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Restorative injustice

Beware any qualifier in front of the word "justice". The latest is "restorative". We have recently had at least two District Court Judges actively promoting the concept, a book by Jim Consedine and a discussion paper issued by the Ministry of Justice. All lawyers should be interested in this, since the principles apply just as much to civil litigation as to criminal process. These proposals could be the thin end of a very thick wedge. The discussion paper's proposals by and large fall into three categories: those which are so vague as to be incapable of discussion ("services for victims and offenders"); secondly those, such as general crime prevention policies, street-lighting, neighbourhood watch and so on which are obviously sensible and can be justified on the basis of philosophies other than "restorative justice"; thirdly those which stem directly from the philosophy of restorative justice and which strike at the foundations of the Rule of Law.

The discussion paper says that "restorative justice" will be impeded if non-restorative elements are allowed to remain in the legal system. Furthermore the difficulties the paper raises in discussion are all in the nature of implementational problems and never objections to the basic philosophy. It is important therefore to attend not to the detailed recommendations but to that underlying philosophy.

This philosophy is explained in the first few pages of the discussion paper. It starts from a denial of the rational actor explanation of crime in favour of a view that criminals are victims of institutionalised injustice and that society must therefore change. (Alan Hawkins for example?) It proceeds to deny the importance of requirements of definition of actus reus and mens rea in favour of simple regard to the harm done. The reasons why this entails a dangerous attack on individual autonomy were well explained by H L A Hart a generation ago, but his work is not referred to. Once we remove the requirements to prove that a previously prohibited act was done with a defined mental state, we are on the road to communal interference with those who simply do not "fit in".

There are also some strange distinctions drawn. One is between the "community" and the "state". Since neither of these terms have any definition in our system it is hard to see how to distinguish them. Why, for example, are the police agents of the state not the community? Another is the distinction between "order", the maintenance of which is the state's responsibility and "peace", the preservation of which is a task for the "community". But what is "peace" if not simply the absence of disorder? Any reply to that question, any attempt to give the concept "peace" some positive content, is simply an attempt to prescribe how others are to live.

As the philosophy in the discussion paper is rather potted, we turn for further enlightenment to *Restorative Justice: Healing the Effects of Crime* by Jim Consedine and published by Ploughshares Publications in 1995. This book is written by one who has observed at first hand the human wreckage that drifts through prison but this experience has caused him (and some Judges) to forget that when you are up to your neck in alligators the object is to get out of the swamp. Few pretend that the prison system will do anything much for the people in it. Most rehabilitationists folded their tents and stole away a generation ago. The point of the criminal justice system is to prevent people from committing crime. Its successes are the people who are subject to just the same pressures as offenders but who do not go to prison and who do not even commit crime. Since these people are not visible they are forgotten.

Restorative Justice reads like a book on alternative medicine. Lots of anecdotes, a few statistics from obscure sources (if the story told on pp 23 and 24 is true why is no official source cited?) a Thomas Cook style tour of a number of agrarian cultures and some dodgy arguments. The Cook's tour sounds jolly good until one comes to matters one knows something about. This occurs periodically with oddments, such as the suggestion that early mediaeval Irish culture was mainly self-sufficient with trade only in luxuries. This commonplace view of early societies is a fallacy derived from the fact that only foreign artefacts survived to be found by archaeologists while commodities such as salt and grain of differing types and qualities did not. Modern archaeologists accept that their predecessors significantly under-estimated the extent and importance of trade.

For serious consideration of the standard of argument let us examine in detail pp 154-155 on the concept of "sanctuary". Here the author should be on strong ground, one expects. But one finds sequences of sentences such as:

> The concept of sanctuary was so compelling that it was recognised in Roman law, medieval common law and English common law. In the 1600s every church in England could be a sanctuary. During the 17th century the whole of the North American continent was seen as a sanctuary from the political and religious persecution in Europe.

Never mind that sanctuary was not so much recognised by the common law as demanded by the Church as a recognition of its secular power, nor that it was in general abolished in 1624 having been severely restricted beforehand. Notice how we have slipped from using the word "sanctuary" in a technical and legal sense in the first two sentences to a colloquial sense in the third. The rest of the page proceeds to use "sanctuary" in its colloquial use.

Then we have an argument built on the idea that we are morally allowed to break into a burning house to rescue children (why not adults?) even though entering will cause damage to property which is against the law. In fact s 293(2) Crimes Act 1961 provides that nothing done constitutes criminal damage unless it is done without lawful justification or excuse; saving life and limb is one of the most obvious lawful excuses. This fallacious argument is used to lump "immigration laws and laws of property" together as laws we are entitled to disobey when we feel like it. But immigration laws and laws of property are not of the same order at all. The law of property is part of the evolved law which exists to protect individual freedom. Immigration laws are products of legislation which restrict individual freedom in pursuit of social goals, something to which, in general, Consedine is not averse. (By the way, Consedine accepts the public choice/Diceyan/Hayekian characterisation of legislation, see p 22, but piously hopes that this can somehow be avoided in "Parliament in a true democracy".)

Amongst the statistics we are presented with are the usual comparisons of English speaking countries with European ones and of the United States with Japan. The European countries and Japan have relatively low imprisonment rates. What is never mentioned on these occasions is that these other cultures have very high levels of population surveillance. Everyone has an identity card and changes of address are registered with the police. In English speaking countries this is not the case. Where one chooses to live is no concern of the police. The United States has a particularly mobile and unregulated population. The result is that all alternatives to imprisonment are bedeviled by high absconding rates, a problem which is never mentioned in either the book or the discussion paper.

The end of all this is suggestions such as "Community Group Conferences" in the case of adult offenders. Since it is acknowledged that the community as a whole cannot take part in these events "representatives" will have to do so. These will presumably be the usual people who are insufficiently occupied creating wealth to have time on their hands. At these conferences the fate of offenders and victims will be decided. (Would you like to be an Asian shopkeeper in an area plagued with shoplifting attending these conferences?) It is even suggested that there should be methods by which victims can take their complaints to such structures without ever going to the police or Courts. Once it became the norm that that should be done two developments can be predicted: in some areas the weak would be at the mercy of whoever most ruthlessly terrorised the area, in other places criminals, or rather, those someone had complained about, would be subjected to intrusive and onerous interference. The discussion paper suggests that "safeguards" would be necessary at least to prevent the latter, but opposition to reform is frequently defused with "safeguards" that are subsequently dismantled when they are seen to impede the grand design.

Consedine's political agenda becomes clear when we are told that a study by one Tony Short at the University of South Australia had identified the Employment Contracts Act as a major contributor to New Zealand having the worst crime rate in the western world. Not bad going for an Act only in force two years at the time of the study. This claim can only be described as breathtaking drivel.

The political line is backed up with references to "equality". This does not mean equality before the law, or equal treatment, but equality of outcome. There is the usual weaseling about "just" and "unjust" societies – weaseling because, as usual, Consedine is unspecific about how our present society is "unjust" or what a "just" society would consist of. Insofar as it is possible to speak of a just society, it is surely a society composed of just individuals. These are people who abstain from coercion of others, tell the truth, keep their promises and so forth. In such a society outcomes will be unequal for the simple reason that people will, entirely voluntarily, pay more for some peoples' promises and activities than for others (compare Jonah Lomu and the Editor of this *Journal* for example). Not only is it unclear in what sense such a society is "unjust", it is especially unclear how Courts and Judges are expected to contribute to pursuing equality of outcome. Is it by awarding suits to the poorer litigant? The simple truth is that equality of outcome cannot be attained by the equal application of abstract general rules. The philosophy of restorative justice is incompatible any meaningful definition of the Rule of Law.

At some point we have to stop and ask why we have "law" and why we have highly paid Judges in Courts, rather than just referring all our disputes, civil and criminal, to Peoples' Committees as Consedine comes close to suggesting. The answer surely is that we expect such disputes to be decided in accordance with pre-existing law by individuals insulated from the current whims and prejudices of the local population. Only in this way can we plan our lives reasonably confident of what we have to do to avoid being interfered with by others. Combine Community Group Conferences for adults, triggered by informal complaints procedures, with erosion of requirements for mens rea and actus reus and you have a recipe for the destruction of individual freedom.

Perhaps the most dangerous aspect of Restorative Justice is that it aims not only to affect behaviour but also to alter attitudes. The idea is to get into the head and to create a model citizen (whose model?). A generation ago this was to be achieved by psychological procedures and mind-bending drugs (remember *A Clockwork Orange*?). Now it is to be by the offender (or politically incorrect) voluntarily taking part in self-critical and expiating procedures. It is not enough that you obey the rules. You must love Big Brother. ❑

Letters

Dear Sir,

The recent ennoblement of Sir Robin Cooke raises some interesting questions as to the intended purpose of the peerage. It may have been that the ennoblement of Sir Robin Cooke was intended purely as an honour, as Mr Bolger suggested. Alternatively however, it may have been to enable him to undertake legislative or appellate work in the House of Lords. The latter however is an unlikely proposition since the function of a peer relates to the British judicial and legislative structure. There has been, moreover, no example of the bestowing of a peerage on a New Zealander since the early 1970s, and that was to a Governor-General who was essentially British. Lord Porritt and his predecessors retired to Britain, and took their seats in a legislative capacity in the House of Lords.

Although Sir Robin Cooke may not be a Lord of Appeal in Ordinary, that is no bar to his undertaking a judicial role in the House. All peers in theory have the right to vote, although the last non-Judge to do so was Lord Denman in *Bradlaugh v Clarke* (1883) 8 App Cas 354, HL. Since the admission of specially ennobled law lords into the House of Lords in the late nineteenth century, appeals to the House of Lords have been heard before at least three judicial qualified lords.

The Lords of Appeal in Ordinary are appointed from the various British judicial benches, and comprise the principal working body of the House. However, other members of the House of Lords who have held high judicial office may hear appeals, and these are known as Lords of Appeal (a style to be carefully distinguished from that of Lords of Appeal *in Ordinary*).

There appears to be no good reason for Sir Robin Cooke to be created a peer unless it is to allow him to sit in the Appellate Committees of the House of Lords. He could continue sit in the Judicial Committee of the Privy Council even after retiring from the Court of Appeal. Most importantly, peerages have never been given on the advice of New Zealand ministers, and have no official precedence here. Indeed, in 1976 an article in *The New Zealand Law Journal* argued that hereditary titles have no legal status in New Zealand.

The conclusion must be that Sir Robin Cooke was made a peer solely to enable him to sit in the Appellate Committees of the House of Lords, since it would not have been to enable him to take part in the legislative functions of the House. The ennoblement of Sir Robin cannot have been intended purely as an honour, because peerages are not bestowed by the Crown in New Zealand.

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Notes for contributors

Contributions to *The New Zealand Law Journal* are welcomed. Publication of contributions will be speeded if the following points are observed:

All contributions: should be accompanied by a disk copy. All standard DOS, Windows and Macintosh formats can be read. It will be possible soon to submit articles by electronic mail.

Letters: the Editor is keen to receive letters relating to articles in the *Journal*, or to topical matters of interest to the profession. Letters should deal with one matter only and be brief.

Articles: the maximum length for an article is 5,000 words, but the shorter the article the more likely it is to be published quickly. Articles dealing with a single recent case, legislative proposal or enactment or with the affairs of the profession are particularly sought. Footnotes should not be used. References should be in the text; other material should be included in the text or left out.

Recent Admissions

Barristers and Solicitors

Perham BWJ	Wellington	19 December 1995	Swift DW	Wellington	19 December 1995
Perry JM	Auckland	6 December 1995	Tait BC	Wellington	19 December 1995
Phibbs MM	Wellington	19 December 1995	Telford S-J	Christchurch	18 December 1995
Pilditch AF	Wellington	19 December 1995	Thomas MJ	Napier	2 November 1995
Prendergast MJ	Wellington	19 December 1995	Thomson TG	Wellington	19 December 1995
Quayle SM	Wellington	19 December 1995	Tirikatene R	Wellington	19 December 1995
Rewi-Wetini AJ	Wellington	19 December 1995	Tribe PY	Wellington	19 December 1995
Rinsma SL	Christchurch	18 December 1995	van Keulen PJ	Christchurch	18 December 1995
Salmond J	Wellington	19 December 1995	Verboeket PCR	Wellington	19 December 1995
Shannon CJ	Christchurch	18 December 1995	Walton EJ	Christchurch	18 December 1995
Silva TM	Christchurch	18 December 1995	Wear MG	Wellington	19 December 1995
Soldera JN	Wellington	19 December 1995	Weston SJ	Wellington	19 December 1995
Sommerville MN	Wellington	19 December 1995	Willberg CS	Wellington	19 December 1995
Speir AH	Wellington	19 December 1995	Wilson VM	Wellington	19 December 1995
Stewart TD	Auckland	15 December 1995	Woods MR	Wellington	19 December 1995

Partnership letterheads – again

P R H Webb, Professor Emeritus, University of Auckland

Does your firm still list the partners on its letterhead? If so, retiring partners should be alert to the problems this could cause.

It might have been thought that the embarrassments capable of arising because a partner's name has remained on his or her former firm's letterhead after retiring from that firm were finally laid to rest by the recent decisions in *Pont v Wilkins*, noted by the writer in [1993] NZLJ 154 and reported in (1992) 4 NZBLC 102,894 and *Hammond v Hamlin*, noted by the writer in [1993] NZLJ 349. This is not, alas, the case.

The recent, as yet unreported, decision of the Court of Appeal of Victoria in *Hamerhaven Pty Ltd v Ogge* (10304/1993; 27 October 1995; Winneke P, Ormiston and Callaway JJA; both Winneke P and Ormiston JA agreed with the reasoning of Callaway JA) once again illustrates the plight of a retired partner in this context and points out some additional refinements which need to be heeded.

The facts were these: the appellant (H) was trustee of a trust established by S, an elderly farmer, when he sold two properties. In July 1986, A, the senior partner in a firm then called Hargrave, Ogge and O'Donnell, S's solicitors, wrote a letter to him offering to invest those funds on mortgage. The funds were invested by the firm. $A105,000 remained invested on 20 February 1989, when S requested the firm, now called Hargrave Ogge, to withdraw that amount from the current mortgage when repayment fell due on 20 May 1989. S died on 1 May 1989. When the funds were repaid on 22 May 1989 they were transferred at call to a company (CFA) associated with the firm of Hargrave Ogge. CFA was then in financial difficulties and later went into liquidation. The funds were lost. In November 1991, H instituted proceedings against parties who included all the persons who were said to be partners in the firm in May 1989. Ogge (O) was included.

At first instance it was held that O had retired as a partner, that H had had notice thereof in 1988 and that judgment must be given for O. Judgment was, however, given against four of the other defendants. The matter of O's liability was not considered. H appealed against the judgment given for O.

"unless the letterhead or the body of a letter spells out in clear terms what alteration there has been to a partnership, a mere alteration of the names on a letterhead should not be treated as 'notice'"

The following questions arose:

(a) Had O ceased to be a member of the firm before the transfer to CFA?
(b) If he did so cease, had H had notice of that fact?
(c) Whether O was liable for the transfer of the funds to CFA even if issues (a) and (b) were resolved against H?

O admitted that he was a partner in July 1986 but asserted that he had retired "as and from" 30 June 1987.

The letterhead had previously listed six partners, including O. It continued to be used, briefly, in July 1987, but, by the end of that month, a new letterhead was in use, listing four partners followed by the word "Consultants" followed by the names of A and O. The evidence included eight letters on the letterhead showing O as a consultant, together with an epitome of extension of mortgage typed on that letterhead, sent either to S or H between 28 July and 23 December 1987. In 1988 A and O ceased to appear on the letterhead at all. The evidence included four letters on this new letterhead, together with an epitome of mortgage typed on that letterhead, sent either to H or S between 6 May 1988 and 22 February 1989. In the view of Callaway JA it was very improbable that the firm would have changed its letterhead in the above manner unless O had in fact ceased to be a partner.

Naturally the critical provision was the Victorian equivalent of s 39(1) of the Partnership Act 1908. This states that, when a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change. It was common ground that O was a member of the firm at least until 30 June 1987 and it was not suggested that he was other than an "apparent" member. It was common ground, too, that the word "notice" in that provision meant actual notice.

It further appeared that O had been one of the applicants for registration of the business name of "Hargrave Ogge" in 1986. That registration was in force from 8 September 1986 to 8 September 1989 in relation to persons including O. If, as he contended, he retired on 30 June 1987, he must have been in breach of the relevant Victorian legislation, as, indeed, Callaway JA observed. It further appeared that O was still an attorney for Ogge Partners Nominees Pty Ltd as late as 23 May 1988.

Callaway JA approached the matter thus:

> In *Elders Pastoral Ltd v Rutherfurd* (1990) 3 NZBLC para 99-201 at p 101,901, it was said of [s 39(1)] that a former partner must still be an apparent member after he or she retires. With respect, I do not think that this is the true construction of the section. In my opinion it means that a person who was an apparent member of the old firm, ie the firm as it existed before the change in its constitution, may for that reason alone continue to be treated as a member of the firm after the change in its constitution until the plaintiff has notice of the

change. "Apparent" is used only in relation to membership of the old firm and "still" relates to continuing membership not the appearance thereof. Accordingly [O's] allegation that he ceased to be a partner on 30th June 1987, even if it were true, would avail him nothing unless [H] had notice of the change. The wording and structure of [s 39(1)], the inappropriateness of requiring a plaintiff to prove that it does not have notice of retirement and the authority of the Canadian decision to which I have referred [viz *Huffman v Ross* [1926] SCR 5, at 6, [1926] 1 DLR 603 at 604, where it was said that "the onus did not rest on the plaintiff of establishing that he was unaware of the defendant's retirement". It rested on the defendant "to prove either direct notice thereof, or, at least, facts and circumstances from which knowledge of such retirement may fairly be inferred. A finding that the plaintiff had such knowledge was essential to the defence."] combine to show that [H's counsel's] submission concerning the burden of proof is correct at least with respect to the second issue. It does not follow that, if [O] could discharge that burden, he would also have to prove that he had in fact retired. If notice of retirement is received, the onus may be on the plaintiff to prove that the defendant is in fact still a partner, but it is unnecessary to decide that point because of the clear view I have formed on the first issue.

After reviewing the authorities (in particular, *Greenwood v Leather Shod Wheel Co* [1900] 1 Ch 421 at 436; *Huffman v Ross* [1926] SCR 5; [1926] 1 DLR 603 (Supreme Court of Canada); *Barfoot v Goodall* (1811) 3 Camp 147; *Hart v Alexander* (1837) 2 M & W 484; *Farrar v Deflinne* (1844) 1 Car & K 580; *Scarf v Jardine* (1882) 7 App Cas 345 (HL) at 349-350, 355-357, 359 and 363), Callaway JA stated that a plaintiff must either be notified of the change in the constitution or know that it has occurred so that the question was whether S was notified of the change or whether he was "told" that O had ceased to be a partner. If so, then H was "told" too. (The word "told" refers to Lord Blackburn's words in *Scarf v Jardine* (1882) 7 App Cas 345 (HL) at 357: "Mr Jardine being an old customer had a right to believe that [Mr Scarf's authority] continued until he was told that it was revoked.")

Callaway JA then continued:

> [S] was not a retired solicitor but an elderly farmer. It must not be too readily assumed that he would notice a change in the letterhead. He could not be expected to know the meaning of the word "Consultants", although that it not decisive because [O] was no longer listed among the members of the firm and, after 1987, did not appear on the letterhead at all. There were 12 letters and two epitomes, most of them received in the latter half of 1987, but that does not make the case like *Barfoot v Goodall* [(1811) 3 Camp 147]. In the first place, the testator there was drawing cheques on the firm, not simply receiving letters. Secondly, Lord Ellenborough meant not that it became the testator to notice the change on the cheques but that, having noticed that change, it became him to inquire. [S] was under no obligation to scrutinize the changing letterhead, and we should not be beguiled by the fact that this letterhead was comparatively simple and easy to read. Accordingly [H] did not have such notice as was required in the case of an existing client of the firm.

Judgment was accordingly given in favour of H against O as if O had been included with the four other defendants against whom judgment was given in the lower Court.

