle* ((1843) 2 Hare 461) where it was said in the case of a wrong done to a company, the company is the proper plaintiff and not individual shareholders.

Under the Companies Act 1993, it is still possible for certain actions of directors to be ratified by shareholders (s 177(1)). Such ratification must be done in the same manner as the power may be exercised. Therefore, if an action taken by directors should have been carried out with the approval of shareholders with 75 per cent of the voting power in the company, the action will only be validated if shareholders holding 75 per cent of the shares later vote in favour of the action at a meeting of the company. If the exercise of the power is validly ratified, it is deemed a proper and valid exercise of that power by the company (s 177(2)).

The consequence of an unrestricted right of ratification would be that wrongdoing directors could escape liability for their breach of duty to the company by preventing the company from suing. If the controlling directors hold a majority of shares, they could commit a wrongful act and then use their majority of shares to ratify that act. As one way of preventing such action, commonly but inaccurately termed fraud on the minority, common law has this century permitted derivative actions. The Companies Act 1993 permits such actions in s 165, by giving the Court the power to grant leave to a shareholder or a director to bring proceedings in the name and on behalf of the company (s 165(1)(9a)).

These actions can be brought if the company does not intend to bring the action and it is in the interests of the company that the conduct of the proceedings not be left in the hands of the shareholders as a whole or the directors (s 165(3)). This would commonly occur where directors themselves are in breach of a duty owed to the company.

Grounds for a derivative action also exist under subs 78(7), where the company gives financial assistance for the purchase of its shares without the consent of all shareholders, under subs 71(7) where the company redeems shares without the consent of all shareholders and under subs 61(8), where the company buys back its own shares without the consent of all shareholders. All these are possible defensive tactics in a hostile takeover and confirmation that a derivative action could be of assistance to minority shareholders. Except for clarification of the law, there is again no advance on or expansion of the common law position.

Even if a complaining shareholder is successful in persuading a Court that grounds for a derivative action exist, he or she may not be given leave to proceed. The Court, when determining whether leave should be given, must have regard to the likelihood of the proceedings succeeding, the costs of the proceedings in relation to the relief likely to be obtained, any action already taken by the company to obtain relief and the interests of the company in the proceedings being commenced, continued, defended or discontinued (s 165(2)).

The Court must also be satisfied the company does not intend to diligently carry on (or not carry on) the proceedings and that it is in the interests of the company that the conduct of the proceedings should not be left to the directors, or to the shareholders as a whole (s 165(3)).

Court interpretations

The interpretation by the Courts of s 165 was seen recently in *Vrij v Boyle* (1995) 7 NZCLC 260,844 which has the dubious distinction of being the *second* reported case on the Companies Act 1993. It involved a director and majority (55/45) shareholder of a plastics company setting up another plastics company. The minority shareholder applied for leave from the Court to bring a derivative action on behalf of the company for breach of fiduciary duty under the s 165 equivalent of the amended 1955 Act. In assessing whether the proceedings were likely to succeed, Fisher J applied *Smith v Croft* [1986] 1 WLR 580, saying the appropriate test when deciding to bring a claim was that which would be exercised by a prudent business person in the conduct of his or her own affairs.

> Such a decision requires one to consider such matters as the amount at stake, the apparent strength of the claim, likely costs and the prospect of executing any judgment (p 260,847).

The Judge decided the action fulfilled the requirements in s 165 and gave leave for the action to be brought.

A shareholder can only bring or intervene in any proceedings on behalf of the company in the manner set out in s 165 (s 165(6)). Once leave is granted, the Court may make any order it thinks fit in relation to the proceedings, including an order requiring the company or the directors to provide information or assistance in relation to the proceedings (s 167(c)). The reasonable costs of the derivative action must be met by the company (s 166). No proceedings brought by a shareholder or a director with the leave of the Court under s 168 can be compromised, settled or withdrawn without the approval of the Court (s 168).

In some respects, the new Act permits a wider range of derivative actions than those available at common law. For example, usually a negligent action which benefited the majority directors did not give rise to a derivative action.

