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ANNUAL REPORTS

Law Journals have not traditionally had an "Annual Report season" but that is one of many things that is changing. Many statutory bodies connected with the law have to produce annual reports and the judiciary are increasingly doing so. The Commercial List has for some years produced an annual report and the Chief Justice has now followed suit.

This is perhaps a brave move since it is bound to expose the judiciary and its leaders to questions that might not otherwise have occurred. Like all brave moves it is not entirely risk free. While we welcome the public and easy access to information that is provided, we must beware of doing anything which increases in the minds of some in the public sector the idea that the Courts are just statutory bodies like any other, to be organised and reorganised as the government of the day pleases.

The *Report of the New Zealand Judiciary* is an impressively produced document which, since it is the first such, provides a great deal of background information. The *Commercial List Ninth Annual Report*, by contrast, assumes knowledge on the part of the reader. (References to Friday sittings and to Auto entry for example.)

Both give some statistics on the workload of the Courts. Court Registers have not traditionally been kept in a form which enables much information to be derived from them and so the Chief Justice has done the best that can currently be done, which is to set out filings and hearing times. The relationship between these two measurements can be easily studied in the Commercial List report where the numbers are smaller and easier to track. It is difficult, however, to produce meaningful figures for days per case filed as there is clearly a lag of part of a year between filing and hearing. What is discernible is that the long term trend for civil filings is downwards but the number of sitting days and hours has not, over the same period, declined in the same way.

The *Report* of the Judiciary sets out, amongst other things, to dispel the notion that Judges just sit in Court. The various duties of the Chief Justice and other leading Judges are set out and the way in which the Judges and the Department cooperate to administer the Courts is discussed. Developments in the use of Information Technology are also discussed. These developments should enable evidence recording to become quicker and more useful and enable Judges to maintain normal communications while on circuit.

A number of concerns and activities are reviewed by the Chief Justice. Some of these concerns are of prime importance to those within the system rather than the public. Without belittling the real need to improve the security of Judges, for example, there is no doubt that the concerns uppermost in the minds of the users of the Courts are expense and delay. The *Report* sets out a number of measures designed to tackle these problems but there is room for concern whether the problem is really being addressed.

The tenor of the *Report* is that increasing workloads and delays must be dealt with first by more efficient processing of litigation and secondly, hopefully, by more resources. The fact of the increasing workload is taken as a given. But should it be? Should not the reasons for this increase be examined? There are two important reasons for examining the causes of the increase in litigation. Some may turn out to be within the control of the judiciary and others may highlight costs of ill thought out legal reforms, costs which the proponents of reform are usually at pains to conceal.

So it may be here. The *Report* informs us that the number of jury trials in the High Court and District Courts has risen by 84 per cent in the last five years and that the number of criminal appeals to the Court of Appeal has increased by 56 per cent over the same period. There is a hint in the next paragraph that a general increase in offending is partly responsible, but the increase in offending has been of the order of 2 per cent annually, not the more than 10 per cent compounding required to explain the increase in jury trials. We are also told that while the District Courts' jurisdiction has been dramatically widened, hearing time in the High Court has not fallen. This is because the "broad effect of the changes has been to concentrate the more serious and complex cases in the High Court with the result that, while the numbers are down, the length of individual cases has increased" (p 13). This does not follow. The average length of High Court cases would increase but the reason why individual cases have lengthened cannot be related to the change in jurisdiction, unless it is an example of Parkinson's Law, that work expands to fill the time available.

In the absence of any empirical work to explain why Court cases are getting longer one has to resort to anecdote. It is easy to say that life is getting more complicated, but one has to question what the factors causing that are. It cannot be the globalisation of the economy, since firms operating globally do all they can to avoid Courts and to settle their differences in international commercial arbitration instead.

A clue to part of the problem is found in the Commercial List Report. On p 4 it gives two examples of kinds of applications which have declined in number "probably because the approach of the Court to these kinds of applications [is] well known". In other words if the law is clear there is less litigation. If the law is muddied by "broad" and "purposive" interpretations of statutes and if Judges at all levels make "breakthroughs" rather than follow precedent, then there will be more litigation.

With breakthroughs in family law, exemplary damages and even in some commercial areas, litigation is obviously encouraged. Every accident victim who consults a lawyer is a potential exemplary damages claim. In Elisabeth McDonald's article in this issue, we find that the Court of Appeal suggests that its interpretation of the phrase "a relationship in the nature of a marriage" does not necessarily apply to the same phrase in other legislation, a straight invitation to more litigation.

As for criminal jury trials, it may be that what has increased is "not guilty" pleas rather than a desire to be tried by jury. This can be laid at the door of the Bill of Rights Act coupled with the legal aid payment system. It seems not uncommon for cases that would take one day on the facts to occupy a week of argument on Bill of Rights issues. At worst a Bill of Rights Act argument guarantees an extra half day's payment, in a jurisdiction where, unlike England, the defendant and defence counsel are almost never charged costs for wasting the Court's time. At best an acquittal might be obtained. One just takes one's chances.

Just as nothing seems certainly right any more, so nothing is certainly wrong. Thus arguments that would, in a more robust age, have been dismissed out of hand are now met with an adjournment and a ten page judgment weeks later. In the last few days the Editor has been told on the one hand of a District Court case that has been standing adjourned for two months awaiting an interlocutory decision and on the other hand by a senior practitioner that when he practiced in the District Courts he never once had a reserved judgment. These comments would not be worth repeating but for the fact that they are representative of much such talk in recent months.