Ormiston JA had certain observations of significant interest to make on the matter of letterheads both specifically and generally. It is clear that they merit very close attention. He said:

> The critical matter argued was whether [H] had had notice of the change in the partnership Hargrave, Ogge and O'Donnell after [O] had retired from that firm in mid-1987. I agree with Callaway JA that "notice" in [s 39(1)] means actual notice. Clearly such notice might be given in a manner which does not require it to be formally notified but the steps taken by a retiring partner must make it unambiguously clear to the recipient of any notice that he or she is no longer a partner of the firm. For this purpose [O] relied upon changes in the letterhead on letters sent to [H] over the years from 1987 to the date of the misapplication of the moneys. I have been concerned that, by reason of the Court's decision on this appeal, it might be seen that an undue burden is imposed on those who wish to retire from partnerships. Nevertheless the reasoning of Callaway JA has entirely satisfied me that no notice of the required kind was given in this case. Nor, in my opinion, should the sending of altered letterheads be treated in any other case as constituting notice, unless attention is clearly drawn to the change.
>
> Those who have some familiarity with the professional relationships and other arrangements of partners in firms of solicitors or of other professional persons may think it relatively obvious that a partner has retired if his name no longer appears on the letterhead. What may lead Judges and lawyers to infer that there has been such a change may, however, not so clearly lead to others drawing the same inference. Even now what was the common practice of including every partner's name on the letterhead is going out of fashion as it did a considerable time ago with accountants and other professional persons.... Whatever the requirements of [the Business Names legislation] may be, it is becoming increasingly less frequent for professional persons to conduct business by way of partnership or for those who do so to set out the names of every partner on the letterhead. Even before it became common for solicitors' letterheads to contain no list of partners, there were many firms who set out only the local partners' names. Then there has been the habit of certain firms of solicitors to include on their letterhead the names of persons who are described as "consultants" and "associates". Those with legal training, and perhaps some others, may be aware that those persons are not partners but no such assumption should be made generally against persons without that knowledge.

continued on p 128

Priorities and floating charges

Ross Grantham, Department of Commercial Law, University of Auckland

Mr Grantham discusses an English case which deals with a common law matter of direct concern in New Zealand, namely the relative priority of floating charges.

The floating charge has long been the principal method of corporate secured lending. Employed by virtually all banks and institutional lenders, it is common to find companies with numerous floating charges secured over their assets. It is also commonplace, given the range and sensitivity of possible crystallising events, for a charge created later in time to crystallise ahead of an earlier floating charge. In such a case a crucial question is, upon what basis is priority to be determined? Is it by reference to the date of the creation of the floating charge, or is it by reference to the date of crystallisation? Although the question is of obvious practical significance and raises fundamental questions about the nature of the floating charge, there is surprisingly little authority on the point. What there is, tends to be ambiguous, while academic comment has tended to rely on these authorities with little or no analysis. It is surprising, therefore, that the decision in *Griffiths v Yorkshire Bank plc* [1994] 1 WLR 1427 has so far been overlooked. In holding that priority goes to the first to crystallise, Morritt J's judgment is not only direct authority, but authority that seems at odds with both commercial expectation and the weight of academic comment.

The facts of *Griffiths* were quite straightforward. In 1977 Skainmead Ltd (the "company") granted a debenture containing fixed and floating charges to Yorkshire Bank (the "Bank"). The debenture also contained a restrictive clause, under which the company agreed not to create any further charges ranking in priority to, or pari passu with, the Bank's charge. In 1985 a further debenture, also containing fixed and floating charges, was granted to APH Industries Ltd ("APH"), a shareholder in the company. The latter floating charge contained a provision for crystallisation by notice in writing. On the 23 June 1986 APH demanded repayment, and on the same day served a notice crystallising its charge. On the following day the Bank appointed the plaintiff as receiver.

Two points arose for decision. The first concerned the priority of the claims of chargeholders and preferential creditors to the company's assets. The English Companies Act 1985 subordinated the claims of floating chargeholders to preferential creditors. However, unlike the New Zealand provision, the Act seemed to provide for subordination only in limited circumstances – circumstances which may not have arisen on the particular facts. The second point concerned the priority of the claims of the two floating chargeholders. Although the Bank's charge had been created before that of APH, APH's had crystallised first. Thus, the issue was whether priority was fixed once and for all by the date of creation or whether a subsequent floating charge might gain priority by crystallising first.

Preferential claims

Most Commonwealth jurisdictions have adopted measures to protect preferential creditors from the all-embracing effects of the floating charge. In New Zealand this is achieved, in s 30 of the Receiverships Act 1993, by requiring the receiver to pay preferential claims in priority to the chargee. In England this protection takes a quite different, and arguably less effective, form. Section 196 of the English Companies Act 1985 provides that "where either a receiver is appointed on behalf of the holders of ... a floating charge, or possession is taken by or on behalf of those" chargeholders, the receiver is to pay preferential creditors out of assets coming into his hands in priority to the chargee. Previous English authority had sought to give effect to what was perceived to be a general legislative direction that preferential creditors were to rank ahead of floating charges. In *Griffiths*, however, Morritt J took a much narrower view of the Act. In his Lordship's view the Act provided for priority only where the first ranking charge was, as created, a floating charge *and* in respect of which a receiver had been appointed or possession had been taken by the chargee. This meant that if, as with APH's charge, crystallisation took place by notice, or if chargee did not take possession, the section was not invoked and the preferential creditors could not rank ahead of the charge. While Morritt J's decision will come as a further blow to preferential creditors and may be criticised as overly technical, the decision is clearly justifiable given the convoluted wording of the English Act. (Walters, "Priority of the Floating Charge in Corporate Insolvency" (1995) 16 *Company Lawyer* 291.)

Chargeholders

On the issue of the priority of floating charges there is surprisingly little direct authority. While it is clearly established that a subsequent fixed charge will prevail over an earlier floating charge (*Wheatley v Silkstone & Haigh Moor Canal Co* (1885) 29 ChD 715), and that a company cannot give two floating charges ranking pari passu without the consent of the first chargee (*Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800), the effect of crystallisation on priorities between floating charges is less clear.

Although not cited in *Griffiths*, there was some authority indicating that the time of crystallisation did not affect priorities between floating charges. In *Watson v Duff Morgan & Vermont (Holdings) Ltd* [1974] 1 WLR 450 Templeman J held that crystallisation did not affect the equitable interests of the chargees, as these were acquired before crystallisation. In *Re Household Pro-*

ducts Co Ltd and Federal Business Development Bank (1981) 124 DLR (3d) 325 Hughes J, in the Ontario Supreme Court, also held that the priorities were fixed at the date of creation, this time on the basis that subordination was inconsistent with the bargain between the company and the first chargee.

In Morritt J's view, however, priority between the floating charges was crucially affected by the timing of crystallisation:

> It is of the essence of a floating charge that proprietary interests having priority over any interest of the holder of the floating charge may be created. Thus, in this case, the company was free as a matter of property law to grant the second charge to APH. If the floating charge contained in the 1985 debenture crystallised then prima facie it would take priority over the floating charge contained in the 1977 debenture, which would not be lost on the subsequent crystallisation of the latter (p 1435).

The basis of this conclusion was that it

> was inherent in the floating charge granted by the 1977 debenture that the company might subsequently confer proprietary interests on others in assets subject to the floating charge to rank in prior to the bank's (p 1436).

Thus in contrast to the views expressed in *Re Household*, Morritt J felt that the Bank's charge necessarily contemplated the creation of charges ranking ahead of it. In so holding, Morritt J seemed to treat the issue of what may have been contemplated as an incident of the nature of the charge itself, rather than an inference about the parties' actual bargain. As such, the conclusion that the creation of prior interests was contemplated was not contradicted by the restrictive clause. In his Lordship's view, such clauses operated in contract only, and while the granting of a charge in priority might constitute a breach of the contract, it did not affect the nature of the property rights created.

The decision is clearly of great practical significance and will, no doubt, come as a shock to many lenders. Contrary to received wisdom, in the absence of specific priority arrangements, the date of creation of the floating charge no longer necessarily determines priority. *Griffiths* suggests that priority goes to the vigilant, the quick and those with hair-trigger crystallisation clauses. While to an extent these practical difficulties can

"in the rush to facilitate the conduct of business it must not be forgotten that the floating charge involves the interests not just of the immediate parties but also of third parties."

be overcome by careful drafting, the decision in addition raises two important issues of principle, the implications of which may be harder to avoid.

A floating chargee's interest

The question whether the chargee has an interest in the assets subject to the charge prior to crystallisation has proved divisive. On the one hand there is the view, usually associated with the implied licence theory, that as the floating charge is a present security it must confer an interest on the chargee, albeit one that is defeasible or conditional. Thus in *Julius Harper Ltd v FW Hagedorn & Sons* [1989] 2 NZLR 471, 492-493 Tipping J said a "floating charge creates an equitable proprietary interest in favour of the mortgagee ... The charge and interest so created is conditional and defeasible ..." On the other hand, there is the view, usually associated with the mortgage of future assets theory, that as there can be no equitable interest until particular assets are appropriated to the charge, an interest arises only on crystallisation. (Gough, "The Floating Charge: Traditional Themes and New Directions" in Finn (ed), *Equity and Commercial Relationships* (Law Book Co, 1987) p 239.)

Morritt J's judgment cuts across this debate. Although not fully articulated, it seems that for his Lordship, to ask whether the chargee does or does not hold an interest is to ask the wrong question. Rather, the question is one of priority between competing interests, or more precisely, the content of the competing interests. Thus, while his Lordship seemed to accept that the chargee may have an interest, that in itself was insufficient to preserve priority. When regard was had to the content of that interest it was clear that it could not prevail over other proprietary interests acquired before crystallisation, including a now crystallised floating charge. The floating chargee's interest was always liable to postponement to other interests, a defeasibility that was inherent in the very nature of the floating charge.

If this account of the nature of the chargee's interest is accepted, then although it may seem at odds with prevailing judicial and academic views, Morritt J's conclusion with respect to the effect of the restrictive clause may indeed follow. The juridical basis and efficacy of negative pledges and restrictive clauses has long been the subject of debate. While such clauses undoubtedly have contractual effect inter partes the real concern has been to establish whether the clause bound third parties. Where, as in *Griffiths*, the clause is contained in a charge, it has generally been assumed that the clause can affect third parties. "This stems from the fact that the floating charge, though ambulatory, is a present security, not a mere contractual right, so that restrictions contained in it will constitute an equity binding those who have notice of them." (Goode, *Legal Problems of Credit and Security*, 2nd ed, Sweet & Maxwell, 1988 p 85.) Such reasoning, however, is clearly dependent upon the chargee having an interest. It is this proprietary right, which the restrictive clause amplifies, that justifies the affect on third parties. If, however, the chargee has no interest, or one that is inherently susceptible to postponement, then the effect of the clause, as Morritt J suggests, would seem to be limited to that between the parties.

Contract or institution?

Morritt J's judgment is also significant for the view his Lordship takes of the nature of the floating charge. The trend in recent years has been to view the floating charge as a matter of contract, which the parties are free to shape and modify. It is this view that underpins decisions such as *Fire Nymph Products Ltd v Home Heating Centre Pty Ltd* (1988) 14 ACLR 274, where effect was given

to a retrospective crystallisation clause, and *Re New Bullas Trading Ltd* [1994] BCC 36, noted [1994] NZLJ 397. By contrast, Morritt J seems to view the floating charge as an institution, within the law of property, with definable, non-malleable features. Thus although the restrictive clause was surely the clearest possible evidence that the parties did not contemplate the creation of prior charges, this had no affect on the charge itself or on third parties. Its inherent nature or essence permitted the creation of prior interests and though the chargeholders might agree to subordinate the interests created, the parties were not competent to prevent those interests arising.

While such a view may now be a little unfashionable, in the rush to facilitate the conduct of business it must not be forgotten that the floating charge involves the interests not just of the immediate parties but also of third parties. So long as the law draws distinctions between institutions and permits third parties to be affected by the choice of institution, and so long as Parliament incorporates them in statutory regimes and assigns different consequences to them, the shape and content of these institutions cannot be entirely a matter for the parties.

Conclusion

From a practical point of view Morritt J's judgment may be undesirable. Faced with the prospect of losing even further ground in the priority stakes, floating charge holders may be forced to intervene at the slightest hint of trouble, effectively signing the death warrant of otherwise redeemable companies. Theoretically, however, the judgment is on stronger ground. The apparent paradox of the floating charge as both a present security, giving property rights, and as one that allows the chargor to deal with the assets, produced a rather sterile debate, racked by ambiguous metaphors and impossible distinctions between contractual rights, equitable interests and mere equities. The real issue has always been one of priority and the nature or content of the competing interests. In accepting this, Morritt J has put the law on a more rational foundation, and even if one disagrees with the answer his Lordship may at least have identified the right question. ❑

continued from p 125

> In other words, unless the letterhead or the body of a letter spells out in clear terms what alteration there has been to a partnership, a mere alteration of the names on a letterhead should not be treated as "notice" for the purpose of [s 39(1)]. No doubt this may cause some inconvenience, especially in the case of large firms with a constantly changing membership, but, even if the requirements of the Partnership Act have not been appreciated to the present, that is merely one of the penalties of seeking to practise as a member of a very large partnership. At all events the requirements are the same whether the partnership be great or small and notice is what the Partnership Act requires.

Although the Court's conclusion, strictly speaking, rendered it unnecessary to pass upon issue (c), the matter was nevertheless dealt with. It was argued that O was liable for the loss of the funds because the relevant contractual obligations were created in July 1986 and that H had not released O from the contract. The contract was, it was said, to be found in A's letter to S and the implied terms were to be discerned from the nature of the transaction and the professional relationship. It was further said to be of indefinite duration and to bind the persons who were partners at the time it was made. Callaway JA indicated that, had it been necessary to decide the matter, it was not open on the material to conclude that a contract of indefinite duration had been made with the existing members of the firm in July 1986. He viewed the letter as, basically, an invitation to invest the funds through the firm's mortgage practice and that it had been accepted.

"retiring partners and, indeed, the continuing partners, now need to exercise even more consummate care over the arrangements for notifying existing clients and customers unambiguously of the impending retirement and about the consequential modifying of the letterhead."

It is clear from this case that retiring partners and, indeed, the continuing partners, now need to exercise even more consummate care over the arrangements for notifying existing clients and customers unambiguously of the impending retirement and about the consequential modifying of the letterhead. Some circumspection, too, appears to be called for before a former partner is listed on the letterhead as a "Consultant". It would seem as well that careful thought needs to be given concerning the use of the words "Associate" or "Associates" on letterheads.

The writer would leave the reader to ponder this problem: suppose that X is a client of Messrs ABCD & Co, a law firm. An unambiguous circular is sent out to X and all other existing clients on 30 June 1995 announcing A's retirement from the firm on 31 August 1995. X received the circular, and therefore has been "told" of the retirement. Early in 1996, however, X receives several letters from ABCD & Co. The ABCD & Co letterhead on which these letters were written still shows A as a partner in the firm. May X now properly infer that, the circular notwithstanding, A must have decided to rejoin the firm as a partner? Or is he put upon inquiry, layman though he is? And what if X should happen to be a legally qualified person? ❑

[The writer wishes to express his best thanks and appreciation to Dr Keith L Fletcher, Reader in Law in the University of Queensland and the author of Higgins & Fletcher, *The Law of Partnership in Australia and New Zealand* (7th ed, 1996) for his kindness in providing him with a copy of the judgments in this case.]

Damages for litigation stress?

Christopher Chapman, barrister and solicitor of Wellington

Oliver Wendell Holmes said that the worst thing that could happen to anyone is that they become involved in a law suit. The Courts seem increasingly willing to compensate successful plaintiffs for the stress caused by their involvement.

Snodgrass v Hammington (unreported, CA254/93, 22 December 1995; Cooke P, Thomas and Penlington JJ) is a case about a residential property which was purchased by the Hammingtons allegedly in reliance on representations by the Snodgrasses and their agent as to the absence of subsidence problems. When the Hammingtons found evidence of modest subsidence, they complained to the Snodgrasses and ultimately cancelled the contract. The Snodgrasses sued for the loss on resale and the Hammingtons counterclaimed for the return of their deposit. In the High Court Ellis J found for the Hammingtons and for the purposes of this note the Hammingtons are treated as successful plaintiffs (albeit plaintiffs by counterclaim).

His Honour's findings of fact were unsuccessfully challenged on appeal. Also unsuccessful was the Snodgrasses' submission that Ellis J erred in awarding general damages of $15,000 to Mrs Hammington and $5,000 to Mr Hammington. These awards were based on the Hammingtons' pleading that "*they suffered considerable anxiety and worry about the transaction and about the action*" and the allegation that "*for a lengthy period Mrs Hammington was under medical care for mental stress resulting from the transaction and from* [their] *claim*".

A jurisdiction to award general damages for inconvenience and mental suffering in limited circumstances has long been recognised. In tort claims damages for discomfort and inconvenience have been awarded in cases of deceit (*Doyle v Olby (Ironmongers) Limited* [1969] 2 QB 158 (CA); *Mafo v Adams* [1970] 1 QB 548 (CA); *Clemance v Hollis* [1987] 2 NZLR 471), false imprisonment (*Walter v Alltools* (1944) 61 TLR 39 (CA); *Willis v Attorney-General* [1989] 3 NZLR 574 (CA)), nuisance (*Halsey v Esso Petroleum* [1961] 1 WLR 683; *Colson v Lockley Park Limited* [1986] NZLJ 31), negligently damaged property (*Ward v Cannock Chase District Council* [1986] Ch 546; *Gabolinscy v Hamilton City Corporation* [1975] 1 NZLR 150; *Young v Tomlinson* [1979] 2 NZLR 441; *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA)), and assault (*Lane v Holloway* [1968] 1 QB 379 (CA); *Fogg v McKnight* [1968] NZLR 330).

"The position appears to have been reached in New Zealand where the Courts will bung almost any successful lay plaintiff an extra few thousand for good measure."

In contract the English Courts in particular have been more circumspect in making awards for inconvenience and stress. Damages for physical inconvenience and discomfort are recoverable but, until more recently, the English Courts would not award for "*annoyance or mental distress*" (*Groom v Crocker* [1939] 1 KB 194 (CA); *Bailey v Bullock* [1950] 2 All ER 1167). A now well recognised exception to this rule was developed in *Jarvis v Swan's Tours* [1973] QB 233 (CA), namely, that damages for mental distress were recoverable if the object of the contract was to provide pleasure to the contracting party or to avoid the inconvenience and mental distress which in fact eventuated. On this basis damages for mental distress have been awarded for holidays which fell short of the promises in the advertising brochures (*Jarvis v Swan's Tours* (supra); *Jackson v Horizon Holidays* [1975] 1 WLR 1468 (CA)), a solicitor's incompetent failure to obtain a non-molestation order (*Heywood v Wellers* [1976] QB 446 (CA)), and a surveyor's negligent report (*Perry v Sydney Phillips & Son* [1982] 1 WLR 1297 (CA)). On the other hand, the English Court of Appeal has recently held that damages for disappointment or distress are not recoverable for breach of contract by an architect retained to design a house; since the provision of pleasure to occupiers, although ancillary, was not the very object of the contract (*Knutt v Bolton* (unreported, Court of Appeal, 24 March 1995)).

As is well known, the New Zealand Courts do not see themselves as limited by the rule that damages for mental distress can only be awarded where the object of the contract is to provide pleasure or alleviate distress. In addition, the Court of Appeal has held that damages for mental distress may be awarded not only in tort and breach of contract cases but also in cases of a breach of an equitable duty (*Mouat v Clark Boyce* [1992] 2 NZLR 559)). The position appears to have been reached in New Zealand where the Courts will bung almost any successful lay plaintiff an extra few thousand for good measure. The Court of Appeal has, however, said that stress damages will not be awarded for breach of ordinary commercial contracts (*Mouat v Clark Boyce* (supra); *Society of Lloyd's v Hislop* [1993] 3 NZLR 135).

Even accepting that awards of general damages can be made to successful non-commercial plaintiffs in just about any cause of action, the Court is still required to differ-

entiate between stress caused by the breach and stress caused by the litigation, and confine awards of general damages to the former.