In the English case of *Pavlides v Jensen* [1965] Ch 565, a shareholder complained that a corporate asset had been sold at a gross undervalue. He alleged negligence on the part of the directors but no bad faith. It was held that negligent acts could be ratified by the majority at a Meeting. That case can be contrasted with another English case *Daniels v Daniels* [1978] Ch 406 which has been applied in New Zealand in *Willems v Stars Corporation Ltd* (1990) 5 NZCLC 66,113. Here directors negligently sold a company asset to one of their number at an undervalue. He resold the asset at a considerable profit. Templeman J allowed a derivative action and said

> To put up with foolish directors is one thing: to put up with directors who are so foolish that they make a profit of £115,000 odd at the expense of the company is something entirely different.

So, self-serving negligence with corresponding benefits to the negligent directors could not be ratified. As a general rule, though, negligent acts could be ratified.

Objective standard of reasonable director

In the Companies Act 1993, the directors' duty of care is stated to be owed to the company. This duty in s 137 imposes the objective standard of a reasonable director on all directors. Thus, the directors in *Pavlides*, as well as the director in *Daniels* would find themselves unsuccessful defendants in derivative actions brought by the company. Again, because the duty to comply with the Act and the constitution is not specifically stated to be owed to the company or shareholders as individuals, there is no room for the Courts to grant leave to bring derivative actions for these breaches. There is no reason, though, to think that the Courts will do anything but build on existing common law grounds, meaning that there is little true expansion of shareholders' remedies in respect of the traditional common law actions.

Defending a takeover

It has been said the best form of takeover defence for a company is for the incumbent management to run that company well. However, sometimes, because of its assets or position in the market even an effectively-run company may become a target. When directors of a company become aware the company is subject to a takeover bid, they must decide whether to acquiesce in or resist the takeover. If resistance is the course decided upon, strategies known as takeover defences may be used. Whether these strategies are legitimate will depend on the Court's interpretation of the 1993 Companies Act.[3]

It is difficult to envisage circumstances where defensive tactics without any other motivating factor would be fair to the company. Directors would however argue entrenching the existing management is in the interests of the company. If such a view is genuinely held it is likely to continue to be considered legitimate by our Courts. However, even though directors are charged in the new legislation only to act as they subjectively consider to be in the interest of the company (s 131), such powers must be exercised for a proper purpose (s 133). This obligation has been adopted from the common law doctrine without further explanation which is unsatisfactory given that, if directors' duties under the 1993 Act were not intended to be a Code, they were certainly intended to be a clearly understood set of obligations. On the face of it, the requirement to use powers for a proper purpose has no meaning. It is impossible to deduce a meaning without recourse to the common law.

The "proper purpose" doctrine developed in the 1960s as a judicial response to cases like *Smith v Fawcett* [1942] 1 All ER 542 where blatant misuse of directors' powers could not be deemed invalid because the directors in question acted in what they genuinely considered to be good faith. The Courts held first, in *Hogg v Cramphorn* [1967] Ch 254 and then in the Privy Council in *Howard v Ampol* [1974] AC 821, in cases which involved the use of takeover defences that, even if directors honestly believed their actions were in the best interests of the company as a whole, it was necessary and possible for the Court to assess objectively what the purpose of a power was, and from there decide whether that purpose had been the substantial purpose of the directors. The case is persuasive in New Zealand but was distinguished by Prichard J in *Baigent* (1984) 2 NZCLC 99,122 on the basis that the case did not involve a bona fide takeover bid. The requirement to exercise powers for a proper purpose, therefore, in theory at least, acts as a considerable check on the use by directors of unwarranted defensive tactics. Although in theory a powerful weapon against directors, s 133 is mere adoption of the common law duty and does not therefore expand the arsenal of weapons available to a disaffected minority shareholder.

It seems clear that if, in defending a takeover, the director genuinely believes the takeover is not in the interests of the company, provided powers are used for a proper purpose, defensive tactics are justified even if they damage individual shareholders. Shareholders could, however, apply for an injunction under s 164, arguing that by not acting in good faith or for a proper purpose, the directors are breaching the provisions of the 1993 Act.