A successful plaintiff is no more entitled to general damages for litigation stress than he is entitled to an award of damages for his actual legal costs, time off work, lost opportunities, etc caused by having to attend to the litigation. A successful defendant is just as liable to suffer these costs and stress yet has no basis for recompense. It is obvious that the possibility of an award of litigation related damages to the plaintiff but not to the defendant puts unfair pressure on the defendant to settle on the plaintiff's terms.

This was recognised by Thomas J in *Rowlands v Collow* [1992] 1 NZLR 178, 209. In that case His Honour awarded general damages to the successful plaintiff but in doing so noted that counsel for the defendant "*correctly warned me against awarding damages relating to distress and anxiety caused by the 'frustration and hassle' which inevitably arise out of a breach of contract or tort or are associated with Court proceedings*".

In the Court of Appeal judgment in *Snodgrass v Hammington* there is no differentiation between stress caused by the breach and stress caused by the litigation. The award appears to compensate for both. Indeed, on analysis of the facts of the case, it appears that the stress in evidence is likely to have resulted mostly from the dispute rather than from the breach. This is not a case where the condition of the property is likely to have caused the Hammingtons distress or discomfort. There is no suggestion that the Hammingtons were in fear of the property collapsing causing injury. Indeed, the Hammingtons were prepared to take the property for a discount of $50,000 so this was really no more than a dispute about money. The stress appears to have resulted largely if not exclusively from anxieties about the outcome of the litigation. Would the Court find that the Hammingtons were entitled to cancel the contract and award them the return of their deposit? Or would the Court find that they had wrongly cancelled the contract and were obliged to pay the Snodgrasses damages?

Anxiety about the outcome of litigation is something which affects all parties. There is no reason why litigation should not be just as stressful (or even more stressful) for defendants as for plaintiffs. To award successful plaintiffs general damages for litigation stress while leaving successful defendants with no more than the usual modest award of costs is fundamentally wrong. ❑

Recent Admissions

Barristers and Solicitors

Adams AM	Auckland	16 February 1996
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Clarke N	Auckland	16 February 1996
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Palmer EJ	Auckland	16 February 1996
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Smythe NJ	Auckland	16 February 1996
Stewart CA	Gisborne	1 December 1995
Stuhlmann CS	Auckland	16 February 1996

The Consumer Guarantees Act: (1) Strike one for the consumer

Rae Nield, Barrister and Solicitor, Rudd Watts and Stone, Auckland

Ms Nield assesses the first case to be decided under the Consumer Guarantees Act 1993. Few such cases are likely to come before the High Court and so discussion of the decisions made in the District Courts is important to ensure that interpretation is consistent.

Almost 21 months after the Consumer Guarantees Act 1993 came into effect, we have a judgment from the District Court in Dunedin which addresses some key points of law. Not surprisingly, the case: *Stephens v Chevron Motor Court Ltd* (District Court, Dunedin, 29 January 1996, Judge MacDonald, to be reported at [1996] DCR 1) involves the purchase of a motor vehicle, and is an appeal from a decision of the Motor Vehicle Disputes Tribunal.

Mrs Stephens paid $18,999 for a 1983 Mitsubishi Pajero, on 25 November 1994. A few days after purchase, the Pajero was found to be out of oil, brake and clutch fluid. Mrs Stephens took it back, the dealer carried out some work and gave it back to her. Shortly after, Mrs Stephens complained that the Pajero was smoking, losing power and burning large quantities of oil. Mrs Stephens took it back to the dealer, and valve stem oil seals were replaced. However, the vehicle continued to use oil and "blow smoke". Mrs Stephens told the dealer that she was rejecting the vehicle, some three weeks after purchase. The dealer took the Pajero to a specialist mechanic who stripped the motor and discovered that the rings were worn and needed replacing. It was accepted by the specialist mechanic that the rings would have been substantially worn at the time of purchase. Without consulting Mrs Stephens, the dealer had the work done at a cost of $1200 and told Mrs Stephens that the Pajero was ready. Mrs Stephens pointed out that she had already rejected the vehicle, and refused to take it back. After some persuasion she took it back, but filed a claim in the Motor Vehicle Disputes Tribunal.

The Tribunal found that the Pajero breached both the warranty of merchantable quality under the Motor Vehicle Dealers Act 1975 and the guarantee of acceptable quality under the Consumer Guarantees Act. The Tribunal refused to rescind the contract under the Motor Vehicle Dealers Act because it was not "fair and just", as the dealer had subsequently remedied the defects. It told Mrs Stephens that her remedies under the Consumer Guarantees Act were "extinguished". However, there is no provision in either Act which allows Consumer Guarantees Act rights to be extinguished. In addition, s 4(1) of the Consumer Guarantees Act provides that the rights and remedies under that Act are additional to those under any other Act or rule of law, unless those rights are expressly or impliedly repealed or modified by the Consumer Guarantees Act.

Mrs Stephens appealed to the District Court, seeking the right to reject the vehicle under the Consumer Guarantees Act. The Court's decision was handed down some 14 months after the supply of the vehicle to Mrs Stephens. At the District Court, it was accepted that there was a breach of the guarantee of acceptable quality, so the judgment sheds no light on this guarantee which is new to New Zealand, although based on the warranty of acceptable quality in s 11.4 of the Saskatchewan Consumer Products Warranties Act 1978.

The main issues were:

(a) whether the Tribunal, having ascertained that there was a breach of a Consumer Guarantees Act guarantee, erred in law in refusing to give remedies under the Consumer Guarantees Act;

(b) whether the breach of the guarantee was of substantial character, entitling Mrs Stephens to reject the vehicle;

(c) the nature of the consumer's remedies under s 18(2) and (3); and in particular whether they could be exercised sequentially, and if not, on the facts, whether the consumer had attempted to exercise them sequentially;

(d) whether, if the consumer was entitled to reject the vehicle under the Consumer Guarantees Act, the supplier was entitled to any compensation for the consumer's use of the vehicle over a 14-month period;

(e) whether the Court had jurisdiction to order the consumer to return the vehicle. As Mrs Stephens was seeking a refund because she wanted to reject the vehicle (a statutory right) an order for rejection did not seem to be necessary. However, the judgment exposes a defect in the Act in a case where the consumer does not indicate willingness to part with the goods.

On the first point, the Court had little difficulty in finding that the Tribunal had erred in law in refusing to consider the consumer's remedies under the Consumer Guarantees Act. This is, of course, supported by s 4(1) of the Act.

On the point of substantial character, the Court held that the issues of whether the vehicle was not of acceptable quality, and whether there had been a failure of substantial character were linked. It would be easy to be misled by this comment into thinking that the "link" is that the two are to be considered together. However, the link that the Court put into effect was first to consider whether there had been a breach of the guarantee, and then whether that breach was of substan-

tial character, before addressing the consumer's remedies. This is clearly the correct analysis, because, where a breach of guarantee is of substantial character but remediable, the consumer has the choice of remedies under s 18: to require the supplier to remedy the defect in a reasonable time under subs 18(2), or to reject the goods or seek damages in compensation for reduction in value under subs 18(3). It is not possible for the consumer to determine the correct remedy until the nature of the breach is established.

The Court decided that this case clearly fell within s 21(a), which provides that a failure to comply with a guarantee is of substantial character where the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure. Saskatchewan case law on "substantial character" was not relevant to this case, because there is no equivalent to s 21(a) in the Saskatchewan Consumer Products Warranties Act. The Court decided that no reasonable consumer would have purchased the vehicle if told that the rings were worn and that they would cost $1200 to repair. It rejected the respondent's argument that the defect was the blowing of smoke and burning of oil, ie the symptoms of the defect.

The "reasonable consumer" test in s 21(a) is a different "reasonable consumer" test from that in s 7(1), which deals with assessment of the existence of a breach of the guarantee of acceptable quality. In the acceptable quality test, the reasonable consumer is constrained to consider only the items listed in s 7(1)((f) to (j), all of which relate to aspects of the supply of the goods. In the s 21(a) test, the reasonable consumer considers only the nature and extent of the defect itself. Considering this narrower "reasonable consumer" test, the Judge took into account the cost of repairs, not only in relation to the whole purchase price of the vehicle, but also in relation to the consumer's initial cash outlay under the hire purchase agreement.

Having decided that the failure was of substantial character, the Court then addressed the remedies: it held that the remedies in subss 18(2) and (3) could not be exercised sequentially. However, on the facts, the consumer did not exercise her remedies sequentially. The consumer's rejection of the vehicle could not have been made until, at the earliest, the time that the consumer was able to make an informed decision about whether or not the failure should be remedied. On the facts, the supplier preempted the consumer's right to choose by simply going ahead and attempting to remedy the failure: "*it was not for the respondent to decide that [rejection] was unnecessary and proceed to carry out repairs*" (although throughout the judgment the term "cancellation" was used in respect of the consumer's rejection of the vehicle, it is quite clear from the context that the Court was referring to "rejection").

"The supplier has been sharply reminded of the need to give sufficient information to the consumer to enable informed choices to be made."

It was relatively easy to infer from the facts that, given both the correct information and the opportunity to choose, Mrs Stephens would have chosen to reject the goods. This is a particularly important point to arise from the judgment: where a defect of substantial character is remediable, a supplier must give the consumer sufficient information on which to make an informed decision as to whether to reject the goods or not.

A more controversial point arose from the issue of the refund. The Consumer Guarantees Act makes no provision for the supplier to be compensated for the consumer's use of the goods, or for depreciation. The Court held that it had no scope under the Consumer Guarantees Act to compensate the dealer. It accepted the Appellant's argument that the legislation was deliberately framed that way, otherwise the incentive for suppliers to comply with the Act would be reduced. If a supplier were entitled to compensation for the consumer's use, the longer the supplier delayed in giving the consumer his or her remedies, the less money (in cash) the supplier would have to refund. The Appellant's argument is supported by surprisingly clear statements in Hansard:

> "However, in the event that the failure is substantial or is not fixable, the consumer will have the right to reject the goods, or to cancel the service, and to claim a refund of the price paid. The government is to some extent flying on an act of faith here. It is trusting that commonsense will prevail in the market place – that suppliers will acknowledge the failure and speedily put it right." (Joy MacLauchlan, 537 NZPD 17035, 29 July 1993).

In addition, the Saskatchewan Consumer Products Warranties Act, which must have been considered by the drafters, does make provision for compensation for suppliers for the consumer's use of the goods, although it specifically excludes a right to compensation for depreciation.

Finally, the Court noted that s 47(1), which sets out the Court's jurisdiction, is deficient in that it does not specify the Court's power to order refunds. The Court held that it had an inherent power to "fill in the gaps" where no legislative provisions exist, in order to achieve the intent of Parliament.

Another "gap" which was raised by the case was not explicitly addressed in the judgment. The Consumer Guarantees Act makes no provision for cancellation of a contract for the supply of goods where goods are rejected. This is a deficiency which should be addressed in a review of the Act, as it requires the Court to look elsewhere for a mechanism to cancel any subsisting contract of supply. In this case, because the supply was of a motor vehicle supplied pursuant to a hire purchase contract, there were two mechanisms available for disposing of the hire purchase contract:

(a) rescission under s 100(c) of the Motor Vehicle Dealers Act, with vesting of the consumer's rights in the associated hire purchase agreement in the dealer;
(b) re-opening of the hire purchase agreement under the "oppressive terms" provisions in s 10 of the Credit Contracts Act 1981 and making an order extinguishing outstanding obligations.

The judgment does not explicitly refer to either option, but upholds

the consumer's "cancellation of the contract". Taxation issues may arise for the dealer in relation to the value of the vehicle on its return to stock: the first method would appear to make the contract void ab initio, while under the second method the contract is merely cancelled.

In a plea for law reform, the Court pointed out what is clearly the greatest barrier to the rights of motor vehicle purchasers under the Consumer Guarantees Act: the fact that s 108(c) of the Motor Vehicle Dealers Act 1975 provides that dealer and consumer must agree in writing before a dispute involving the Consumer Guarantees Act can be heard before the Motor Vehicle Disputes Tribunal. Removal of this restriction is a key element of the recent government policy decision for reform of the Motor Vehicle Dealers Act, released by the Ministry of Consumer Affairs on 31 January 1996 (*The Motor Vehicle Dealers Act 1975: Proposed Reform*).

All in all, this seems a satisfactory beginning to the interpretation of the Consumer Guarantees Act, even though it has exposed some shortcomings in that Act as well as in the Motor Vehicle Dealers Act. The distinction between the technical approach of the Motor Vehicle Dealers Act and the focus on reasonable consumer expectations of the Consumer Guarantees Act has been clearly drawn. In particular, the consumer's right to choose between options offered by the Consumer Guarantees Act has been upheld by the Court. The supplier has been sharply reminded of the need to give sufficient information to the consumer to enable informed choices to be made. The Motor Vehicle Disputes Tribunal has been reminded that, where a consumer brings a dispute under the Consumer Guarantees Act and a breach of a guarantee is established, the non-technical tests and remedies of the Consumer Guarantees Act must be used. ❑

(2) Rejection of goods

Una Jagose, Ministry of Consumer Affairs

This note considers the comments of the Court in Stephens v Chevron Motor Services *on what it described as the "unsatisfactory" state of the provision in the Consumer Guarantees Act for rejection of goods without any accounting for the use that the purchaser has had.*

Introduction

The first decision regarding the Consumer Guarantees Act 1993 [the Act] in the District Court (*Stephens v Chevron Motor Court*, District Court, Dunedin, 29 January 1996, to be reported at [1996] DCR 1) throws into relief an interesting and potentially difficult issue in relation to rejection of goods due to their failure of a substantial character or where the failure is not substantial and cannot be remedied (s 18(3) of the Act). In *Stephens* the Court awarded a full refund of the purchase price of a motor car despite the passage of some 14 months and 15,000 kms between the date of purchase and the date of the decision. In doing so the Court acknowledged that this result was "unsatisfactory" but recognised that there was no scope under the Act to compensate the dealer or otherwise pro rate the refund granted to the consumer.

Policy background

The major legislative intention behind the Act is the clarification of rights, obligations and remedies in relation to the quality of goods and services sold in consumer transactions. Consumers and traders alike are now able to identify legitimate claims and resolve them, thus contributing to the continuing development of a "fair and informed marketplace" in consumer transactions. Consumers must be informed and discerning about their rights and responsibilities in order to participate effectively in a competitive marketplace.

Furthermore, the Act seeks to establish a clear framework in which consumers can use the law to settle disputes. One of the effects of the Act has been to arm consumers with a clear knowledge of their rights in order to negotiate settlement to their own disputes.

In the introduction of the Consumer Guarantees Bill to Parliament the Honourable Katherine O'Regan, Minister of Consumer Affairs noted the policy intent of the proposed legislation (NZPD, 6901, 17 March 1992):

> Consumers and suppliers must be able to understand the law and relate it clearly to their circumstances. Consumers must be able to enforce their rights, in the same way that suppliers must be clear about their obligations in order to improve the quality of their service and the performance of their products.

It is this legislative framework then to which the Court gave priority, despite the apparently "unsatisfactory" nature of the outcome.

Pro rata refunding or refunds in full?

MacDonald J was correct when he said (at p 11 of the decision) that "the legislation has been deliberately framed in [this] way". The section which allows a consumer to reject the goods and receive a full refund of the purchase price has the clear policy justification of encouraging settlements between parties and of discouraging litigation. Traders who unnecessarily prolong a dispute by refusing to accept the consumer's legitimate request for rejection should be encouraged by the Court's interpretation of the section to reach a settlement in accordance with the Act as soon as practicable.

Another policy option, and one considered at Select Committee, is to allow a refund given to consumers who reject the goods to be pro rated in accordance with the use they have enjoyed of the product. By such a method, consumers could retain the right to reject for a refund of their money less an amount calculated to represent the use they enjoyed of

the goods prior to the defect manifesting itself.

Advice to the Select Committee given by the then Department of Justice (the administering body of the Act until 1 October 1995 when responsibility passed to the Ministry of Consumer Affairs within the Ministry of Commerce) was that pro rating was unnecessary as consumers right to rejection is limited by s 20 of the Act.

Section 20 removes the consumer's right to reject goods where they do not exercise this right within a reasonable time, where the goods have been destroyed or damaged or are incorporated into any real or personal property and cannot be removed without damage. (Section 20 (2) sets out that the loss of this right is determined by an examination of the type of product and its expected consumer use, a reasonable expectation of its life and the amount of use which it is reasonable for them to be put before the defect becomes apparent.)

The Department of Justice was of the view that as the right to reject is limited and clearly defined, consumers are unlikely to have had sufficient use of the product when they exercise their right to reject the goods to warrant pro rating.

There are potentially many fact scenarios in which this is not the case. The loss of the right to reject is not clearly defined. It relies on an interpretation of what is a reasonable time in the circumstances of individual fact situations. In certain circumstances, consumers will be justified in rejecting products, mainly "big ticket" items, after having had some use from the product where a substantial or non-repairable defect arises some time after purchase.

The concept of pro rating a refund to take into account consumer use of the product is contained in the Consumer Products Warranties Act 1977 (Saskatchewan, Canada). Section 23(c) provides for the trader to recover from the consumer who rejects goods under the Act (or to set off against the refund of the purchase price) an amount that is equitable for the use of the product. This amount does not include depreciation of the product. The legislation attempts an incentive for traders to settle the matter through negotiation; s 23 (d) states that the consumer is entitled to retain possession of the rejected goods until the purchase price is refunded

In theory, requiring consumers and traders to agree to a sum that is "equitable" may cause extended disputes that remain unsettled without judicial intervention such as that in which Mrs Stephens found herself. Extending a dispute over a consumer's entitlement to reject the goods could appear beneficial to traders who may string out a dispute in the knowledge that the refund to the consumer will decrease with the passage of time that the consumer has the product. If pro rating is desirable and is to be effective, the statute would need to contain an incentive to discourage such the practice of "stringing out" a dispute.

"Traders who unnecessarily prolong a dispute by refusing to accept the consumer's legitimate request for rejection should be encouraged by the Court's interpretation of the section to reach a settlement in accordance with the Act as soon as practicable."

In addition, legislating for pro rating would need to state clearly that the calculation is to represent the useful portion of the goods that the consumer has enjoyed. Whether a consumer exercises the right to reject the goods days after purchase, after a period of recurrent faults or six months after sale, the calculation for pro rating must only examine that period of use, prior to the fault occurring, which the consumer enjoyed.

Rejecting goods in the future

Although *Stephens* has given rise to the identification of this problem, similar fact cases should not provide Courts or a Motor Vehicle Disputes Tribunals with undue agonising over the fairness of the consumer's entitlement to a refund in full.

Mrs Stephens tried to reject the goods almost as soon as she took possession of the vehicle. The intervening period of delay can be attributed to the dealer's refusal to provide her with this remedy. That Mrs Stephens acted with the "reasonable time" required in exercising her right to reject was not in dispute and she was therefore entitled, by the operation of s 18(3) in conjunction with s 20, to a full refund of the purchase price.

Difficulty may arise in the future however where a product's substantial failure to meet the guarantees in the Act arises some time into the contract and where the consumer has had a period of trouble free use of the product. In the absence of legislative change, a Court or Motor Vehicle Disputes Tribunal will be faced with one of two avenues; either following the legislative intention and awarding a refund in full or by limiting the consumer's right to reject the goods.

The consumer's right to reject goods that have a substantial fault is not, and should not be, time bound. To approach the problem raised in *Stephens* by limiting the concept of what is a "reasonable time" within which to reject the goods would be counterproductive to the legislative aim of encouraging dispute settlement in consumer goods transactions.

The approach to pro rating is itself fraught with difficulties. For example, how can a pro rating regime avoid the situation where traders refuse to settle with consumers in the hope that the longer the dispute, the less they have to pay? Would pro rating encourage litigation of disputes instead of settlement through negotiation? How should the amount of compensation be determined in a pro rating regime? Any legislative attempt towards pro rating would have to deal with these and other difficult issues before such a regime is considered. Note that, despite the Act's wording, there are two ways in which pro rating may be brought into the settlement of disputes. One is the ability of the general Disputes Tribunal to depart from a strict interpretation of the law and to consider the "substantial merits and justice" of the case (s 18(6) Disputes Tribunals Act 1988). The second is the ability of a consumer who has a claim under the Act to agree to settle or compromise that claim (s 43 (7) of the Act).