A "golden handshake" or "golden parachute" clause is written into a director's contract with a company obliging the company to provide a high severance payment or other compensation to a director if he or she loses his or her position in the company. The rationale behind the tactic is that the company will be less vulnerable to potential takeover if bidders are aware of the high contingent liability of the company to existing directors.

In the Companies Act 1993, the Board of Directors has the authority to authorise payment of remuneration or other benefits to directors (s 161(1)(a)). Before authorising payment, the Board must be satisfied the proposed remuneration is fair to the company. Directors voting in favour of the remuneration proposed must sign a certificate to be entered in the interest register of the company stating *why* they consider the proposal is fair to the company (s 161(4)).

When authorising a "golden handshake" clause in a director's remuneration contract, directors voting in favour would need to set out reasons in the directors' certificate why authorising such a payment is not only in the interest of the company but is a legitimate use of the power to compensate directors for their services. To justify the payments, the Board might state it is impossible to secure the services of a qualified competent director without some compensation for possible loss of office and argue that redundancy payments are normal business practice. In authorising such payments, though, the Board would need to be aware the payments may be open to challenge with disaffected shareholders able to argue a golden handshake is a reward for failure in a business climate increasingly moving away from the concept of large redundancy payments. If a golden handshake payment is made in circumstances which could not reasonably be considered fair to the company, the recipient director must repay it to the company (s 161(5)). Whether, in the future, such payments are considered legitimate will probably depend on whether Courts use their increased powers to interfere in the operation of companies, or whether the Courts continue their reluctance to question the business judgment of directors operating a company.

Issue of shares

Another defensive tactic a company may use is the issue of shares either before or after it becomes aware of the presence of a hostile bidder. Under the 1993 Act, the range of tactics of this type available has potentially widened. For example, with the abolition of the prohibition on share buybacks for companies registered or reregistered under the 1993 Act, it is possible for target companies to issue shares to a friendly third party with an agreement to repurchase those shares at a later date.

To thwart a takeover, a target company may issue shares or assist a friendly third party to acquire its shares. The new Act prohibits the disclosure or use of confidential company information by directors or employees except for the purposes of the company or as required by law. Directors can, however, disclose or use confidential information if they are first authorised to do so by the Board, and the disclosure or use is unlikely to prejudice the company (s 145). Directors could argue the use of a "white knight" is for the benefit of the company. However the Securities Amendment Act 1988, by penalising insider trading, restricts companies' ability to use this defence. In *Baigent* (1984) 2 NZCLC 99,122 which involved use of a white knight defence, Prichard J held there was not a bona fide takeover bid, presumably within the 1963 amendment. *Howard Smith*[4] therefore did not apply. This decision has been criticised by, among others, Farrar[5] who says the use of a defensive tactic meant the proper purpose doctrines should apply.

"Poison Pill" is the colloquial name given for a share issue by a company with special rights designed to be exercisable if the company is taken over. Like golden handshakes, it is intended a "poison pill" will make a company a less attractive takeover target. Under the 1993 Act, companies are given the broad power to issue shares after incorporation at any time, to any person and in any number the Board thinks fit (s 42). This right is ordinarily subject to the constitution, although any restriction in the constitution can be overcome by a special resolution passed by each interest group affected by the issue (ss 116, 117). The section does not have to be complied with if the shares are issued fully paid up from reserves of the company or are a consolidated division or subdivision of a class. If the consent of all shareholders and entitled persons is obtained, it also does not apply (s 107).

Directors of a Board resolving to make an issue must sign a certificate stating that, in the opinion of the Board, the consideration for and terms of the issue are fair and reasonable to the company and shareholders (s 47). Directors of a target company voting in favour of a share issue for defensive purposes may be able to argue it is reasonable and fair to the shareholders and company that it be protected from a takeover by the issue of shares on special terms. They may be able to argue that there is another motivating factor behind the share issue. However, it is clear that if the only purpose of the issue is considered by the Courts to be to defend against a takeover, this will be considered an improper use of the power. If it is one of several purposes, the Courts may consider this a matter of business judgment for directors.

For companies listed on the Stock Exchange, there are currently restrictions on the issue of shares. Securities cannot be issued without shareholder approval (Rule 5.3.2.). For example, shares may not be issued with super voting rights (Rule 5.4.1(b)) or except in limited numbers, to directors or persons connected with directors (Rule 5.3.2(h)).

Share buybacks

With the abolition of the capital maintenance rules, greenmail, where a company purchases its own shares to avert a takeover, may become a legitimate takeover defence. Before purchase of the shares in the company, the Board of the target company must comply with a complicated procedure. It must

- be authorised in its constitution to acquire its own shares (s 59(1)).
- be satisfied and remain satisfied that after the repurchase the company will satisfy the solvency test. All directors voting in favour must sign a certificate stating this (s 52(2), s 52(1)).
- ensure the buyback is consented to by all shareholders in writing (s 60(1)(b)(i)) **OR** that it is expressly permitted by the constitution (s 60(1)(b)(ii))

If the selective buyback is expressly permitted by the constitution, but not consented to by all shareholders, the Board must have resolved the acquisition is of benefit to remaining shareholders, the terms of the offer and consideration are fair and reasonable to the remaining shareholders and have set out the reasons for the directors' conclusion in full in the resolution (s 61(1), s 61(2)). Directors voting in favour must sign a certificate setting out their reasons and shareholders must, between ten working days and twelve months before the offer is made, have been sent a disclosure document giving details of the offer, resolution, nature and extent of any director's interest and necessary explanation (s 61(3), s 61(5), s 61(6), s 62).

- resolve the acquisition is in the best interests of the company, its terms and consideration are fair to the company and it is not aware of any information not disclosed to shareholders material to an assessment of the value of the shares and as a result of which the terms of the offer and consideration offered are unfair. Directors in favour must sign a certificate (s 60(3)).

It is possible for companies to avoid complying with the procedural requirements for share buybacks if all entitled persons agree in writing to the arrangement. Surprisingly, directors are not required to disclose any interest they may have in the purchase of the shares from the hostile bidder in these circumstances. Nor are directors required to resolve the purchase is in the best interests of the company or remaining shareholders. Shareholders do in these circumstances, though, retain the right to withdraw their consent at any time (s 107). Nevertheless the unanimous assent system is clearly the simplest method for a company to repurchase its own shares from a hostile bidder. It is however clearly questionable whether the lack of protection is in the interests of all shareholders, since they may never become aware of all information connected with the repurchase. Practically, the unanimous assent provision can only be used in smaller or closely held companies with only a small number of shareholders. The legislature may have decided extra protections are not needed in these companies.

For companies listed on the Stock Exchange, the procedure for purchasing selected shares differs depending on whether the company is purchasing more than five percent of its own shares. Since a takeover bid can only be of threat to the company if the bidder holds a substantial number of shares, usually the more lengthy procedure would be used.

The Board must resolve, setting out reasons in full, that the acquisition is in the best interest of the company, its terms and consideration are fair and reasonable and that it is unaware of any non public information which is material to any assessment of the value of the shares (s 63(1)). Directors voting in favour of the resolution must sign a certificate confirming the matters contained in it (s 63(3)). Before the company makes a stand on the market for the shares not more than ten days but less than twelve months must have elapsed since all shareholders were sent a copy of the resolution and a disclosure document giving details of the offer (s 63(7), s 64).

Share buybacks are potentially an important takeover defence mechanism for a company subject to a takeover. The converse is that there is further potential for the rights of minority shareholders to be ignored or the value of their shares to be reduced. Directors risk personal liability if a Court later decides a share buyback was not in the interests of the company; however, the most common scenario for a share buyback will be the company buying the shares from a hostile bidder at a premium. In most cases, directors may not have much difficulty in persuading the Courts that a repurchase to prevent a hostile takeover is in the best interests of the company. This is despite the fact that the premium paid will have led to a reduction in the net asset backing of all shares.