Stephens does not provide a definitive argument that pro rating is necessary. It merely shows up a difficulty with the current rejection provisions in the Consumer Guarantees Act which may arise in the future. ❑

Fitness to be tried

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In this article Mr Brookbanks considers the question of the extension of the concept of someone being unfit for trial even though they might not come technically within the bounds of being mentally disordered. He notes the decision of Thomas J in R v Duval *and of Judge McElrea in* Police v XYZ. *In both of these cases the Court was prepared to extend the concept of unfitness for trial, although in the* Duval *case even the extension of the concept was not such as to prevent the accused being tried.*

Introduction

The issue of fitness to be tried or, as it is known in New Zealand, "under disability" (see Criminal Justice Act 1985, s 108), is commonly associated with mental disorder which renders a person incapable of participating meaningfully in a criminal proceeding. Indeed, as New Zealand's under disability provisions are currently drafted a finding that a person is "under disability" in a legal sense can only be made where there has been a prior determination that the person is "mentally disordered" in terms of the Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2. (see Criminal Justice Act 1985, ss 2, 108, 111). In other words, mental disorder is a necessary precondition for a finding of "under disability" in New Zealand.

However, an issue which periodically arises but has been little tested by the Courts concerns the legal status of persons who are not under disability arising from mental disorder but who, nevertheless, are not fit to be tried. This note aims to consider the legal issues attending this category of persons in light of the recent decision in *R v Duval* [1995] 3 NZLR 202 and to make some recommendations for reform. Some preliminary historical observations may assist in clarifying the legal issues.

Historical observations

The concept of being unfit to plead arose from the rituals of medieval law Courts where the taking of a plea was an essential part of the trial process. Without a plea the trial process could not begin. If a defendant was mute and did not enter a plea, the Court had to determine whether this was through malice or on account of a visitation of God. Various forms of ordeal, including the dreadful procedure of peine fort et dure, were devised to "encourage" defendants to enter a plea. Eventually, the focus shifted from the issue of plea per se to the question of whether an accused person could conduct a defence "with discretion". A person who lacked that capacity and was found to be unfit to plead was said to be insane on arraignment and following the enactment of the Criminal Lunatics Act 1800 could be held "at Her Majesty's Pleasure", which usually meant detention in an asylum. (See discussion in J Gunn & P J Taylor (eds) *Forensic Psychiatry – Clinical, Legal and Ethical Issues* Oxford, 1993, 43 et seq). A similar procedure was adopted in New Zealand from an early date. (See Brookbanks, "Fitness to Plead and the Intellectually Disabled Offender" (1994) 1 *Psychiatry Psychology and Law* 171, 174.)

"The common law was unconcerned whether an accused possessed the functional ability to participate in proceedings or was debarred by other personal or environmental factors from doing so"

Many early cases involving defendants unfit to plead or be tried concerned people who were deaf mutes and unable to communicate. Early legal criteria were concerned exclusively with intellectual performance and focused on such matters as ability to plead with understanding to the indictment, comprehend the details of evidence, ability to follow Court proceedings, knowledge that a juror may be challenged and ability to instruct legal advisors. The "classic test" for disability was formulated in *R v Pritchard* (1836) 7 C & P 303, in which the above criteria were laid down. The *Pritchard* standard has been incorporated into New Zealand legislation on disability. (See Criminal Justice Act 1985, s 108.)

Significantly, the principal concern as regards fitness to plead at common law has always been whether an accused person, because of the defect of his faculties, possessed sufficient intelligence to understand the proceedings against him (See *Halsbury's Laws*, vol 11(2) para 963). The common law was unconcerned whether an accused possessed the functional ability to participate in proceedings or was debarred by other personal or environmental factors from doing so but simply whether he was "insane on arraignment". This has produced two curious consequences for the common law. First, the issue of fitness to plead cannot be tested before magistrates. Magistrates in the United Kingdom may postpone or adjourn a case to await a more favourable time. Adjourning proceedings sine die has the effect of excusing the accused from a trial. Secondly, where a defendant is found by a jury to be incapable of pleading, taking his trial and following the proceedings, because of an inability to communicate with and be communicated with by others, such a person is deemed to be insane and may be detained in a psychiatric hospital. (See *R v Governor of Stafford Prison, ex p Emery* [1909] 2 KB 81 where the accused, totally deaf and unable to read or write was held to be "mute by visitation of God" and accordingly unfit to be tried, even though it was conceded that he did not suffer from a mental illness as

such.) However, the common law, in spite of the curious legal fiction of a deaf and dumb person being "insane", has not been generously disposed towards defendants who are not mentally disordered in a medicolegal sense but who experience some trauma which renders them for the time being unable to participate meaningfully in a trial. For example in the case of *Podola* [1960] 1 QB 325 the Court of Appeal was unwilling to admit evidence of hysterical amnesia covering the period of events which were the subject of the indictment as a factor rendering an accused unfit on the ground of insanity to stand trial, despite the fact that the accused could not remember the events leading to his arrest and was unable to instruct counsel. English common law has pursued a narrow, mentalistic view of what constitutes unfitness for trial. It has never attempted to devise appropriate procedural means for dealing with "non-insane" persons under disability.

New Zealand developments

Until quite recently the issue of fitness to plead or to be tried was seldom litigated in New Zealand. It is not clear why this was so. One factor may be that New Zealand's mental health legislation, at least until the passing of the Mental Health (Compulsory Assessment and Treatment) Act 1992 was better able to accommodate intellectually disabled persons who, at common law, were typically the subjects of disability hearings, and to shield them from the processes of prosecution and criminalisation so that the issue of disability was not tested. With the passage of the 1992 Act that protection was removed and the issue of fitness to plead has had to be tested in relation to a growing number of intellectually disabled offenders. (See eg *R v T* (1993) 9 CRNZ 507; *Police v M* [1993] DCR 1119; *Police v M (No 2)* [1994] DCR 388.) What has not been common, however, has been determining the issue of fitness to be tried in relation to persons who are not mentally disordered in a formal sense but who are nevertheless incapacitated in such a way that to try them would be unfair. How does the law respond to such persons who appear to fall outside the parameters of the fitness to plead rules?

This issue was recently considered by the High Court in *R v Duval* which will now be considered.

The facts in *R v Duval*

The accused was charged with a number of sexual offenses involving young girls. His counsel applied for a stay of proceedings on the basis that the accused suffered from a medical condition which, it was contended, made it impossible for him to face trial or to obtain a fair trial. The accused had suffered back and shoulder injuries in work-related accidents in 1986. He suffered great pain. He had surgery but degenerative changes occurred and the pain continued. Eventually the accused was referred to a pain clinic and the pain was managed by means of an epidural portal delivery system, which meant that he could self-administer morphine directly into his spine.

A specialist anaesthetist in pain treated the accused and in a report to his counsel offered the opinion that it would be "very unkind" to have the accused attend a four to five day hearing. He considered that it would be impossible for the accused to concentrate sufficiently to be able to answer and comprehend the questions which would be put to him and that his condition would be impaired as a result of the stress involved in attending Court. The specialist also noted undesirable side effects caused by the application of morphine, including sleepiness, inability to concentrate, and respiratory depression.

In order to determine whether the accused suffered from a mental disorder for the purposes of the application of the provisions of Part VII of the Criminal Justice Act 1985, in particular s 108 which defines "under disability", the Judge directed that a psychiatric report be obtained pursuant to s 121 of the Criminal Justice Act. However, because the report subsequently obtained indicated that the accused did not suffer from any psychiatric illness or disability, Thomas J concluded that the accused was not mentally disordered and that any stay of the prosecution could only be granted pursuant to the Court's inherent jurisdiction, rather than as a result of a finding of disability in terms of Part VII of the Criminal Justice Act 1985.

Inherent jurisdiction

Thomas J noted that the High Court may invoke its inherent jurisdiction whenever the justice of the case so demands and may exercise the power in respect of matters regulated by statute or by rules of Court, provided the exercise of the power does not contravene any statutory provision. His Honour said:

> ... the Court's inherent jurisdiction may be exercised to direct a stay of a prosecution where justice so requires, and justice obviously requires that a stay issue where the accused is not fit to stand trial.

The Court noted that the requirement that an accused be fit to stand trial is fundamental to our criminal justice system and is affirmed by s 25(a) of the New Zealand Bill of Rights Act 1990. Thomas J held that a trial will not be fair if the accused suffers a disability which prevents him or her from effectively defending him or herself. Similarly, an accused's presence at trial is rendered ineffectual if he or she is not capable of comprehending what is taking place at the trial, since presence means not merely physical attendance but also ability to understand the nature of the proceeding. (See New Zealand Bill of Rights Act 1990, s 25(e) and see *R v Lee Kun* [1916] 1 KB 337 at 342.) His Honour also held that if the right to present a defence is to be effective, accused persons must have the capacity to appreciate the case against them and to present a defence to that case.

The Court characterised the notion of fitness to plead and stand trial as being not simply a matter of procedural fairness but as a substantive requirement firmly rooted in an accused's constitutional rights to a fair trial, since the doctrine defines the limits to which society may go in prosecution of persons who are unable to defend themselves. (See Brookbanks, "Judicial Determination of Fitness to Plead – the Fitness Hearing", (1992) 7 Otago LR 520, 521.) However, as his Honour noted the more critical question is determining when an accused is not fit to plead or stand trial and referred, inter alia, to the six questions formulated by Smith ACJ in the now celebrated case of *R v Presser* (1958) VR 45, namely, whether the accused understands the nature of the charge

against him, whether he understands the nature of the Court proceeding, whether he is able to exercise the right of challenge, whether he is able to follow the evidence against him, whether he is able to decide what defence to offer, and whether he is able to offer his version of the facts to his counsel and to the Court. These rules define the common law test for fitness to plead in Australia. (For a fuller discussion of the implications of *Presser* see I Freckelton, "Assessment of Fitness to Stand Trial", in Fitness to Plead: Under Disability in the 90's, LRF March 1995, 13, 17 et seq.)

In *Duval* Thomas J took the approach that the criteria in s 108(1) provide a reliable guide as to what constitutes a disqualifying disability, and as such constitute "a" test applicable to the facts of the case. However, the Court was not suggesting that the criteria in s 108(1) could be applied to persons suffering from a medical or physical disability automatically or to the exclusion of other factors, since it is possible to anticipate that there may be medical or physical disabilities which would make it unfair to require a person suffering from them to stand trial (eg a terminally ill but alert patient facing imminent death).

Concerning s 108(1) of the Criminal Justice Act, which Parliament has enacted for the purpose of determining whether a person is under a disability sufficient to exempt that person from standing trial for the crime charged, Thomas J said:

> The fact that no mental disorder is present, and no order for the detention of the person under the Mental Health (Compulsory Assessment and Treatment Act 1992) is justified, *does not render the criteria inapplicable as a test of disability.* It would be anomalous to have a situation where one set of criteria applied to determine a person's disability where that person suffers a mental disorder and another set of criteria or test applied if he or she does not suffer from a mental disorder. What is imperative in any trial is that the accused is able to plead, to understand the nature or purpose of the proceeding, and to communicate adequately with counsel for the purpose of conducting a defence. [Emphasis added.]

His Honour added that the fact that a person is unfit to plead because of a medical or physical condition did not necessarily mean that the prosecution should be stayed, because in circumstances where the person's disability was of a transitory nature, an adjournment might be in order, or the disability could be overcome by the provision of facilities which will enable the accused to stand trial.

In concluding his analysis Thomas J observed that in cases such as the present, a procedure parallel to that set out in Part VII of the Criminal Justice Act, in particular s 111 which requires the evidence of two medical practitioners, is likely to be appropriate in respect of an application to stay a prosecution.

Decision

In the event the Court concluded, on the basis of psychiatric evidence presented at the hearing, that the applicant was not unfit to stand trial. He understood the nature and implications of the charges, he understood that he had to answer for the charges in Court and that he would be given opportunity to plead guilty or not guilty and if he pleaded not guilty he knew that he was entitled to be heard in his defence.

Furthermore, the accused understood various matters relating to the Court hearing, was able to distinguish the function of the Judge and Counsel, comprehended the function of the jury and was aware that it was the jury which would determine guilt or innocence. He understood the Court procedure which would be followed and had an appreciation of his right to have counsel present, to instruct counsel and have his counsel make submissions in Court and to cross-examine witnesses.

Because the Court was satisfied that the accused was not suffering from a disability which would prevent him entering a plea and facing trial the stay was refused. However, in order to minimise the accused's discomfort at the trial the Court laid down a number of directions aimed at accommodating the accused's disability and securing a fair trial.

Comment

This decision is to be welcomed for clarifying an area of law and practice that has been unclear. It is helpful to now have a clear statement that the criteria for disability, as expanded by the Court, are equally applicable in cases of disability where no mental disorder is present.

However, *Duval* is not the first time a stay has been sought in respect of a defendant arguably unfit to be tried but not mentally disordered in terms of the Mental Health Act. In *Police v I J M* (District Court Auckland, CRN 3004008328, 12 November 1993) Judge Imrie refused to make an order that the offender was under disability in terms of Part VII of the Criminal Justice Act on the basis that although he was unable to understand the purpose of the proceedings or communicate adequately with counsel for the purposes of conducting a defence, his abnormal state of mind was not of such a degree that it posed a serious danger to the health or safety of others and he was thus not mentally disordered in terms of the Mental Health Act definition. The implication was that the defendant was required to proceed to trial.

However, at a subsequent hearing, in the case now reported as *Police v XYZ* [1994] DCR 401), counsel for the defendant applied for a stay of proceedings before another Judge on the ground that although the accused was not under a disability, he was unable to understand the purpose of the proceeding or to communicate adequately with counsel for the purpose of conducting a defence. It was submitted that in allowing the matter to proceed to trial, certain provisions of the Bill of Rights Act 1990 would be breached, giving rise to unfairness and amounting to an abuse of process. Judge McElrea concluded that a stay of proceedings should be granted in that case in order to overcome a deficiency in the legislation and to avoid the "fundamental unfairness" of the defendant being required to stand trial. There the Judge also observed that a stay would have the same practical effect as a finding of disability coupled with an order for the defendant's immediate release (See Criminal Justice Act 1985, s 115(2)(b)) given the relative triviality of the charge and the fact that "there is no presumption that persons under a disability who are an occasional social nuisance must be dealt with under either the criminal justice or mental health regimes".

Judge McElrea held that the case would, regardless of any issues touching the Bill of Rights, have justified a stay grounded in the principles of abuse of process on the basis that there could be no clearer case of oppression than to proceed to try a person who suffers from a mental illness to such an extent that he is unable to communicate with counsel in a meaningful way. Simply put, the law was not capable of serving the purpose it is intended to serve, namely, trying a person in a fair manner.

In addition in *Police v XYZ* Judge McElrea noted that certain express rights in the New Zealand Bill of Rights Act 1990 (see s 24(c), 24(d), 24(f), and 25(e)) collectively amount to a right to engage the assistance of counsel and to have the benefit of the legal expertise of counsel in the conduct of a defence. In granting the stay his Honour said:

> If a person is ... unable to communicate with counsel in any sort of meaningful way, then the rights so mentioned, although confirmed by the Act, would be hollow or empty/ ... [T]he Bill of Rights is intended to enhance and protect rights in a substantial and meaningful way, and not in a hollow or empty way.

Reform

From this brief survey it is evident that the Courts have been able to achieve substantial fairness in cases involving defendants unfit to be tried in the absence of legal mental disorder by the use of the procedure of a stay of proceedings and the doctrine of abuse of process. Thomas J's approach in *Duval* emphasises the anomaly, were it to be the case, of applying different criteria for determining disability depending on whether or not the person is mentally disordered. In both *Duval* and *Police v XYZ* the Bill of Rights Act provisions provide the final legislative justification for relief in such cases.

While it is probably true that the present criteria for disability will be applicable to many cases of unfitness for trial involving non-mentally disordered defendants, it may be that in some cases the criteria, geared as they are towards defendants with intellectual insufficiency or a lack of rational capacity, will be incongruent with the presenting disability. For example, if a person is suffering acute and disabling pain to the extent that they are constantly distracted and unable to concentrate, the issue is not strictly whether the person "understands" relevant facts or can "communicate adequately" for certain purposes, but simply whether it is appropriate to attempt to try a person in such circumstances at all. Similarly, if a person is severely constrained in their physical movements or other essential functions like speech, sight and hearing as a result of injuries suffered, say, in a car accident and likely to remain so indefinitely, the issue of fitness to be tried should be determined not with reference to intellectual capacity but rather with regard to the practicalities of trying someone who is manifestly incapable of performing the functions of a person who is a party to an adversarial proceeding.

"Perhaps the time has come for consideration also to be given to a new type of disposition in such cases allowing for a "trial of the facts" to determine whether the disabled offender was responsible for the actus reus of the crime."

While in such cases in the High Court a Judge may invoke his or her inherent jurisdiction to issue a stay of proceedings, and define the criteria applicable to determining disability, the District Court, being a creature of statute, does not possess the same degree of flexibility and while it does have the jurisdiction to prevent an abuse of process, it is limited to existing statutory criteria in determining whether a person is fit to be tried. At the present time these are exclusively contained in s 108 of the Criminal Justice Act 1985, Part VII of which is in the nature of a code. (See *R v Mason* [1978] 2 NZLR 249.) While a number of disposal options are available, including a stay of proceedings where there has been or would be an abuse of process, adjournment for a determined period in anticipation of an early recovery of the defendant, or adjournment sine die, there can be no right of appeal against a finding of disability where the disability is not based upon mental disorder. (See s 112 Criminal Justice Act 1985, where the right of appeal against a finding of disability adheres to a finding of disability in terms of s 111, requiring that the defendant is "mentally disordered".) Furthermore, under present law there would appear to be no procedure for an unfit non-mentally disordered defendant to postpone determination of the question of fitness to plead, a procedure available where a defendant is suspected of being under disability in the formal legal sense. (See Criminal Justice Act 1985, s 110.)

Perhaps the time has come for consideration also to be given to a new type of disposition in such cases allowing for a "trial of the facts" to determine whether the disabled offender was responsible for the actus reus of the crime. This procedure would be broadly analogous to a procedure now adopted in a growing number of jurisdictions in relation to mentally disordered offenders found to be unfit to be tried, the purpose of which is to increase the opportunity of such persons being acquitted and avoid unnecessary detention as an unfit accused. (See S White, *The Criminal Procedure (Insanity and Unfitness to Plead) Act*, [1992] Crim LR 4,7.)

While Thomas J is undoubtedly correct in identifying the anomaly that would occur if there were two different sets of criteria governing unfit accused, the reality would seem to be that the present law does treat each group differently, although the differences are not always reflected in legislation. If the legislature were to give serious consideration to the challenges presented by non-mentally disordered unfit accused, then I would suggest that the present disability criteria and the procedures for determining disability are inadequate for this purpose and ought to be supplemented by additional statutory criteria designed to address the specific problems such offenders present. This task could well be undertaken by the Law Commission in relation to its present reference on Criminal Procedure. ❑

Litigation

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Discovery of confidential documents

Confidentiality and discovery are not happy bedfellows. In recent times, the conflict between them has been demonstrated in many contexts; this has been particularly evident where businesses are involved in Court proceedings.

There appears to be a growing trend in commercial litigation for parties to claim restricted inspection of documents on the grounds that they are commercially sensitive. It has become commonplace for businesses to seek to restrict inspection of all documents to counsel and nominated experts in the field, and to prevent the other party to the litigation from sighting the documents at all. While this may be a very convenient practice for businesses, it has significant disadvantages for those conducting litigation, and it must be queried whether it is appropriate.

The modern approach to the production of confidential documents finds its origins in patent cases. In *Warner-Lambert Co v Glaxo Lab Ltd* [1975] RPC 354, the English Court of Appeal confirmed that commercial sensitivity could be a ground for the exercise of the Court's discretion in discovery matters. A cautious attitude in patent cases is understandable, because trade secrets are frequently involved in disputes between competitors.

The principles have subsequently been extended to other commercially sensitive documents. The first New Zealand case to develop this was *T D Haulage Ltd v NZ Railways Corp* (1986) 1 PRNZ 668, a case involving allegations of interference with contractual relations. Barker J stated (at 673) that, where there is a reasonable objection to production on the grounds of confidentiality, the Court should not order production unless it is thought necessary.

"It has become commonplace for businesses to seek to restrict inspection of all documents to counsel and nominated experts in the field, and to prevent the other party to the litigation from sighting the documents at all."

Although it had not been established that the plaintiff was a direct competitor of the defendant or that any misuse of the documents was likely, the Court ordered that inspection initially be restricted because of commercial sensitivity, and the possibility that the documents might turn out to be only marginally relevant.

Since *TD Haulage*, the attitude of the Courts has been refined, and the onus effectively reversed. The Court of Appeal outlined the proper approach in *Port Nelson Ltd v Commerce Commission* (1994) 7 PRNZ 344, at 348:

> Relevant documents should generally be made available for inspection. The fact that they are regarded as being confidential, and would not be made available were it not for the requirements of the litigation, is immaterial. An order for non-disclosure can only be made when the Court is satisfied in terms of r 312 that such an order is "necessary". It must be either apparent from the document in question or shown by other evidence that disclosure would be likely to prejudice the party in some significant way.

And further at 349:

> It follows that documents must be approached on a one by one basis. This is the responsibility of counsel. In the vast majority of cases counsel should be able to agree whether or not a document is such as to require special protection, bearing in mind the restrictions on the use of discovered documents which apply in any event.

It is clear from this that the starting point in every case is that documents relevant to the issues in dispute are to be made available to the other party. It is only in an exceptional case that restrictions on inspection will be imposed, and it is for the party seeking those restrictions to show that they are justified. This requires, at the least, proof of significant potential prejudice. It is not enough simply to claim that the other party is a "competitor" and that documents are "confidential". Particulars must be provided of how disclosure of each document is likely to prejudice the party concerned.

There may be those who contend that the discovery process pays insufficient attention to the confidentiality needs of businesses. The answer to this lies chiefly in the nature of litigation. As Lord Scarman said in *Home Office v Harman* [1983] 1 AC 280 at 315:

> Litigants ordered to give discovery must have the protection of the law against the misuse of their documents, but they know that the right to public trial carries with it the risk, amounting in many cases to near certainty, that their documents, by being produced and read in the course of the trial, will become "public property and public knowledge".

Although the Courts have the power

to require evidence to be heard in camera, one of the tenets of common law justice is the public nature of the trial process. Maintenance of public scrutiny is one of the important checks on the system, and there must be good reason to justify departing from it.

Secondly, restrictions on inspection of documents make litigation much more difficult. This issue was referred to by McGechan J in *Tua v Durie* (High Court, Wellington CP 215/95, 27 February 1996) where his Honour said:

> Such restrictions are inherently awkward and are best avoided if possible. However, the implied obligation to restrict use of material disclosed to the proceeding stands. These documents are for use in this proceeding. They are not for use on the marae, or for political purposes, or through the media. Counsel will no doubt advise. I specifically record that plaintiffs and others are at risk of contempt proceedings if misuse occurs. For my own part I would not be at all averse to seeing an example being made in this area, where it is necessary to preserve confidence.

Although the case did not involve commercial sensitivity, the same type of reasoning is applicable, and it is suggested that the approach of McGechan J is a sound one. For the most part, the rule which prevents use of discovered documents for purposes other than those of the proceeding should be sufficient protection.

Wholesale reliance on confidentiality should not be permitted to hijack the litigation process, which is complicated enough. By the same token, applications to restrict inspection on the grounds of confidentiality should not be encouraged in the hope that a lenient attitude will be taken to them. It is suggested that such applications should be actively discouraged, and the indication from the Court of Appeal in the *Port Nelson* case that this is primarily a matter for counsel should be taken seriously.

Recent cases

Commercial List

WEL Energy Group Ltd v Bethune – [1996] BCL No 214 – **Commercial List – Application for removal to – Alleged breach of trust – Trustees of WEL Energy Trust – Whether proceedings of commercial nature – Trust private in form but with public flavour – Trustees elected by local authority citizens – Trust controlling huge assets – Commercialisation of electricity industry – Counterclaim involving Companies Act – Commercial List not Auckland phenomenon – Venue decided later – Subsidiary judicial review claim – Costs – Judicature Act 1908, s 24B(1)(g) – Trustees Act 1956, s 66(1) – Energy Companies Act 1992 – Companies Act 1993** – At issue was whether these proceedings, issued in Hamilton, should be removed to the Commercial List. The plaintiffs were WEL Energy Group (WEL) and two others. The defendants were trustees of WEL Energy Trust (the Trust). The plaintiffs sought to challenge the trustees' exercise of alleged powers (a) to remove and appoint two nominee directors to WEL's board; and (b) to move a shareholders' resolution to vary WEL's articles of association. The trust was the successor of the Waikato Electricity Authority. It was the single biggest shareholder (42.8%) in WEL, the supplier of electricity to Hamilton. The shares were not listed on the Stock Exchange, but WEL was a public company. The trustees were elected by the residents of all local authorities concerned (Hamilton City, Waikato and Waipa Districts). The dispute arose out of the trustees' purported resolutions, under their rights as shareholders of WEL, to remove the two trust nominees from WEL's board of directors. Barker J assumed for the purpose of argument that WEL was entitled to bring the proceedings. The statement of claim sought directions pursuant to s 66 of the Trustees Act as to WEL's duties on receipt of the various requisitions and orders relating to the alleged irregularities. The claim was essentially for breach of trust. Barker J saw a judicial review claim as very weak and subsidiary. The defendants counterclaimed for Companies Act relief. The plaintiffs vigorously opposed the Commercial List application. Barker J emphasised that the List was not an Auckland phenomenon and a trial venue would be decided later. Barker J was satisfied these were proceedings of a commercial nature (Judicature Act s 24B) for the following reasons: (1) although in form this was private deed of trust it had a distinct public flavour; (2) rather unusual provisions were involved, as the electricity industry had been opened up to the exercise of commercial forces; (3) these were truly commercial enterprises dealing with huge assets and competing in the marketplace; (4) the counterclaim was certainly List material. Barker J allowed entry to the List and ordered accordingly. The judicial review claim was not struck out, but side-tracked. Costs to the defendants of $1,500. (High Court, Auckland, CL 5095, 31 January 1996, oral judgment of Barker J).

See *Laws NZ*, Civil Procedure: High Court paras 329-347.

Comment: In this strongly contested application for transfer of a Hamilton proceeding onto the Commercial List, Barker J reiterated that the List is not to be seen as a parochial Auckland phenomenon, and that there are ways of accommodating parties and counsel from other centres. The main issue perceived by the Court was whether the case had a sufficiently commercial nature to justify being placed on the List. Although cases involving breaches of trust would not generally be seen as commercial, Barker J held that the case was essentially a commercial one between commercial players.

The decision illustrates that it is not the subject matter of a dispute, or the area of law involved, which determine suitability for the List, but whether or not it can truly be classed as "commercial". It does raise the question, however, as to the need for a separate list for commercial matters, rather than adopting appropriate case management techniques in every proceeding.

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New High Court Rules

The High Court Amendment Rules (No 3) 1995 (SR1995/288) have now all come into effect. These rules are particularly significant with regard to the exchange of briefs of evidence, but also contain provisions dealing with *Calderbank* letters and judicial conferences.

Briefs of evidence

Rules 441A to 441L came into effect on 1 March 1996. They effectively require statements of the evidence to be given by witnesses to be exchanged in all proceedings unless the Court orders otherwise.

The rules make provision for a default procedure which requires briefs of evidence to be exchanged sequentially after the praecipe has been filed. This applies to all parties, which means that third parties will have to serve their witness statements at the same time as defendants. In many cases, the rule will not suit the particular needs of the parties, which means that an application for directions will be required. It is not clear whether the parties may deal with this issue by consent memorandum. While that would appear to be a sensible approach, r 441A states that the rule applies unless the Court has made an order to some other effect.

Witness statements are required to be signed by the witness and served on all other parties; they do not have to be filed. While supplementary statements are permissible, the leave of the Court has to be obtained in order to adduce them in evidence. The same applies to supplementary oral evidence in chief, but r 441G imposes restrictions on when such leave may be granted. The rules are clearly designed to ensure that, as far as possible, all evidence in chief is set out in written statements. The ordinary procedure will be for witness statements to be read out as evidence in chief.

Settlement conferences

A small but significant amendment to r 442 has removed the requirement that all parties consent to the convening of a settlement conference by a Judge. In practice this will probably make little difference, because such conferences generally require a measure of cooperation in order to get anywhere. In some cases, however, it is possible that a Judge could use this device to enable a recalcitrant party to see the wisdom of a settlement.

Calderbank letters

Calderbank letters (written without prejudice except as to costs) have been recognised by the Courts as a legitimate factor to be taken into account in making a costs decision. In *Andrews v Parceline Express* Ltd (1994) 7 PRNZ 721, the Court of Appeal said that they should not be allowed to subvert the rules governing payments into Court. Rule 46A gives legislative recognition to the concept of these letters, but makes it clear that they are only one factor within the Court's discretion. The rule requires that the offer be in writing and state that it is made "without prejudice save as to costs". It also prohibits disclosure of the offer to the Court.

District Courts procedure

Important changes have been made to rules governing procedure in the District Courts by the District Courts Amendment Act 1995 and the District Courts Rules 1992, Amendment No 3 (SR1995/319).

Appeals

The longstanding difficulty with determining the time for appeals from the District Courts has been ameliorated somewhat by the District Courts Amendment Act 1995, which came into force on 1 March. The crucial date is now the date on which the order is sealed – applications for leave to appeal have to be made within 21 days after the date on which interlocutory orders are sealed, and appeals from final orders have to be brought within 21 days after the date on which the order is sealed.

There has been no clarification of when an order is to be considered a final order. This appears to have been fairly conclusively settled by the Court of Appeal decision in *Craig v Craig* [1993] 1 NZLR 29. Any order which is not made on an interlocutory application, and which determines a substantive issue in the proceeding is a final order. It is not necessary for all issues between the parties to be resolved.

Judges have also been given the power to call conferences with respect to any appeal or intended appeal in order to give directions or make procedural rulings: r 546A.

Discovery

The "self-help" remedy for non-compliance with a discovery notice, introduced into the High Court Rules in 1993, has now been incorporated into r 319 of the District Courts Rules. Where a discovery notice is not complied with, the party requiring discovery may obtain an order for compliance without applying to Court.

The time for compliance with a discovery notice has been extended from 14 to 28 days (or 42 days for non-residents). The corresponding High Court rule only allows 14 days, and it is not clear why a longer period should be permitted in the District Courts.

Form of documents

As from 1 April, the form of documents for filing in the District Courts has been brought into line with that adopted in the High Court in 1994. Backing sheets are no longer needed, and documents will be filed flat with an appropriate description on the first page, together with the details of the solicitor filing the document.

Interim payments

The interim payment provisions of the High Court Rules have also been included in the District Courts Rules. Rules 355A to 355J permit the Court to order an interim payment pending judgment where it is likely that the plaintiff will obtain a "substantial" award at trial. In the absence of an admission, this is a difficult burden to discharge, and the procedure has not been widely used. The principles are discussed in *Bowen v Williams* (1993) 5 PRNZ 721.

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Costs out of public funds

NZ Federation of Commercial Fishermen (Inc) v Ministry of Fisheries – [1996] BCL No 215 – **Costs – Payment out of public funds – Application – Recreational Fishing Council – Became third respondent – No formal representation order – Participation optional – Common interests with Crown – Sizeable membership – Judicature Act 1908, s 99A – High Court Rules RR 46, 78** – Four applicants, representing commercial fishing interests, sought judicial review of the Minister's determination of total allowable catch. Two further applicants, representing Maori fishery interests, subsequently joined. The Crown then successfully sought joinder of the NZ Recreational Fishing Council Inc (RFC) as a third respondent. While RFC was seen as representative of recreational fishers generally, no formal representation order was made. RFC now applied for an order that its legal costs be paid out of public funds. Opposing counsel conceded jurisdiction to make the order under s 99A. McGechan J recorded some doubt, questioning whether s 99A applied to a party. This important point was left open. McGechan J declined the application. Reasons were: (1) RFC need only act as it saw fit; (2) There was considerable common interest between the Crown and RFC; and (3) RFC had 300,000 (indirect) members who could be expected to fund representation if it were deemed sufficiently important. (High Court, Wellington, CP 237/95, 8 February 1996, McGechan J). [9pp]

See *Laws NZ*, Civil Procedure: High Court, paras 21, 69 and 581.

Comment: McGechan J's refusal to order costs to be paid out of public funds was clearly justified on the facts before him. However, his doubt as to the jurisdiction to make the order raises questions as to the correctness of the decision in *NZ Fishing Industry Board v Attorney-General* (1992) 6 PRNZ 500, where an order was made in favour of the NZ Recreational Fishing Council.

Although McGechan J left the point open, his Honour clearly favoured the view that s 99A is intended to apply only to non-party participants, most obviously interveners or amici curiae. There is much to be said for this view, as costs should not be payable out of public funds other than in exceptional circumstances. The section seems to require that a public interest be represented in order for this to be justified, and public interest should be understood as representing the public in the widest sense, rather than only a section of the public. Where the Court has requested assistance, or where the matter is taken up by the Attorney-General or Solicitor-General, there is a clear case for public funding. Other appropriate situations would be rare, if not non-existent.

Appeals from District Court

Cheng v Trustees of the Monckton Charitable Trust [1996] BCL No 218 – **Striking out – Want of prosecution of appeal – Application for hearing evidence on appeal – Part of transcript lost – District Courts Act 1947, s 75(2).** – There were two applications before the Judge. They arose out of a rent dispute concerning a commercial site. The DCJ had preferred the evidence of the respondent to that of the male appellant. The appellants appealed the DCJ's decision. It was discovered that part of the transcript was lost. The DCJ declined to provide his own notes to cover the gap. No application for an order to produce the Judge's notes was made. The respondent moved to dismiss the appeal and then the applicants sought to have the DCJ rehear the case. The Judge discussed "want of prosecution" saying that s 75(2) requires an appellant to prosecute the appeal with "due diligence". The criteria were inordinate delay which was inexcusable and whether the defendants were likely to be prejudiced by it. The appellants had not moved this appeal along with due diligence. It was only when prodded by the respondent's application for dismissal that they had acted. There were steps which could have been taken in regard to the missing notes of evidence. The delays however could not be laid at the respondent's door. To allow the matter to be remitted back to the DC would simply amount to re-litigation of the main issue: which had been decided on the credibility of the two main witnesses. It would be unfair to the respondent to re-litigate it. Hammond J adjourned the application to strike out to be brought up again on seven days notice on terms that the appellants bring into Court within 21 days of delivery of this judgment $50,000 to be held by the Registrar pending further order. If the terms of this judgment were not adhered to the respondents could move to dismiss the appeal. (High Court, Hamilton AP 17/95, 21 December 1995, Hammond J). [10pp]

See *Laws NZ*, Civil Procedure: High Court, paras 86, 406 and 407.

Comment: The case deals with two difficulties arising in District Court Appeals – want of prosecution of an appeal, and absence of a full record. Hammond J has made it clear that it is only in certain cases that a full transcript will be needed in order to prosecute an appeal diligently, and in such cases both parties should make application to the Registrar to ensure that a transcript is made available as soon as possible. It is not acceptable for the appellant to sit on its hands, waiting for the transcript to appear. If it turns out that certain parts of the transcript are missing, counsel should collaborate in order to determine whether the missing parts can be made up. In an exceptional case, it may be possible to apply for a copy of the Judge's personal notes to be made available: see *Belling v Belling* (1995) 8 PRNZ 523.

His Honour considered that there had been inexcusable delay in prosecuting the appeal. The method of dealing with this delay is, however, of considerable interest. Instead of striking out the appeal, Hammond J required the appellant to put some monetary support into its convictions. While this was no doubt onerous, it would appear to be an appropriate test of bona fides in a case where there is a suggestion of undue delay. The moral is clear: appeals need to be diligently pursued. ❑

"Do not sign"

Nicky Richardson, The University of Canterbury

This article discusses the problem of spouses who agree to a charge over their home for the benefit of their partner's business and subsequently claim that their consent was obtained by undue influence or misrepresentation.

Introduction

In both *Massey v Midland Bank plc*[1995] 1 All ER 929 and *Banco Exterior Internacional v Mann & Others* [1995] 1 All ER 936 women had agreed to charges over their homes in order that their partners could borrow money for business enterprises. In both cases the women alleged that there had been undue influence and or misrepresentation and that the banks had constructive notice of this which affected the validity of the charges. The problem is of course not new. Since married women were able to own property (Married Women's Property Act 1892 (Imp)) they have been giving charges over their share of the home in order to enable their spouses to raise finance for various purposes.

This note considers just one aspect of the problem and that concerns the type of advice solicitors must give to women about to sign such charges.

The advice might not of course be given to a woman. In the cases discussed it is made plain that although it is often the wife who signs a charge over the home the law applies equally to heterosexual and homosexual cohabitees. Indeed in *Massey v Midland Bank plc* the couple were not cohabitees but had enjoyed a stable sexual relationship.

Background

In the leading case, *Barclays Bank plc v O'Brien* [1994] 1 AC 180 Lord Browne-Wilkinson stated the problem thus:

> In a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions. The number of recent cases show that in practice many wives are still subject to, and yield to undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed therein (at 188).

"Has the solicitor a duty to do more than reiterate what the bank has already told her, or should, as Hobhouse LJ suggests, the solicitor advise the wife not to sign?"

Lord Browne-Wilkinson stated that first one must ask if the situation is one where undue influence is presumed. Undue influence is the improper use of ascendancy of one person over another which results in a person making a disposition or agreement which was not the result of free will (see *Allcard v Skinner* (1887) 36 Ch D 145). Secondly, can the third party, the bank, prove that there was in fact no undue influence in relation to the relevant transactions. Thirdly, has the third party proved that it did not have constructive notice of the undue influence that is presumed to have occurred or did in fact occur?

A creditor is put on enquiry when

(a) the transaction is on its face not to the financial advantage of the wife;
(b) there is substantial risk that the husband has committed a wrong which entitles the wife to set aside the transaction.

The Court went on to hold that a creditor, in order to avoid being fixed with constructive notice can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice. Lord Browne-Wilkinson said that in future:

1. The wife should attend a private meeting (in the absence of the husband) with the creditor where she is told

   (a) The extent of the liability;
   (b) Warned of the risk;
   (c) Urged to take independent advice.

In exceptional cases where the creditor has further facts which render the presence of undue influence probable, the creditor to be safe would, in his Lordship's view, have to *insist* that the wife be separately advised.

Massey v Midland Bank plc

Ms Massey and Mr Potts had a long standing emotional and sexual relationship commencing in 1976. It had resulted in the birth of two children. In 1985 Ms Massey agreed to a charge over her home for £25,000. She was advised by a solicitor and understood the advice. She agreed to the charge because Mr Potts needed overdraft facilities with Lloyds Bank plc for a business venture. The business collapsed, Lloyds delayed taking legal proceedings and Mr Potts repeatedly assured Ms Massey that he would repay the £25,000 by the sale of his mother's house. In 1989 Mr Potts embarked on a new venture which was to offer financial services to the public. He needed money and sought an overdraft from Midland Bank. Once again he approached Ms Massey requesting that her home be used as security. Mr Potts deceived Ms Massey in two respects; he painted a glowing picture of the new venture and he said the legal charge in favour of Lloyds Bank would be discharged.

On visiting Midland Bank the couple were told that Ms Massey would require independent legal advice. Mr Potts arranged for Mr Jones, a lawyer of many years standing and a partner in a reputable law

firm, to see Ms Massey. Mr Jones explained the nature of this second charge to Ms Massey in the presence of Mr Potts. She understood. The lawyer offered no advice and asked no questions. The Midland Bank subsequently advanced the funds.

By 1990 it was clear that Mr Potts' latest enterprise was doomed.

Mr Potts did not challenge the allegation of fraudulent misrepresentation. There was no evidence that the bank had actual knowledge of any misrepresentation or undue influence on the part of Mr Potts.

Steyn LJ (at 934) held that the guidance in *O'Brien's* case ought not to be mechanically applied, "The relief is after all equitable relief", and on the facts concluded that the bank had complied with the requirements of that decision.