Refusal to register transfer

Not all takeover defences are subtle. Directors may simply refuse to register any transfer of shares to a hostile bidder.[6] Under the new Act, directors refusing registration must follow a specified procedure (s 84(4)). The Board must within 30 days of receipt of the share transfer, pass a resolution setting out in full the reason why registration is being refused (s 84(4)). Notice of the resolution including the reasons for refusal must be sent to the transferor and transferee within five working days of its approval by the Board (s 84(4)(b)).

Major transactions

Again, any use of this power by directors would need to be for a proper purpose. It is clearly questionable whether repelling a hostile takeover bid is a valid use of the power unless additional compelling reasons can be demonstrated which show it is not desirable for the company that the bidder take control.

The reason behind a takeover bid is often gaining possession of assets held by the target company. If those assets are sold by the target company, then the motivating factor disappears. For companies registered under the 1993 Act, any sale of assets equivalent in value to half or more of the existing value of the assets of the company is a major transaction. The consent of shareholders by special resolution is required before major transactions with dissenting shareholders having buyout rights.

As well as defensive tactics being used by the incumbent management of a company to resist a takeover, small shareholders will also be affected if the takeover bid is successful and a hostile bidder obtains control of the company. The new management will probably intend to move the company in another direction. The bidder would not have troubled to take over the company if it did not believe the true value of the company was not reflected in its current share price. The bidder may believe assets have a greater value than shown; it may believe the company is positioned to move into a lucrative market; it may believe control of the company will enhance its overall business.

The positions of shareholders wishing to move out of listed and unlisted companies are completely different. In both cases, small shareholders must find a purchaser willing to invest money in a business over which they will have minimal control. In unlisted companies, though, the ability of the purchaser to resell those shares if he or she wants to move out of the company is limited whereas a small shareholder in a listed company may sell his or her holding on the Stock Exchange at any time. Of course, even here the small shareholder may lose because the price he or she obtains for the shares may be lower than their value before the takeover.

Major transaction limitation

One of the main inroads into the powers of directors in the 1993 Act is the requirement they obtain at least 75 per cent of the votes of shareholders before entering into a major transaction. Deals which on the face appear relatively insignificant could well fall within the broad ambit of the definition of major transaction (s 129). An agreement to sell more than half the company's assets will be a major transaction. So will an obligation a company enters into where the potential liability could exceed half the value of the company's assets. Thus, a corporate raider who acquires a company and sells off a large asset may be entering into a major transaction (s 129). The transaction must be approved by special resolution. Unless stated to be a higher number, 75 per cent of the votes of shareholders in a meeting (s 106) will comprise a special resolution. If instead the resolution is made in writing it will, unless a higher percentage of votes is specified, require the approval of 75 per cent of voting shares *and* three quarters of shareholders (s 122).

The additional requirement of 75 per cent shareholder approval by numbers will prevent a corporate raider with a high percentage of shares in the company selling off a major asset without holding a meeting of the company. It will not, though, prevent the raider holding the meeting and using its majority of shares to vote in favour of the proposal. It will also not require the new management to obtain shareholder approval for a series of sales of large assets which do not comprise half the assets of the company, unless the Courts decide that the sales as a group are a major transaction. Nor will it prevent directors calling a meeting and later ratifying the major transaction. Nevertheless, the inclusion of s 129, which is considered by some commentators to be an unwarranted inroad into the powers of directors, could potentially provide significant protection for minority shareholders.

Commonly, after a change of management in a company, there is a change of direction in the company. If the business of the company is set out in its constitution, this may necessitate an alteration of the constitution. Also, after a takeover, the new Board may want to give itself increased powers. Here, also the constitution will need to be altered by special resolution (s 32). As with a major transaction this can either be done in a meeting, or in writing (s 122) with the added safeguard of the requirement for approval of three-quarters of shareholders. If the alteration of the constitution varies the rights of classes of shareholders, a special resolution will be required by each interest group involved (s 117). An interest group here will be a group of shareholders whose affected rights are identical and whose rights are affected in the same way by the alterations (s 116). It is however also possible for the company to later ratify an unauthorised alteration to the constitution under s 177.