The bank had advised Ms Massey to seek independent legal advice. "How far a solicitor should go in probing the matter, and in giving advice, is a matter for the solicitor's professional judgment and a matter between him (sic) and his (sic) client." (ibid) The bank had no duty to enquire what happened between Ms Massey and the lawyer and the bank was entitled to assume that the solicitors would act honestly and give proper advice (ibid at 935).

Neill and Peter Gibson LJJ agreed with this judgment and thus Ms Massey's appeal failed.

Banco Exterior Internacional v Mann & Others

Mr Mann wanted to charge the matrimonial home as security for a loan to his company. The bank. Banco Exterior Internacional, offered to the company £175,000 to be secured by a debenture over the assets of the company, a personal guarantee by Mr Mann and a second charge over the matrimonial home.

Mrs Mann subsequently visited her husband's solicitor and signed a charge document. After her signature was a declaration that the nature and effect of the charge had been explained to her and that she understood. This was signed by Mr Rochman, Mr Mann's solicitor. Mr Mann was present when Mrs Mann signed the charge. The company subsequently went into liquidation, Mr Mann went bankrupt and the bank sought vacant possession of the matrimonial home.

At first instance it was held that the wife was entitled to an equitable interest in the property, that there was undue influence and that the bank had constructive notice of the undue influence.

On appeal Morritt LJ reiterated what Lord Browne-Wilkinson has said in *Barclays Bank v O'Brien* and Stein LJ's views in *Massey v Midland Bank plc* and concluded that the bank did not have constructive notice of the undue influence. The Court [1995] 1 All ER 936 at 944 held that the bank was entitled to rely on the fact that Mr Rochman undertook the task of showing that he was sufficiently independent for that purpose.

> The bank was entitled to consider that it would not be possible adequately to explain the effect of the declaration without making it abundantly clear to Mrs Mann the risks she would run if she executed the declaration and the company defaulted. Further, the bank would justifiably assume that the solicitor would appreciate the reason why his advice was being sought and the need for his warranty at the foot of the declaration to be completed. In my judgment the bank was fully entitled to think that Mr Rochman's explanation would reasonable include some reference to the fact that Mrs Mann was under no obligation to execute the declaration if she did not wish to undertake the risk. (ibid)

Hobhouse LJ dissented on the ground that the bank had never advised Mrs Mann to take independent advice. "The bank never communicated with the wife. They never gave her any advice. They did not take any steps to see that she was advised by anyone to take independent advice." (ibid at 948) The bank had simply written to Mr Mann's company saying that the document should be signed in the presence of a solicitor who would sign to the effect that the contents had been explained. Hobhouse LJ explained that in the *Massey* decision the bank had face to face with Ms Massey advised her to get independent legal advice.

Sir Thomas Bingham MR noted the dividing line between explanation and advice was unclear. His Lordship held that if the certifying solicitor did his job with reasonable competence Mrs Mann would realise she could lose her home and that it was for her to decide whether she was willing to take that risk or not. It was not part of the solicitor's duty to advise her not to sign. Hobhouse LJ felt that there could be situations where the solicitor should say "my advice to you is: Do not sign" (ibid) as this would provide some counterbalance to a person who was being improperly influenced by the will of another.

Independent advice

The bank should always interview the wife alone and explain to her the extent of the liability and the consequences that follow from her signing the charge if things go wrong. The bank will have discharged its duty if it then tells the wife to seek independent advice. The bank may rely on the solicitor to act honestly and properly, the bank has no duty to check the adequacy of the advice or the circumstances in which it is given, it may even rely on the solicitor's decision that he or she is sufficiently independent for the purpose.

Has the solicitor a duty to do more than reiterate what the bank has already told her, or should, as Hobhouse LJ suggests, the solicitor advise the wife not to sign?

The problem here is not that the wives lack intelligence or education, it is not that these persons do not understand what they are doing. Ms Massey, for example, was a business woman who clearly appreciated the effect of charges. She had run a hairdressing business for some years and had taken over her father's business of letting bedsits. She had purchased her parents' home and raise a mortgage to do so. Her problem was that she had, in everyday parlance, been pressurised to sign the charge. Mrs Mann had told the solicitor during the course of the meeting that she felt she had "little or no choice" but to sign the document.

Ms Massey and Mrs Mann knew what they were doing but felt they had no choice.

"I advise you not to sign"

If the majority opinion in *Massey* and *Mann* is to be preferred it is difficult to see that the solicitor's advise does much to help. The solicitor is only reiterating what the client

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Mistake of law and mitigation
Forfeiture under the Fisheries Act 1983

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Forfeiture and mistake of law both raise vexed questions in criminal law. This is especially so when the criminal law is used to enforce not laws which all can be taken to know but regulations which have to be consulted. This article examines how far mistake of law may operate as a mitigating factor, or as a "special circumstance" to enable the Court not to order forfeiture.

Introduction

The Fisheries Act 1983 is one of a number of statutes which recognises the power to forfeit the property of individuals involved in certain forms of criminal activity. Pursuant to s 107B, on conviction of a person for specified offences against the Act or regulations made under the Act, property used in respect of the commission of such an offence is forfeit to the Crown unless the Court is satisfied that there are special reasons relating to the offence which enable it to order otherwise. "Presumptive forfeiture" is therefore a statutory consequence of conviction (*MAF v Lima*, High Court, Auckland, AP 146/93, 26 August 1993, [1993] BCL 1886), with the Court having a residual discretion to make an order for non-forfeiture in the appropriate circumstances. Section 107B targets both amateur fishermen and commercial operations. Depending on the nature and severity of the offence committed the property subject to forfeiture can include fish, proceeds of sales, property (such as fishing gear and vessels) used in the commission of the offence, and even forfeiture of quota. Given the potentially harsh economic consequences resulting from forfeiture under the provision, it is important to determine the circumstances in which an order for non-forfeiture is justified. What amounts to "special reasons relating to the offence" for the purposes of s 107B has been considered in a number of cases. (See *MAF v Schofield* [1990] 1 NZLR 210; *Bullen v MAF*, High Court, Auckland, AP 162/93, [1993] BCL 1949; *MAF v Hughes*, CA 52/95, 21 June 1995.) The recent High Court decision in *MAF v Carson* (High Court, Dunedin, AP 102/94, 28 September 1995) revisits this issue and finds that a mistake as to the law by the defendant may be enough to justify exercising the discretion in favour of non-forfeiture.

Background

The two respondents and another person had fished off the South Otago coast in a vessel owned by the respondents. They caught and returned to shore 30 hapuku or groper. The daily bag limit for hapuku in the relevant management area was five per person. The respondents mistakenly believed the limit to be 10 per person. They had initially caught 32 hapuku in the course of their fishing but had returned two to the water in the belief that this brought the total catch back to the permitted maximum.

The respondents pleaded guilty to several breaches of the Fisheries (Amateur Fishing) Regulations 1986 and the Fisheries (South-East Area Amateur Fishing) Regulations 1986 including a charge of taking an excess number of hapuku. They were convicted, and on the charge of taking excess hapuku each was fined $500 and ordered to pay Court costs and informant's solicitor's costs. Additionally, and as a result of the convictions, the respondents' fishing vessel became forfeit to the Crown unless the Court, pursuant to s 107B(3)(a)(i) of the Fisheries Act 1983, for special reasons relating to the offence, ordered otherwise. (In the judgment the relevant provision is erroneously reported as s 107B(2)). At first instance Saunders DCJ concluded that there were special reasons relating to the offence warranting an order of non forfeiture. One of the Judge's special reasons – that the respondents made an honest mistake as to the law about the daily quota – subsequently became the central issue of MAF's appeal to the High Court.

High Court decision

Fraser J relied on *MAF v Hughes* (supra) where Gault J found that in determining what constitutes a special reason for the purposes of s 107B, it is unnecessary to engage in over-analysis of what is a straightforward statutory test. Rather, the Court must look at the offence in the round to determine whether there are matters that place the offending out of the ordinary run of cases so as to be categorised as special. Moreover, the circumstances of the offender except so far as they bear upon the offence are not material. Gault J also noted that it must be accepted as legislative policy that the consequence of refusing an order is harsh, but that the very difficulty in policing fisheries clearly is considered to justify serious consequences by way of deterrence (at 5).

On the basis of the findings in *Hughes*, counsel for the respondents conceded that several grounds taken into consideration by Saunders DCJ in granting the order of non-forfeiture were not, after all, special reasons relating to the offence, although they should nevertheless be taken into account in the exercise of the Court's discretion as to whether or not to make the order sought. The respondents' primary argument in the High Court was that their honest but mistaken belief about the daily quota did constitute a special reason.

MAF argued that a mistake as to the law could not amount to a special reason. Section 105(1) provides that in any prosecution for any offence against the Act or any regulations

made under the Act it shall not be necessary for the prosecution to prove that the defendant intended to commit an offence. Liability is therefore presumed on proof of the commission by the defendant of the prohibited conduct. However s 105(2) provides a defence if the defendant can prove:

(a) That the defendant did not intend to commit the offence; and
(b) That –
  (i) In any case where it is alleged that anything required to be done was not done, the defendant took all reasonable steps to ensure that it was done; or
  (ii) In any case where it is alleged that anything prohibited was done, the defendant took all reasonable steps to ensure that it was not done.

Section 105(2) imposes both a subjective and an objective requirement on the defendant who must establish that he or she acted honestly (ie without intent to commit the offence) and reasonably in the circumstances of the case. (For a discussion of the relevance of the defendant's absence of intention for the purposes of the s 105(2) defence, see *MAF v Modesto Holdings Ltd* CA 438/93, 28 March 1994, [1994] BCL 533; *MAF v Gibbs* [1994] DCR 173; *MAF v Prangley* [1994] 1 NZLR 416.) The respondents had pleaded guilty to the charge of taking excess hapuku and had not attempted to satisfy the defence available pursuant to s 105(2). Counsel for MAF was particularly concerned that the respondents had not made out that part of the defence in s 105(2)(b) requiring proof that the defendant has taken all reasonable steps to avoid the conduct which has resulted in the commission of the offence. She contended that it would be contrary to the legislative scheme for a finding of special reasons to be made solely on the basis of lack of intent to commit the offence (s 105(2)(a)) which, in essence, was the respondents' argument before Fraser J. MAF also claimed that lack of intent or honest mistake was not "special" in the sense that it took matters outside the ordinary run of things as required by Gault J in *Hughes* (supra), because the same claim had arisen in a number of previous cases (at 6). Nor did it "relate to the offence" because the issue of intent or ignorance relates to the *offender* and not the *offence*. Alternatively, counsel argued that if mistaken belief was a special reason relating to the offence, it was nevertheless insufficient to justify an order of non forfeiture in this case and that the other factors, conceded by the respondents not to be special reasons, should not be taken into account.

Although there was no direct authority determining whether an honest but mistaken view of the legal position could constitute a special reason, Fraser J noted that the respondents' argument derived some support from *Bullen v MAF* (supra). There, Fisher J rejected a claim of mistake of law as a *defence* to the charges, although he was prepared to accept that, in the appropriate circumstances, a mistake over the maximum quota could be considered a special reason for making a grant of non-forfeiture under s 107B (at 10). This was not borne out by the facts however, which involved several matters going to aggravation rather than mitigation.

In *Carson* Fraser J found that it was open to the District Court Judge to conclude that the respondents' honest but mistaken belief was a special factor in the sense that it was not one found in the ordinary run of cases (at 7). Knowledge or ignorance is a matter personal to the offender, but Fraser J was of the opinion that in the circumstances it also related to the offence itself. It was the *reason* that the respondents' fishing was in breach of the regulations. Had they not been mistaken they would have limited their catch to the allowable maximum. In the circumstances of the case therefore, the respondents' honestly held mistake as to the law could be considered as potentially a special reason relating to the offence for which the Court might order that the vessel should not be forfeited. However, Fraser J then proceeded to rule that while the respondents' mistake was honestly held it was nonetheless negligently formed. In finding that the mistake must be both honest and reasonable the Judge implicitly accepted that the requirements of the s 105(2) defence should also be applied when considering whether to exercise the discretion at sentencing to grant an order of non-forfeiture pursuant to s 107B(3)(a)(i). (See *MAF v Modesto*, supra, *MAF v Gibbs*, supra.) After reviewing all the relevant circumstances Fraser J held that an order for non-forfeiture was not justified, and allowed the appeal. He based that decision on a number of surrounding facts. The daily bag limit of five hapuku per person had been in force for three years at the date of the offending. The respondents were regular amateur fishers, owned a vessel for the purpose, and were members of the local fishing club. They were aware of the relevant regulations and also that there were limits on the daily take. They relied on what they had been told by others rather than making any independent inquiries. Fraser J considered that this would have been a simple task that could have been carried out at the nearest Ministry office. Moreover, a sign at the entry to the beach provided all the relevant information. His Honour concluded:

> It must surely be an obvious precaution for people who engage regularly in this recreational activity, which is closely regulated with heavy penalties for breach, to ensure that they know from a reliable source what the limits and other obligations are. It was their responsibility to find out (at 9).

However, while refusing to uphold the District Court Judge's order for non-forfeiture, Fraser J thought that the circumstances of the case would support an application to the Minister, who, pursuant to s 107C(2) has ultimate discretion to order the release of the property on payment to the Crown of an amount (if any) not more than the value the item would realise if it were sold at public auction (see Robertson J's observations in *MAF v Bannister*, High Court, Whangarei, 17 July 1992, 9-10).

Comment

Subject to very few established exceptions ignorance or mistake as to the law is no answer to a criminal accusation. The general rule is firmly anchored in s 25 of the Crimes Act 1961. By contrast, mistakes of fact can exclude criminal liability by negating the mental element of an offence or, where an offence requires no mental element, by operating

as an excuse external to the elements of liability. The general embargo on ignorance or mistake of law can produce results which have little or no correspondence with basic notions of fairness. For example, the person who makes a mistake as to the law is often no more blameworthy than the person who makes a mistake about the facts. Yet the difference between exculpation and inculpation depends on the fact/law distinction.

But whereas a plea of mistake of law is almost certain to have no effect in determining a defendant's *liability* in respect of an offence, in cases where a discretion as to sentence is vested in the Courts, such a claim is sometimes reflected in reduced penalties. Thus in *Carson*, Fraser J recognises that in the appropriate circumstances a mistake of law may be regarded as a special reason for exercising the judicial discretion to order a grant of non-forfeiture under s 107B of the Fisheries Act 1983. The result is to create some degree of parity at sentencing between claims of mistakes of fact and of law. This strategy of ameliorating the harshness of the mistake of law rule by mitigating sentence is not without New Zealand precedent. In *Tipple v Police* [1994] 2 NZLR 362 the defendant was convicted of selling firearms to unlicensed persons contrary to the Arms Act 1983. There was evidence that the defendant had relied – at least to some extent – on the incorrect advice of members of the police force with responsibility under the Act. On appeal to the High Court, Holland J found that the police had condoned clear breaches of the Act, and proceeded to discharge the appellant without conviction pursuant to s 19 of the Criminal Justice Act 1985. It should be noted, however, that the approach adopted by Holland J in *Tipple* will not always be available. For example, where an offence requires a minimum penalty a discharge without conviction pursuant to s 19 of the Criminal Justice Act is not available (see *Labour Department v Green* [1973] 1 NZLR 412).

Although on the facts in *Carson* an order for non-forfeiture was not justified, Fraser J's criticism of the respondents' actions in itself provides some room for speculation as to when an order under s 107B may be warranted. If there had been a recent change in the daily bag limit regulations rather than settled law of some three years, if the respondents had been first time fishers instead of experienced amateurs, and if there had been no warning sign posted at the entrance to the beach, then the result in the case *may* have been different. Perhaps most significant however, is Fraser J's criticism of the respondents' failure to inquire from "a reliable source" what the daily bag limits and other obligations were. In *Tipple* (supra) Holland J regarded "officially induced error" as a reason for discharging the appellant without conviction. From Fraser J's observations it might also be argued that honest and reasonable reliance on the erroneous advice of a fisheries officer responsible for administering or enforcing the particular regulations could provide a defendant with special reasons for ordering a grant of non-forfeiture.

Whether *Carson* will be followed in subsequent cases is dependent on further judicial developments in this area. In the meantime *Carson* creates a window of opportunity for defendants facing the prospect of forfeiture under s 107B to claim "special reasons" based on honest and reasonable mistake of law. Moreover, when taken together with decisions such as *Tipple*, the potential effects could be wider still. We may be witnessing the beginnings of a more general trend towards mitigation of penalty in cases where the defendant has been mistaken as to the law. ❑

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already knows – the home might be lost if affairs go awry.

The object of the law here is to protect the party whose free will has been taken away. It could be argued that what is needed is a weapon to counteract the undue influence.

Browne-Wilkinson's intended protection would be advanced if a truly independent solicitor advised the wife. Clearly the husband's solicitor, the bank's solicitor and even the family solicitor is not the best person to give independent advice. If the wife's own solicitor, or a totally new and independent solicitor advised the wife not to sign the wife would have a weapon she could use to counteract the undue influence. She would have a valid excuse not to sign. Mrs Mann could say to her husband that as much as she would like to help him with his business venture by raising money by charging the home she has been told not to by a lawyer. Lord Hobhouse's dissenting judgment better accords with the object of the law which is to provide protection. If Ms Massey and Mrs Mann had such an excuse and they then failed to use it and nevertheless went on to sign the charge then the bank would be entitled to rely on their security.

"I must advise you that it is not in your interests to sign this document."

A balance does need to be struck. It may be argued that where the family home is at risk wives deserve more protection from the law than other guarantors. On the other hand if the protection offered is seen as too generous banks will offer fewer loans to this group of borrowers. Lord Browne-Wilkinson referred to this as making the "wealth tied up in the matrimonial home ... economically sterile" [1993] 4 All ER 417 at 422.

Finally, from the solicitor's point of view, if he or she is truly independent then it is not an onerous requirement to ask that person to actually advise the client not to sign.

Conclusion

The two cases discussed are just two of the many decisions which have come before the Court in recent years, and only one aspect of the problem has been considered. Lord Hobhouse's views should prevail. The independent solicitor should say to persons such as Ms Massey and Mrs Mann:

> I know that you feel you have no option but to sign, but you are wrong. You do have a choice and I must advise you that it is not in your interests to sign this document. You should feel under no obligation to do so. You are asking for my advice. My advice to you is: Do not sign.
> [1995] 1 All ER 936 at 948. ❑

The solicitor's duty to comply with an attachment notice issued under s 157 of the Tax Administration Act 1994

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The following matters are examined in this article: (i) the effect of an attachment notice which requires a solicitor to pay to the Commissioner moneys held for a client in the solicitor's trust account; (ii) the effect of an attachment notice which requires a solicitor to pay to the Commissioner moneys held in the solicitor's trust account as security for costs; and (iii) the validity of an attachment notice which requires judgment moneys, obtained through the work of a solicitor, to be paid to the Commissioner without any deduction from those moneys for the solicitor's reasonable costs of obtaining judgment. It is contended that in the latter situation, the solicitor could refuse to comply with the attachment notice until the Commissioner permitted the solicitor to retain her or his reasonable costs of obtaining the judgment.

Introduction

Section 157 of the Tax Administration Act 1994 (NZ)[1] provides that where any taxpayer has made default in the payment of any income tax payable, the Commissioner of Inland Revenue (the Commissioner) may, by notice in writing, require a person to deduct from any amount payable to the defaulting taxpayer such sum specified in the notice and to pay that amount to the Commissioner. Section 157 empowers the Commissioner to issue an attachment notice to collect unpaid tax from persons who owe money to, or hold money on behalf of the defaulting taxpayer. An attachment notice could be issued to a solicitor. The notice could require a solicitor to pay to the Commissioner money held on behalf of the taxpayer in the solicitor's trust account.[2] Where the amount held by the solicitor on behalf of the taxpayer exceeds the amount of tax owing by the taxpayer, the notice can only require the solicitor to make a payment from the solicitor's trust account up to the amount of tax owing by the taxpayer (see s 157(1) and (10)).

Where a solicitor fails to comply with the attachment notice, he or she is liable on summary conviction to a fine not exceeding $15,000 for the first offence and up to $25,000 for subsequent offences (see ss 211, 215 and 222(4) of the Tax Administration Act 1994 (NZ)). The Court may, in addition, order the solicitor to pay the amount stated in the notice. A solicitor, who complies with an attachment notice, is protected by s 157(7) from possible action by the taxpayer (the client) for breach of any contractual or fiduciary obligation. Section 157(7) provides that a person who makes a payment (pursuant to an attachment notice) to the Commissioner is deemed to have been acting with the authority of the taxpayer. Section 157(7) would also protect the solicitor in relation to possible action for breach of reg 36 of the Solicitors Audit Regulations 1987 (NZ). Regulation 36 prohibits a solicitor making withdrawals from the trust account unless, inter alia, the solicitor has written authorisation from the client.[3]

"An attachment notice could be issued to a solicitor. The notice could require a solicitor to pay to the Commissioner money held on behalf of the taxpayer in the solicitor's trust account."

A notice to pay moneys held for a client

In *King v Leary* (1988) 11 TRNZ 489 a solicitor held moneys on behalf of his client (a family trust) in the solicitor's trust account. The solicitor was also one of the trustees of the family trust and the taxpayer was a beneficiary of the family trust. The family trust had been created by the taxpayer's father. A default assessment was issued to the taxpayer for tax owing ($22,388.25) and an attachment notice was served on the solicitor. The attachment notice required the solicitor to make a deduction in favour of the Commissioner from any amount payable by the solicitor to the taxpayer. The attachment notice was served pursuant to s 400 of the Income Tax Act 1976 (NZ) (the predecessor of s 157 of the Tax Administration Act 1994 (NZ)). After service of the attachment notice on the solicitor, the solicitor was instructed by the taxpayer's father to pay a cheque for $2,552.40 from the family trust to the taxpayer. The solicitor complied with this instruction and paid a cheque for that amount to the taxpayer from the family trust funds held in the solicitor's trust account. The solicitor did not comply with the attachment notice and failed to pay the taxpayer's (beneficiary's) trust

distribution to the Commissioner. The taxpayer collected the cheque but did not present it. The taxpayer handed the cheque back to the solicitor with instructions that it was to be used to pay legal fees incurred by the taxpayer's father. The Commissioner instituted proceedings against the solicitor alleging a breach of s 400 of the Income Tax Act 1976 (NZ).

The solicitor argued that there was no breach of s 400 because the moneys in the solicitor's trust account were not an "amount payable" to the defaulting taxpayer by the solicitor (as required by s 400) as the person making the payment to the taxpayer was the family trust not the solicitor.

Heron J, of the High Court of New Zealand, indicated that whilst there was an amount payable by the family trust to the taxpayer (beneficiary), this was not an exclusive situation. The same amount was also payable by the solicitor to the taxpayer. The solicitor held moneys in the solicitor's trust account on behalf of his client, the family trust, but the moneys became payable by the solicitor to the taxpayer (for the purpose of s 400) on receipt of instructions from the family trust to make payment to the taxpayer (beneficiary). Heron J indicated that s 400 was not confined to the primary obligation to pay, recognising only the ultimate relationship between the payer (the family trust) and the payee (the taxpayer/beneficiary). Section 400 was designed to charge all persons who in any paying capacity have control of funds which were to go to the taxpayer. His Honour concluded that the policy behind s 400 was, once default has occurred, to intercept funds and cut across fiduciary or contractual obligations owed by a solicitor or trustee except where otherwise provided by statute (at 495, also see *Murphy v New Zealand Newspapers Limited* [1982] 5 TRNZ 876). His Honour held that the solicitor was in breach of s 400. It is submitted that the reasoning in *King v Leary* would apply to s 157 of the Tax Administration Act 1994 (NZ).

There was doubt (before the decision in *King v Leary*) whether s 400 applied to payments made to a taxpayer by persons in their capacity as agent or trustee. This doubt existed because s 400 did not clearly define the words "amount payable". There was no express reference in s 400 to payments made by agents or trustees. Section 400 was subsequently amended by inserting a new definition of the words "amount payable" in s 157(10) of the Tax Administration Act 1994 (NZ) expressly includes amounts payable by agents or trustees and would include payments by a solicitor from the solicitor's trust account.

A notice to pay moneys held as security for costs

In *Gilshenan and Luton v Federal Commissioner of Taxation* [1984] 1 QdR 199[4] a firm of solicitors had been retained by a client who had been charged with three criminal offences. The solicitors requested the client to provide A$100,000 as security for costs. By 2 December 1982, the solicitors received A$29,414.48 which was marked in the solicitors' trust account as being "in respect of security for costs". The client gave the solicitors written authority to withdraw moneys from the trust account to cover "such reasonable costs and outlays if any as may be properly payable by (him) in accordance with the requirements of the Trust Accounts Act and to take effect from 1st July 1983".

On 2 December 1982 the solicitors were served with an attachment notice which required the solicitors to pay to the Commissioner all money held on behalf of the client in the solicitors' trust account. The client had a tax liability of A$1.5 million. The attachment notice was served pursuant to s 218 of the Income Tax Assessment Act 1936 (Cth). This provision is equivalent to s 157 of the Tax Administration Act 1994 (NZ). At the time the attachment notice was served, the litigation related to the charges levelled against the client had not been completed and a bill of costs had not been delivered to the client.

The solicitors argued that they did not have to comply with the attachment notice because they had been given the money as security for their costs under a contract of retainer with their client. The solicitors were of the view that the money credited to the solicitors' trust account was subject to a charge in their favour and they could not be required to pay any money to the Commissioner until the termination of their retainer and the taxation (revision)[5] of their costs.

The Commissioner argued that whether the solicitors had been given security for their costs by the client or had a lien over money held in the trust account, the security or the lien amounted to nothing more than a mere retaining lien which attached only to the amount actually due, and that as a bill of costs had not been delivered or taxed (revised), there was no amount actually due. The Commissioner was of the view that the money in the solicitors' trust account was the property of the client (and not the property of the solicitors) and was available to satisfy the client's tax liability. The solicitors could only refuse to comply with the attachment notice if, at the time the notice was served, the moneys were no longer the property of the client (the taxpayer).

The solicitor's lien

In reaching his decision in *Gilshenan and Luton v Federal Commissioner of Taxation* Andrews SPJ, of the Supreme Court of Queensland, noted (at 204-206) that the nature of a solicitor's lien, and the question of ownership of money in such circumstances, was considered by Hope JA in *Johns v Law Society of NSW* (1982) 2 NSWLR 1. Hope JA

1 This legislation came into force on 1 April 1995.

2 The requirement for a solicitor to pay a client's money into a trust account is contained in s 89 of the Law Practitioners Act 1982 (NZ). Also see reg 21 of the Solicitors Audit Regulations 1987 (NZ).

3 Regulation 36 provides, inter alia, that no trust account shall be debited with any costs of the solicitor unless a dated bill of costs has been rendered in respect of those costs or there is an authority in writing signed and dated by the client specifying the sum to be debited and the purpose to which it is to be applied.

4 Also see T Middleton, "The Solicitor's Duty To Comply With A Notice Issued Under s 218 Of The Income Tax Assessment Act 1936 (Cth)", 1994, 24(4), QLSJ, 337.

5 Under s 24 of the Costs Act 1867 (Qld) the client may have the bill taxed by the appropriate taxing officer for the purpose of determining whether the costs are fair and reasonable. The equivalent provisions relating to the taxation or revision of costs are contained in ss 141-155 of the Law Practitioners Act 1982 (NZ).

indicated that a solicitor, who held money for a client in the solicitor's trust account, had a general retaining lien over that money for costs. According to His Honour, this lien gives the solicitor a right to withhold the money from the client until payment of costs; it does not give any right to payment out of money which is the subject of the lien. His Honour indicated that if the solicitor has the client's authority to transfer any part of the money out of the solicitor's trust account for costs, it remains the client's money until transferred to the solicitor's general account. If, for whatever reason it may be, the solicitor is not yet entitled to be paid for her or his costs, the solicitor cannot remove money from the solicitor's trust account in respect of a prospective claim for costs. His Honour concluded that until the solicitor pays money out of the solicitor's trust account in satisfaction of her or his costs, the money in that account, although subject to the lien, belongs to the client. When part of that money is paid to the solicitor for costs, that part belongs to the solicitor absolutely (at 18-19, also see *Stewart v Strevens* (1976) 2 NSWLR 321).

Andrews SPJ applied the reasoning of Hope JA and held that the general retaining lien did not entitle the solicitors to transfer trust account moneys to their general account (at 204-206). Trust account moneys could only be transferred to the solicitors' general account when one of the conditions specified in s 8 of the Trust Accounts Act 1973 (Qld) was satisfied. Section 8 provides that the solicitors could only recover their costs out of moneys held to the credit of a trust account when a specified amount was due whether after taxation (revision) as taxed (revised) or as set out in a bill of costs delivered and not objected to or as authorised in writing by the client. The equivalent provision is contained in reg 36 of the Solicitors Audit Regulations 1987 (NZ). None of these conditions was satisfied on the facts of the case. It will be recalled that the written authority held by the solicitors did not authorise the solicitors to make any transfers from the solicitors' trust account at the time the attachment notice was served on them (on 2 December 1982). That written authority was only effective as from 1 July 1983.

Andrews SPJ held that until payment could be insisted upon by the solicitors (by complying with s 8 of the Trust Accounts Act 1973 (Qld), the money in the solicitors' trust account was the property of the client (subject to the solicitors' general retaining lien[6]) and legitimate claims of third parties (such as the Commissioner) were enforceable against the money (at 206, the decision in *Loescher v Dean* [1950] 1 Ch 491 was not followed on this point). It followed that the solicitors had a statutory duty under the legislation to comply with the attachment notice.[7]

"Section 400 was designed to charge all persons who in any paying capacity have control of funds which were to go to the taxpayer."

In *Shand v MJ Atkinson Ltd (In Liquidation)* [1966] NZLR 551 a solicitor rendered miscellaneous services to a company and, at the date of the liquidation, the solicitor had not delivered a bill of costs. The solicitor claimed a general retaining lien over moneys held in the solicitor's trust account in an attempt to recover his costs from the liquidator. The moneys in the trust account represented funds paid to the solicitor (as the company's solicitor) for progress payments on building contracts and proceeds from the sale of company property. Turner J and North P (McCarthy J not deciding on this point), of the New Zealand Court of Appeal, held that the general retaining lien of a solicitor, whilst applicable to documents (in the solicitor's possession) of a client, does not extend to moneys held in a solicitor's trust account (at 560, 562, 565 and 570).[8] Their Honours held that once the solicitor banked moneys which came into his hands, the solicitor lost possession of those moneys. The general retaining lien depended on possession and was lost when possession was relinquished (at 559-560 and 570).[9]

Whilst the decision in *Gilshenan and Luton v Federal Commissioner of Taxation* recognised the existence of a general retaining lien over moneys held in a solicitor's trust account, the result in that case would have been the same even if there was no lien, that is, the Court held that the general retaining lien was no ground for a refusal to comply with an attachment notice. What was crucial in that case was the Court's decision that at the time the attachment notice was served on the solicitors, the solicitors had not met the legislative requirements for the recovery of their costs, therefore the money in the trust account was the property of the client and accordingly, the solicitors had to comply with the attachment notice. It is this aspect of the decision that is applicable to s 157 of the Tax Administration Act 1994 (NZ). The decision in *Gilshenan and Luton v Federal Commissioner of Taxation* was considered and approved by Heron J, of the High Court of New Zealand, in *King v Leary*, above, at 493.[10] Heron J indicated that the decision in *Gilshenan and Luton v Federal Commissioner of Taxation* highlighted the time at which the solicitor's entitlement to the moneys in the solicitor's trust account crystallised. Heron J made no examination of the question of the solicitor's lien.

A notice to pay judgment moneys

Where the moneys, which are the subject of the attachment notice, are judgment moneys obtained through the work of the solicitor, the principles enunciated in *King v Leary* and *Gilshenan and Luton v Federal Commissioner of Taxation* do not appear to apply. In *Deputy Federal Commissioner of Taxation v Government Insurance Office of NSW & Anor* (1992) 92 ATC 4295 the taxpayer owed A$48,742 to the Deputy Commissioner relating to assessments for the 1980/1981 to 1982/1983 years of income. On July 1986 the taxpayer commenced an action for damages arising out of a motor vehicle accident against the Government Insurance Office of NSW (GIO). On 3 October 1986 the Deputy Commissioner served an attachment notice (pursuant to s 218 of the Income Tax Assessment Act 1936 (Cth) on the GIO. The attachment notice required the GIO to pay to the Deputy Commissioner, up to the relevant amount (A$48,742), any moneys it may be required to pay in damages to the taxpayer. On 14 July 1987 the taxpayer became bankrupt.

The Deputy Commissioner lodged a proof of debt but that proof was not dealt with by the taxpayer's trustee in bankruptcy. The proof of debt was neither admitted nor rejected by the taxpayer's trustee in bankruptcy. In July 1990 the taxpayer was discharged from bankruptcy. On 13 August 1991 the taxpayer recovered judgment against the GIO. The amount of the judgment was A$10,793 together with costs to be agreed or taxed (revised).

The Deputy Commissioner sought a declaration and an order that, pursuant to the attachment notice, he was entitled to the whole of the judgment moneys. The solicitor, who had acted for the taxpayer in the action for damages, claimed that he had an equitable lien over the judgment moneys and was entitled to the judgment moneys (to cover his professional costs and disbursements) in priority to the right of the Deputy Commissioner to be paid the judgment moneys under the attachment notice.

Unlike the situation in *King v Leary* and *Gilshenan and Luton v Federal Commissioner of Taxation*, the relevant moneys were not located in the solicitor's trust account. The proceeds of the judgment never came into the possession of the taxpayer's solicitor. By consent of the parties, the judgment moneys were paid directly into Court by the GIO. An attachment notice was not served on the solicitor. Like the situation in *King v Leary* and *Gilshenan and Luton v Federal Commissioner of Taxation*, the solicitor's retainer predated the attachment notice and the solicitor had not rendered a bill of costs (at the time the attachment notice was served on the GIO).

Wilcox J, in *Deputy Federal Commissioner of Taxation v Government Insurance Office of NSW & Anor* held that the attachment notice was valid and that by service of the attachment notice the Deputy Commissioner became a secured creditor of the taxpayer in relation to the judgment moneys (at 4304). It should be noted that a person's discharge from bankruptcy does not affect the right of a secured creditor (such as the Deputy Commissioner) to realise or otherwise deal with the security provided that the secured creditor (the Deputy Commissioner) has not proved in the bankruptcy (see s 153 Bankruptcy Act 1966 (Cth)). In the present case it was agreed between the parties that the Deputy Commissioner did not ultimately prove in the bankruptcy.

The equitable lien

In relation to the solicitor's claim, Wilcox J indicated that there is a general principle that a person who does work on behalf of another has an equitable lien over the property in relation to which the work was performed. Wilcox J noted (at 4303) that in *Hewett & Ors v Court & Anor* (1982-1983) 149 CLR 639 at 668 Deane J, of the High Court of Australia, cited as an example of an equitable lien, "the solicitor's lien over the proceeds of an action". In *Shand v MJ Atkinson Ltd (In Liquidation)*, above, Turner J (at 560) and North P (concurring at 570), of the New Zealand Court of Appeal, described this equitable lien as a "particular lien". Wilcox J indicated that the validity of the solicitor's equitable lien was not affected by the fact that the judgment moneys never came into the solicitor's physical possession (at 4303). Turner J (at 560) and North P (concurring at 570) were also of this view in *Shand v MJ Atkinson Ltd (In Liquidation)*. Possession is an essential ingredient of a common law lien, but not of an equitable lien.[11] By contrast, the solicitor's general retaining liens referred to in *Gilshenan and Luton v Federal Commissioner of Taxation* and *Shand v MJ Atkinson Ltd (In Liquidation)* were common law liens.

Wilcox J also noted (at 4304) that in *Shirlaw v Taylor* (1991) 102 ALR 551 the Full Federal Court of Australia stated:

> ... where a party has by his efforts brought into Court a fund in the administration of which various parties are interested, his costs and expenses should be a first claim on the fund (at 558).

Wilcox J recognised that the judgment moneys had become available through the work of the taxpayer's solicitor. His Honour held that the solicitor had an equitable lien over the judgment moneys. His Honour stated:

> It would be inequitable to allow the Deputy Commissioner to take the benefit of the judgment

6 Note that s 11 of the Trust Accounts Act 1973 (Qld) provides that nothing in the Act shall be construed as taking away any lawful claim or lien which a solicitor has against any moneys held in a trust account. The equivalent provision is contained in s 89(4) of the Law Practitioners Act 1982 (NZ). In *Shand v MJ Atkinson Ltd (In Liquidation)*, above at 566, Turner J (North P concurring at 570) indicated that this legislation preserves the solicitor's particular lien and does not apply to general liens.

7 The taxpayer in *Gilshenan and Luton v Federal Commissioner of Taxation* failed in an Administrative Decisions (Judicial Review) Act (Cth) application to the Federal Court of Australia to have the decision to issue the attachment notice declared invalid. This application was reported as *Huston v Deputy Federal Commission of Taxation(Qld)* (1983) 83 ATC 4525. In this case, at 4531, Fox J held that an attachment notice could be issued to a solicitor which may have only prospective application. His Honour indicated by way of example that an attachment could apply to funds which at some future time became due and payable by a solicitor to the taxpayer (the client) such as moneys received by a solicitor (on behalf of the taxpayer/client) on discharge of a mortgage in relation to a real estate transaction.

8 The decisions in *Mills v Rogers* (1899) 18 NZLR 291, *In re Hardy* (1901) 19 NZLR 845 and *Official Assignee of Reeves and Williams v Dorrington* [1918] NZLR 702 were affirmed on this point. By contrast, authorities which indicated that the general retaining lien extends to moneys held in the solicitor's trust account include: 36 *Halsbury's Laws of England*, 3rd ed 174; *Cordery on Solicitors*, 5th ed 368, 369; *Atkinson on Solicitors' Liens and Charging Orders* (1905) 43, 44 and *Chitty's Archbold's Practice*, 14th ed (1885) 163.

9 Turner J (at 567), North P (at 570) held that the solicitor was entitled to set off his claim for costs (under s 104 of the Bankruptcy Act 1908 (NZ)) against a claim by the liquidator for moneys held in the solicitor's trust account.

10 The decisions in *Gilshenan and Luton v Federal Commissioner of Taxation* and *Johns v Law Society of NSW* were also approved and applied by the Full Federal Court of Australia in *Kirk and Others v Commissioner of Australian Federal Police* (1998) 81 ALR 321.

11 Wilcox J (at 4305) referred to 28 *Halsbury's Laws of England*, 4th ed, paras 501-505 and 551 where it is stated that: "An equitable lien differs from a common law lien in that a common law lien is founded on possession and, except as modified by statute, merely confers a right to detain the property until payment, whereas an equitable lien, which exists quite irrespective of possession, confers on the holder the right to a judicial sale". Also see Harman J, in *Loescher v Dean*, above, at 495-496.

> moneys without making any deduction from those moneys of the costs reasonably and actually incurred in obtaining judgment (at 4304, also see *Hewett & Ors v Court & Anor*, above).

The Deputy Commissioner appealed against the decision of Wilcox J and the Full Federal Court of Australia (Hill J and Beazley J, Jenkinson J dissenting) in *Deputy Federal Commissioner of Taxation v Government Insurance Office of NSW & Anor* (1933) 93 ATC 4901 held that the attachment notice was ineffective and did not make the Deputy Commissioner a secured creditor at the time the taxpayer's bankruptcy was discharged. This was because an attachment notice has no effect and does not create a charge until the debt owed (by GIO) to the taxpayer comes into existence (at 4909, per Hill J and see *Deputy Federal Commissioner of Taxation v Donnelly & Ors* (1989) 89 ATC 5071; (1989) 25 FCR 432). At the time of the taxpayer's discharge from bankruptcy, there was still no debt owed (by GIO) to the taxpayer (because the judgment moneys had not yet been awarded to the taxpayer) in respect of which the Deputy Commissioner's charge (under the attachment notice) could operate. Accordingly, the Deputy Commissioner was an unsecured creditor and the taxpayer's tax liability was released upon his discharge from bankruptcy. Hill J and Beazley J held that the GIO had no obligation under the attachment notice to make payment to the Deputy Commissioner. The GIO was obliged to pay the judgment moneys to the taxpayer.