If a shareholder has consistently opposed a major transaction of the company which the company proceeds with, he or she may be able to compel the company to buy him or her out (s 110). Similarly, if the company by means of a special resolution, adopts a constitution or alters or revokes its existing constitution where the change imposes or removes a restriction on the activities of the company, that shareholder has buy-out rights. Shareholders also have buyout rights if class rights attaching to shares are altered. No application to the Court needs to be made to exercise the buyout rights. Such rights could be compared with the common law right, illustrated in cases such as *Re German Date*, (1882) 20 Ch D 169 where individuals were not compelled to remain shareholders in companies which had lost their substratum. There, the companies were liquidated; under the 1993 Act the company may continue to operate, but disaffected individuals could divest themselves of their shares (s 110).

To be able to compel the company to buy his or her shares, the shareholder must follow a specified procedure laid down in the Act. The shareholder must have opposed the exercise of the power by casting all his or her shares against the exercise of the power, either in the meeting of the company or in the resolution in lieu of the meeting (s 110(c) and s 118(c), 118(d)).

The problems with the buyout rights are, first, their limited scope and, secondly, again they must be an action taken after the event. It may be quite possible, through wrong doing by directors that the company has become insolvent and cannot be compelled to buy a shareholder's shares.

Prejudicial conduct

The disadvantage with all statutory prohibitions is that their effectiveness depends upon directors and companies complying with the legislation. If the company fails to obtain the consent of shareholders in the manner set out in the Act before entering into a major transaction, or if the company alters its constitution other than in accordance with the Act, a shareholder may apply to the Courts for relief. If the company does not comply with the major transaction requirements, the shareholders are deemed unfairly prejudiced (s 175(1)) and automatically have a cause of action under s 174. In addition, if the new Board has issued new shares, (s 175(1)(a), s 175(1)9b)) paid dividends, (s 175 (1)(c)) acquired its own shares (s 175(1)(d), s 175(1)(e), s 175 (1)(f), s 175(1)(g)), provided financial assistance to shareholders to acquire its shares (s 175(1)(h)), (s 175(1)(i)), (s 175(1)(j)), or altered shareholder rights (s 175(1)(k)) other than in accordance with the procedures set out in the Act, this is deemed unfairly prejudicial and automatically gives rise to a cause of action.

The breaches deemed to be prejudicial conduct are not limited to those listed in the section, so it is likely actions for breaches other than those held to be automatically-made grounds will be possible. Where the constitution has been wrongly altered, or where other actions are taken by new management which give cause for concern, the shareholder would need to convince the Court the alteration was unfairly prejudicial or, alternatively, oppressive or unfairly discriminatory. If Courts continue to interpret these terms in the same manner as the equivalent provision in the 1955 Act (s 209), to show oppression the complaining shareholder would need to demonstrate he or she was "being constrained to submit to something which is unfair ... as the result of some overbearing act or attitude on the part of the oppressor" (Buckley LJ in *Re Jermyn Street Baths* [1970] 3 All ER 374 cited with approval by Ongley J in *Re HW Thomas Ltd* (1983) 1 NZCLC 98,659 at 98,663). In the takeover situation, the shareholders are more likely to succeed if they can show the alteration is unjustly detrimental to them.

Remedies for small shareholders

If the complaining shareholders succeed under s 174, there are a variety of remedies available to the Courts (s 174(2)). These include orders requiring the company to acquire the shareholders' shares or pay compensation to shareholders. The Court can also make orders regulating the future of the company. The problem with this remedy is first, most Boards would not be foolish enough to fail to comply with procedural requirements but instead will circumvent them, and secondly, as pointed out by one critic of our current takeovers regime, the provisions give protection "after the horse has bolted".[5] For example, the major assets may well be irrecoverable and the company insolvent by the time the action goes through the Courts.

It is for that reason that the most valuable remedy available to small shareholders under the new Act may prove to be the rights of shareholders to apply for an injunction if the company or its directors engage in conduct which contravenes the 1993 Act, the Financial Reporting Act 1993 or the constitution of the company (s 164). Sometimes, though, it is not action but inaction by directors which causes damage to the company. The 1993 Act recognises this by also giving shareholders the right to bring an action requiring the directors or the company to act (s 170, s 172). These are actions which the company is required to take under its constitution, the Act or the Financial Reporting Act 1993.

Shareholders also have the right at any time to make a written request to the company for information held by the company (s 178). A shareholder can in addition inspect the company records (s 216). Shareholders can review the management of the company by the Board, with shareholders being given a reasonable opportunity to discuss and comment on the management at company meetings. However, unless the constitution provides otherwise, any resolution passed relating to the management of the company is not binding on the directors (s 128).

All these rights increase the ability of small shareholders to scrutinise management performance. It is thus more likely any wrongdoing by directors will be detected by shareholders. They require, though, minority shareholders to be proactive, whereas most shareholders in listed companies are notoriously apathetic. In the future small shareholders may recognise the necessity of protecting themselves. It is possible for them to act effectively as a group. After the asset-stripping raid on London Pacific in late 1988, where small shareholders were left holding valueless shares, the same bidder tried a similar asset-stripping raid on Euronational Corporation Ltd. However, vigilant directors protecting minority shareholder interests prevented the raid (Hunt, "Sham Loan Deal Set Up to Strip Company of $31 m", in *National Business Review*, 26 March, 1993, 7).

Conclusion

Under the 1993 Act regime, it is more possible for small shareholders to monitor the operation of companies in which they hold shares. In reality, it is really the rights of shareholders rather than the remedies of shareholders which have been expanded under the new Act. Difficulties with the 1993 Act remedies continue from the common law and from previous legislation. Unless shareholders are alerted to the actions by the bidders and obtain an injunction, any action brought by them will be too late. Even the requirement that the company purchase dissenting members' shares requires the prerequisite of consistent opposition, (where the reality is that most shareholders of listed companies are trusting in management). Listed company directors will need to consider the consequences of a large base of enquiring and critical shareholders.

Unless the business of a company is enshrined in its constitution or unless a change in business leads to a major transaction proceeding, there still remains little a small shareholder can do to maintain the status quo in a company after a takeover. For companies listed on the share market, shareholders can sell their shares. Even here, though, cautious investors may in light of new management, be unwilling to pay a price for those shares which their asset backing or direction prior to the takeover indicates they should have been worth.

The merits or otherwise of New Zealand adopting the Takeovers Code have been thoroughly debated. There is little room for compromise or consensus given the split represents a "major split in economic, public policy and legal opinion".[6] As this article shows though, it is erroneous for opponents of the Code to argue that minority shareholders are given increased protection under the Companies Act 1993. ❑

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1 The Minister of Justice, Mr Graham, TCL 27 April 1993.

2 The article does not discuss the effect of the New Zealand Stock Exchange Listing Rules. Although the Rules attempt to regulate corporate governance of listed companies, they contractually apply only to the company itself and may be difficult to enforce.

3 The curbs on defensive tactics for listed companies in the new Stock Exchange Rules are not discussed.

4 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821.

5 Farrar "Business Judgment and Defensive Tactics" in *Farrar (ed), Takeovers – Institutional Investors and the Modernization of Corporate Laws* (1993) Oxford University Press, 378.

6 Due to the new Stock Exchange Rules, this tactic may not be available to directors of listed companies.

7 Mr Gaynor in report in *The New Zealand Herald*, 18 April 1994.

8 Hodder, TCL, 27 April 1993.

Sex in the USA

That our popular art forms have become so obsessed with sex has turned the USA into a nation of hobbledehoys; as if grown people don't have more vital concerns, such as taxes, inflation, dirty politics, earning a living, getting an education, or keeping out of jail.