In relation to the solicitor's claim, the Full Federal Court of Australia unanimously agreed with the decision of Wilcox J. Hill J (Beazley J and Jenkinson J concurring) stated that had the attachment notice been valid:

> it would be unconscientious and unfair for the Deputy Commissioner to be permitted to take the benefit of the judgment without being subject to the lien for the payment of the costs of obtaining that judgment (at 4905 and 4913).

It should be noted that the decision of the Full Federal Court of Australia, in relation to the solicitor's claim against the Deputy Commissioner, would be regarded as obiter dictum. However, during the course of this appeal the Deputy Commissioner conceded that it would be unconscionable for him to take the benefit of the judgment without bearing the burden of the costs associated with it.

It is submitted that the reasoning in this case (in relation to the solicitor's equitable lien) would apply to attachment notices issued pursuant to s 157 of the Tax Administration Act 1994 (NZ). Support for this submission is found in *Shand v MJ Atkinson Ltd (In Liquidation)* where Turner J (at 559), North P (concurring at 570) and McCarthy J (at 568) recognised that the solicitor's particular (equitable) lien over judgment moneys obtained for the client was not a mere right of retention, the lien extended to judgment moneys not in the solicitor's possession and included a right to the intervention of the Court to protect the lien.

Conclusion

Where a solicitor (who holds money for a client or who holds money as security for costs) has not met one of the requirements for the recovery of costs contained in reg 36 of the Solicitors Audit Regulations 1987 (NZ), the money in the solicitor's trust account is the property of the client and that money is not subject to a solicitor's general retaining lien. In this situation the solicitor must comply with the attachment notice. However, where a solicitor is served with an attachment notice prior to the rendering of a bill of costs, and the only moneys available to satisfy the notice are judgment moneys (which have become available through the work of the solicitor), the solicitor has an equitable lien over the judgment moneys. In this situation the solicitor could refuse to comply with the attachment notice until the Commissioner permitted the solicitor to retain her or his reasonable costs of obtaining the judgment. The solicitor could rely on the equitable principles of unconscionability or unfairness to assert priority (in relation to the solicitor's reasonable costs of obtaining the judgment moneys) over the Commissioner's claim for the judgment moneys. This reasoning would apply not only to judgment moneys held in a solicitor's trust account but also to judgment moneys paid into Court because the solicitor's claim is based upon an equitable lien and upon the equitable principles of unconscionability or unfairness. These equitable principles are of general application and are not fettered by common law considerations such as possession of the judgment moneys. It is submitted that whilst the policy behind s 157 of the Tax Administration Act 1994 (NZ) is to intercept funds and cut across fiduciary or contractual obligations owed by a solicitor, the section is subject to the equitable principles of unconscionability or unfairness. ❑

AIJA: L'Association Internationale des Jeunes Avocats

Michael Webb, of Wellington

Legal Conferences are now so commonplace that their particular value can get overlooked. In this article Michael Webb writes about a Conference he attended in Washington DC in August. This Conference, with about 650 delegates, was the Annual Congress of the International Association of Young Lawyers. He describes the Association which in 23 years has spread through 45 countries, and then discusses the Congress he attended. Mr Webb sums up his experience as being that the Association provides a meeting point for young lawyers from all countries and continents, across borders and across race, religion and culture. Young lawyers are defined for membership purposes as those under 45 years of age. Mr Webb hopes to encourage more New Zealand practitioners to become involved in the Association.

Introduction

Whatever the collective term for a group of lawyers is, there was a big one of them during the week of 14-17 August this year, when hundreds of young attorneys, barristers and solicitors from around the globe descended on Washington DC. The occasion? The XXXIIId Annual Conference of the Association Internationale des Jeunes Avocats; more commonly known as AIJA, or the International Association of Young Lawyers. The author was the sole New Zealand delegate at the Washington Congress.

This article is intended to give readers a flavour of AIJA: what it stands for; who its members are; and what it offers. It also includes some postcards from the Washington Congress. From this, it is hoped that more New Zealand practitioners might become motivated to participate in future AIJA events and initiatives.

What is AIJA?

Founded in Toulouse and Luxembourg in 1962, AIJA is a non-political organisation for lawyers aged under 45. It has two official languages: English and French. Since its inception, AIJA has expanded far beyond its European base and now has a presence in more than 45 countries around the world. In addition to its over 2,500 individual members, AIJA also has 40 "collective" members, representing hundreds of thousands of young practitioners through their respective bar associations.

The intention of AIJA's founders is articulated in Article 2 of its statutes:

> The objects of the Association are to encourage meetings and to promote co-operation and mutual respect between young lawyers from all countries around the world, to defend the interests of young lawyers and to study questions of relevance to them, to help set up groups of young lawyers in countries where none as yet exist and to play an active role in the development of the legal profession and the harmonisation of its professional rules; in addition, to contribute to the provision of full and effective protection in all circumstances and places of the right of all lawyers to practice their profession freely and of every person to be aided, counseled or represented by a lawyer freely chosen, and to be entitled to a fair trial by an impartial and independent judge within a reasonable period of time.

These objectives are achieved through a wide variety of means, including:

- An Annual Congress, usually held in August or September;
- Regional meetings among young lawyers of neighbouring countries, and intercontinental meetings for lawyers of similar backgrounds and interests;
- Standing Commissions and special committees in several practice areas which monitor new developments and offer programmes/publications on them; and
- Seminars on topics of current interest and introductory courses on the main legal systems in the world.

Annual Congress

AIJA's Congresses draw several hundred young lawyers from around the world. (Around 650 attended the Washington Congress.) They come to learn from one another's experiences, as well as from invited experts, on a wide range of current legal topics. A full social itinerary ensures that delegates also have an opportunity to get to know other attendees, as well as take advantage of the host city's attractions. Recent Congresses have been held in Rio de Janeiro in 1993 and Vichy in 1994.

Standing Commissions and Sub-Commissions

Congress seminar topics are chosen with the advice and assitance of the Standing Commissions and Sub-Commissions. Work is done during the year to complete reports by AIJA members or outside experts. AIJA's Standing Commissions and Sub-Commissions comprise:

- Human and Procedural Rights and Responsibilities
- Intellectual Property and New Technologies

- International Business Law
  - Sub-Commissions:
    - Franchising and Distribution
    - Labour Law
    - White Collar Criminal Law
- Future of the Profession
- Family and Estate Law
- Civil Procedure
- Tax Law
- International Arbitration
- European Community Law
- Transportation Law
- Banking and Finance
- Corporate Acquisitions and Joint Ventures
- Insolvency Law
- Environmental Law

The Commission on Human and Procedural Rights and Responsibilities is concerned with the independence of lawyers and the rights and independence of the defence, as well as problems which concern human rights more generally. This Commission, at the request of the United Nations and the Council of Europe, was given the task of preparing the Resolution on the death penalty which was adopted at the Philadelphia Congress in 1980. (AIJA has the status of a Consultative Non-Governmental Organisation with those two institutions.) AIJA has also advised the UN concerning the proposed creation of a war crimes tribunal in the former Yugoslavia.

All issues relating to the rights of lawyers to practise their profession freely have been delegated by the Commission to a Lawyers Emergency Defence Committee, which has the task of preventing and making known infringements of the adopted principles. It also represents AIJA on the Joint Emergency Committee set up with two other international bar associations: the Union Internationale des Avocats and the IBA itself.

Through its Joint Emergency Committee, and in cooperation with its Standing Commission on Human and Procedural Rights and Responsibilities, AIJA conducted the defence of an Association member threatened with disbarment by the military regime of the Central African Republic. AIJA has also acted against the serious interference with the free practice of the profession by the Mali authorities prior to the fall of a former government. More recently, in January 1993, AIJA intervened to secure the release of six Cameroon lawyers who had been arbitrarily detained.

The Commission on the Future of the Profession studies present and future problems of the legal profession to decide what further means are necessary to equip it for the needs of society, both as to basic principles and institutionally. Round table discussions are organised on these topics to benefit colleagues who are not members of AIJA, and to bring them to the attention of relevant professional organisations.

The Commissions on International Business Law, Intellectual Property and New Technologies, Family and Estate Law, Civil Procedure, Tax Law, International Arbitration, European Community Law, Transportation Law, Banking and Finance and Corporate Acquisitions and Joint Ventures, Insolvency Law and Environmental Law address those substantive areas through seminars, Congress working sessions and publications. The International Arbitration Commission, for example, puts out the *AIJA Arbitration Gazette*, and published a book in 1994 on evidence in international arbitrations. In 1990, the Commission on European Law published a comparative analysis of distribution agency and franchising contracts in the EEC. The Commission on International Business Law, with three working sub-commissions concentrating on franchise and distribution, labour law, and white-collar crime, has launched new Standing Commissions on Banking and Finance Law, Corporate Acquisitions and Joint Ventures, and Insolvency Law.

Regional Meetings and Seminars

In order to further international exchanges and to permit better understanding between its members, AIJA organises regional meetings and intercontinental meetings between young lawyers of neighbouring countries or of common interests. Recent meetings were held for Africa in Douala in February 1993, for Asia-Pacific countries in Sydney in November 1994, for Latin American countries in Miami in February 1995, and for Central-Eastern Europe in Budapest in April 1995. European regional meetings have included Helsinki in April 1995, Linz in June 1995, and the Channel Islands in June 1995.

"One of the most exciting opportunities offered by AIJA membership is ... three months foreign work placements for young lawyers who wish to gain professional experience abroad."

Recent years have also seen meetings in Kyoto, Mexico City (bringing together colleagues from the three North American countries to study NAFTA, leading to an AIJA book on the subject), Tokyo, Quito, Cork, Bamako, Algiers, Bratislava, and Warsaw.

The need to keep the profession up to date and informed on legislation, case law and theory have led the Association to organise seminars on specific subjects as well as introductory courses on the main legal systems of the world. These programmes started as courses on French and English law, organised on alternate years in Paris and London. This choice has now extended to German, Spanish, American and European Community law. An introductory course on French business law is planned in Lille in October 1995.

Recent seminars have dealt with issues such as inheritance law (Vienna, February 1994), law practice management (New York and Copenhagen, April 1994), banking and finance (Zurich, June 1994), insolvency law (Montpellier, October 1993; Tokyo, July 1994; and Windsor, October 1994), political refugees (Miami, February 1995) takeovers and market regulation (Milan, March 1995), law and business in Russia (Moscow, June 1995), and European law (Brussels, September 1995). Future seminars are planned on intellectual property (Madrid, October 1995) and arbitration (Prague, Spring 1996).

Work Placement Programmes

One of the most exciting opportunities offered by AIJA membership is participation in the Secrétariat Permanent pour l'Echange des Stagiaries (SPES) Trainee Exchange Programme. The SPES actively organises three-month foreign work placements for young lawyers who wish to gain professional experience abroad. The host office undertakes to ensure that

the exchange lawyer's work within the firm involves both international and local legal matters, so that he or she will have the opportunity to compare legal practice in two jurisdictions and become familiar with a legal culture other than his or her own.

Postcards from Washington

From this full list of activities, the highlight of the AIJA calendar is still unquestionably the Annual Congress. What follows are some postcards from the latest Congress held in Washington DC.

Monday, 14 August 1995

After registration this morning was an all-day seminar on the telecommunications revolution. Featuring speakers such as General Counsel of France Télécom/FCR and officials from the United States National Technology Information Agency, the seminar addressed both the issues of privatisation and the global information superhighway. Lunchtime conversation buzzed with terms of art. This was definitely the seminar to be at for those delegates who were lucky enough to have e-mail or Internet homepage addresses on their business cards. Crestfallen faces told the sad story of delegates who had discovered that a mere fax and mobile telephone number, one time preserve of the techno-savvy lawyer, have long-since become passé.

Tonight the Congress's Opening Ceremony was held at Union Station. Speeches were interspersed with songs from a black gospel choir, the impassioned performance of which led one Irish delegate to speculate whether the New Zealander seated next to him would be meeting the challenge with a haka of his own. (This Irishman, like a number of his countrymen, was interested less in the emerging jurisprudence of our Court of Appeal than in the prospects of Jonah Lomu signing with rugby league or the WRC.) After the formalities came an elaborate buffet dinner and dance, followed by a discothèque.

Tuesday, 15 August 1995

All Congress activities today were spent at Georgetown Law School. This was a day of serious work; the start of le Programme des Travaux. Topics included:

- AIDS and the Law: Wrenching Questions without Answers?
- Sale of Private and Public Companies by Auction
- A Walk Around Another Round: Implications of the Uruguay Negotiations and the GATT's Resurgence in a Globalised Economy
- Beyond Fiduciary Duties: Employees' Duties of Loyalty
- Professional Ethics in Multi-Jurisdictional Practice: A Worthless Pursuit?
- Family Law Mediation

"It is impossible to retain a narrow regionalism when listening to a former East German talking about the incredible changes in his country, legally and otherwise, that have followed the breakdown of the Berlin Wall and reunification."

In amongst the substantive working sessions, light relief was provided by observing the speed with which French delegates resiled from President Chirac's pro-nuclear stance when they wandered unsuspectingly into a South Pacific delegate's path. The day concluded with tours and research projects in the new Georgetown law library.

Before preparing one's body for more punishment at the ritual of the discothèque, there was time for an informal dinner at the home of a Washington area attorney, arranged by the Congress organising committee. Discussions about the virtues and drawbacks of one's own politico-legal system versus the host's ran long into the night. This sitting proved to be an invaluable way to swap notes with a local lawyer.

Wednesday, 16 August 1995

Today began with a short Pacific rim forum over bagels and coffee. After being exposed to such a vast array of nationalities during the preceding days, it struck me in this room full of people from countries like Hong Kong, Japan, and Australia, just how natural it is for a New Zealander to feel at home being grouped under the "Asia-Pacific" label. There is a real community of interest here.

Following the breakfast meeting, there were more optional working sessions. Topics on offer today were:

- Options Available to Foreign Bidders in Public Procurement
- How does Brussels work and how do you make it work for you?
- Judicial Review of State Action
- Arbitration of Intellectual Property Rights
- TRIPS: Trade Related Aspects of Intellectual Property
- International Taxation of Employee Share Ownership

The social programme for tonight featured a dinner/dance cruise on the Potomac. This brings me to an important observation about the AIJA approach to its events. Sure, there is an emphasis on broadening one's horizons intellectually; about the stimulation to be had from debating comparative approaches to legal problems from an international perspective. But running parallel to this is an equally serious committment to having fun.

Thursday, 17 August 1995

The penultimate day of the Congress was given over to sports, notably a tennis and golf tournament, or sightseeing in and around the District of Columbia. Despite what I have noted about the ethic of fun at AIJA events, as a contender in the tennis tournament I can report that playing in 40°C heat during the height of a Washington summer is *not* all that much fun. Mind you, playing against other delegates from exotic places like Brazil and Sweden did provide scope for wild imaginings of victories at the US Open.

From 4pm to 9pm there was a reception, barbecue and square dance on the Mall. With the Capitol at one end, the Lincoln Memorial at the other, the Washington Monument in the middle, and the White House and the Jefferson Memorial to either side, the Congress organisers billed the festivities on the Mall as "surely no better site for a truly all-American event". It did not disappoint.

As "Mom and apple pie" as it sounds, there was a real family atmosphere to the evening. The children of Congress attendees, who had their own programme which ran alongside the Congress proper (Le Mini-Congrès des Aijistes de demain), all had a great time running

around terrorising the adults. The traditional AIJA soccer match was another highlight. The tennis and golf prizes were awarded, too, and candidates for elected office at the next day's AGM were introduced and ritually humiliated.

Afterwards, those who had developed an addiction to the AIJA style of discothèque over the preceding days were given their last fix. Others were content to while away the wee small hours with brandy, cigarettes, and anecdotes that sounded funny the first time they were told, and, at that time in the morning, and told with those accents, still were.

Friday, 18 August 1995

The final day of conference. There is time during the election of next year's AIJA officers for a little quite reflection on the Congress highlights. Above all, I suppose, an AIJA Congress is about exploding one's comfortable view of the world through the simple act of talking with people from places as otherworldly as Lithuania and Zaire. It is impossible to retain a narrow regionalism when listening to a former East German talking about the incredible changes in his country, legally and otherwise, that have followed the breakdown of the Berlin wall and reunification. The immediacy of these first-person narratives forces you to become international in your perspective.

I am reminded of something that Simon Jenkins, a columnist in *The Times*, wrote not so long ago:

> A yawning gulf separates those who do things, make things, manage things or help people – and those who go to conferences. It is the gulf between workers and drones, between those who sweat blood each day to keep the world's wheels turning and those who move smoothly from foyer to suite to club-class lounge, gin-and-tonic in one hand and vacuous draft resolution in another . . . Conferences are like the Wall Street lunches – they are for wimps.

Sitting in the Annual General Meeting today, surrounded by delegates from all around the world, I am struck by how far from the reality such an assessment is for an AIJA Congress. These people are young; they are motivated; and they want to make a difference.

So I come away from Washington after tonight's Gala Ball having made many new friends who have brought to life for me the operation of law and legal practice in their far-away countries. I now have a global network of contacts whom I can call on for advice and support. If for no other reason, this Congress has been important for that. It so just happened to be a lot of fun as well.

The New Zealand infrastructure of AIJA

Where, then, from here? The Executive Committee of AIJA is responsible for local administration in each country, and appoints a National Vice-President or National Presidential Delegate whose job it is to promote the "AIJA spirit" among colleagues in that country. The author is the Délégué Présidential National pour la Nouvelle Zélande.

While AIJA membership is New Zealand is small at present, numbers are growing. Efforts are being made to tap into the existing young lawyers' groups attached to the various District Law Societies, and there are plans to interest the New Zealand Law Society in "collective" membership of the Assocation.

A focus for existing and prospective New Zealand AIJA members will be an upcoming seminar in Hong Kong during 26-27 April 1996. The seminar will discuss the highly topical issue of "Investing in the emerging markets in Asia". Details of the seminar are currently being finalised and should be available shortly.

The last regional meeting in Sydney underlined the need for practitioners to work towards greater mutual understanding and closer business and professional relationships in the Asia-Pacific region, particularly if the goal of creating free trade and investment in the region in the next 25 years is to be realised (the goal set out in the Bogor communiqué following the most recent APEC summit). Developing greater consistency between the laws of the various countries of the region, and enabling lawyers to practise more freely throughout the region, will be critical elements of this process. There is a natural dovetailing here with AIJA's aims of fostering harmonisation of laws between countries and facilitating co-operation among young lawyers around the world.

"Sydney is to be the host city for the 1998 AIJA Annual Congress .... Sydney '98 promises to be a highlight on the region's legal calendar."

The leadership of AIJA certainly recognises the importance of the Asia-Pacific and the value of expanding the Association's presence in the region. An exciting development in this respect, one which has only just been confirmed, is that Sydney, Australia, is to be the host city for the 1998 AIJA Annual Congress. There is a strong AIJA presence in Australia, and the Australian Vice President for AIJA flew to the Association's Executive Committee meeting held in Dublin during November to bid for the event to come "Down Under". Her proposal was greeted with great enthusiasm by the European and North American members of the Executive, who saw it as an ideal way to promote the Association in this region, and to directly tap into the concerns of its young lawyers. Sydney '98 promises to be a highlight on the region's legal calendar.

Conclusion

AIJA is active in many domains. It acts to ensure freedom of practice and the rule of law in countries where these ideals are threatened. It fulfils its mission of education by sponsoring high-level courses and seminars for young practitioners around the world. It consults as a non-governmental organisation with the UN and with other international associations. And it provides a meeting point for young lawyers from all countries and continents, across borders and across race, religion and culture.

AIJA's XXXIVth Congress will be held during the week of 26-30 August 1996 in the Alpine town of Montreux, Switzerland. Young practitioners throughout the country are encouraged to start lobbying to attend. Failing that, they are urged to become involved in the work of AIJA in some way: either directly by becoming members; or indirectly, through finding out more about AIJA and supporting the ideals that it upholds. □