Anita Loos
Kiss Hollywood Goodbye (1974)

Correspondence

Dear Sir,

Fast ferries decision [1995] NZLJ 363

Over the holiday period I have had the opportunity of catching up on the November issue of *The New Zealand Law Journal* and have read with interest the article beginning on p 363 by counsel for Tranz Rail Limited in the Fast Ferries case.

The article illustrates vividly the twin dangers to counsel of hyperbole and venturing into areas where they (or perhaps their clients) have no or insufficient knowledge. I refer to the quotation in the third column on p 363 which appears to be from counsel's address to the Tribunal and which claims:

> The same recessional tune would leave us with coal smoke belching, counter-sterned ferries like the *Tamahine*.

This would indeed be a remarkable tune as the *Tamahine*'s boilers were designed from her building to burn oil fuel, she had no bunkers for coal and it would have been a physical impossibility for her to "belch coal smoke".

Whatever the legal qualifications of the authors of the article, they clearly are completely lacking in any knowledge of New Zealand maritime history.

Their statement in the second column on the same page that Tory Channel and Queen Charlotte Sound have been used as a shipping route for ferries and other commercial vessels "at least since 1925 (when the first regular ferry operations commenced)" is also questionable. While the *Tamahine* was the first vessel specifically built for this route, it had been used for at least 30 years previously by vessels of the Union Steam Ship Company and other operators, usually in conjunction with onward services to Nelson and West Coast, South Island ports.

I appreciate that this letter has little to do with legalities but such flights of fancy as quoted cannot be allowed to pass unchallenged.

W A Laxon

Reply to Mr Laxon's letter:

Fair enough. The *Tamahine* blew oil smuts, not coal smoke. That point apart, my submission to the Tribunal holds (and indeed is not challenged by Mr Laxon).

1925 was the year in which the first regular, direct and dedicated Wellington-Picton ferry operation commenced. I was aware of the previous irregular or combined services, my source being McIntyre, Field & Quinn, *Cook's Wild Strait* (1983) 78-79. (The former page, incidentally, has a photograph of the *Tamahine* blowing smoke from her twin stacks). It was for that reason that I used the words "at least" in the passage quoted.

One all. At least Mr Laxon's criticisms are confined to nautical history. Evidently he has no problem with legal propositions we expounded.

J Stephen Kós

Televising Court proceedings

The basic argument for letting television into the Courts can be simply stated. Trials are of public importance and of public interest. The public has a right to be clearly informed about what happens in Court. Television is now the main source of news for most of the people. If the public is not allowed to see on their television what goes on in Court, how in the late-20th century can justice be seen to be done?

This argument has won significant support. In 1989, a working party of barristers, led by Mr Jonathan Caplan QC and set up by the Bar Council, unanimously concluded that the televising of English Courts should be permitted on an experimental basis ....

It was clear (says the Caplan report) that the material used would invariably be recorded and edited. "Very rarely" would there be "live coverage". If that reassures you, it does not reassure me. I have no doubt that television would press for "live" coverage of sensational trials and that this would happen more and more, not "very rarely".

If most trial coverage is to be edited, could television give a fair and accurate report? What would we see in "edited news reports"? We would see clipped from the day's recordings the most newsworthy moments, the juicy bits, a witness breaking down, a gruesome exhibit, a clash between counsel.

Editing, of course, would be professional, skilful and dramatic (as in the highlights of a Test match when every ball either takes a wicket or goes for a boundary). But would we ever see a cross-examination in full, or get a fair impression of evidence given by a witness? Not, I think, if we only have edited highlights. But if Court coverage is "live" and continuous, as in the O J trial, then the camera with its mass audience is liable to turn the judicial process into entertainment ....

Parliament historically is a theatre, as well as a workshop. It is right for television to transmit the theatre of Parliament with its humour and its drama of debate. But a Court of law is for calm and dispassionate enquiry. The liberty of an individual may be at stake. A criminal trial is not for mass entertainment.

Sir Robin Day
The Spectator
30 December 1995