So in family law, commercial law, criminal law, administrative law and other areas we seem to be attempting to emulate the Irish Court of Chancery of the last century, before which it was said that no case was certain but none hopeless. There can be no better guarantee of an increase in litigation, especially when for many plaintiffs the decision to sue is backed by the taxpayer.

These developments come at substantial cost to the taxpayer and to the litigant. The cure is not "more resources" or even for Judge's to seize control of cases from the parties but to return to a few old-fashioned ideas. One is that Judges do not consciously make law. They allocate rights between the parties in the instant case and the law is discerned subsequently by examining the cases. Another is that non-curial statements of the law are not referred to. This would have the benefit of ending the growing tendency to refer to the Parliamentary record. It can be seen from Ms Salt's article in this issue that this constitutional heresy is already having the predictable effect, that Ministers and Select Committees are developing devices for dictating to Courts how Acts are to be interpreted.

Whether or not this argument is accepted, there are improvements that can be made in the operation of the Courts. The *Report* goes some way to explaining to Press and public some of the constraints under which the judiciary operates. Not having been prepared overnight, it cannot deal with the latest topical issue, that of bail applications. It would be interesting to see some figures for the success rate of bail appeals to the High Court and some discussion of the statutory constraints on the Judges in making those decisions. Then we might see a more informed reaction when disasters occur. It would also be good to have some figures on the delay between filing and hearing of undefended actions. Even the Law Commission project on women's access to justice has discovered, after substantial research, that Maori womens' main concerns are the cost of legal services and difficulty of access to legal information. The sex and race of lawyers and Judges does not seem to be a major worry to the client. After all, it does not really matter who the Judges are if it takes so long to get before one that one is forced to settle a case regardless of the merits.

THE LAW COMMISSION

The Law Commission report is in more conventional form, being a regular exercise. The Commission costs us three and three quarter million dollars a year and the report sets out what the Commission has done during the last year as well as its total output over its existence. There are some strange features to the report, however, which indicate that the performance measures which are part of the current system do not match well with a body that compares in many ways to a think tank or university faculty rather than to a government department. In several cases, for example, the quantity aspects of the Commission's outputs are determined by the Commission itself.

One obvious measure of the success of the system of which the Law Commission is a part might be the rate of implementation of its proposals. Critics frequently complain that this is low. Several proposals which have resulted in legislation have been enactments of international harmonising conventions which are really in a different category from the Commission's own proposals. The mere fact that relatively few of the Commission's proposals have been enacted is not a criticism of the Law Commission itself, but is a valid criticism of a system in which a considerable amount of money may be being spent at the wrong point. The Law Commission itself expresses concern about the low rate of implementation of its proposals but acknowledges that the rate has increased in recent years (p 16).

The Law Commission's first task is to keep the law under systematic review and to propose systematic reform. There is an appendix by Sir Kenneth Keith justifying this activity. Here we seem to meet the constructivist fallacy in overt form. To justify creating a body for the purpose of systematic reform of the law you first have to believe that there is some systematic problem; that it is possible for a body such as the Law Commission to gather the knowledge and understanding necessary systematically to reform a body of law which was not designed but which grew up case by case; and that this process will not be captured by any particular group and used to advance their purposes.

All these beliefs seem open to question and the recent report on Succession would seem to justify all such questions. At the end of this road lies the kind of letter that the Australian Law Reform Commission has just sent out asking for views on a comprehensive review of the adversarial nature of our legal system. Here one not only sees the constructivist conceit reaching colossal proportions, but one senses a political barrow being pushed. It seems inevitable, however, that if one sets up bodies charged with the systematic reform of the law that this is where they will end up.

The Law Commission is a product of a heady era when rational comprehensive decision making was the rage and "change" was invariably a good thing. Review of the details of the Law Commission's report and its degree of success at meeting its output requirements should not divert attention from the questions "what is the job of the Law Commission?" and "why do we want that job done?". ❑

THE HUMAN RIGHTS COMMISSION

The Chief Human Rights Commissioner, Ms Pamela Jefferies

responds to Grant Huscroft's guest editorial

We are taught that "ignorance of the law excuseth no man". Guest editor Grant Huscroft, either practices it himself or accuses the Human Rights Commission of it. Of course it is appropriate to debate when and in what circumstances a Human Rights Commissioner should speak out. However our politicians seem to have decided that Human Rights Commissioners should be outspoken creatures and legislated accordingly.

Let me quote two examples from other national institutions established within domestic legislation but within the framework of the Paris Principles adopted by the United Nations as a hallmark of a genuine national institution for the protection of human rights. My first example concerns the involvement of the Indian Human Rights Commission which produced a manifesto during the last election period in that country setting out a human rights agenda. It encouraged the political parties to adopt it and promote human rights concerns.

The second example is a report published last month (*New Zealand Herald*, 14 October) about the Indonesian National Commission on Human Rights. That Commission blamed the Indonesian government for sparking mass riots in Jakarta which left five people dead. The Commission "found the involvement of the government (in the affairs of the Indonesian Democratic Party) went beyond the point that was acceptable, that it was overly interfering".

The Commission also found that a string of basic human rights were breached during the incident including freedom of assembly, freedom from cruel and inhuman treatment and the rights to personal security.

I would hope that if ever the New Zealand government acted in a way comparable to that commented by the Indonesian National Human Rights Commission, I or my successors would have the courage to speak out in the same way.

Our more modest contribution to the New Zealand human rights debate, that has so annoyed Grant Huscroft and other critics who have voiced their concerns in various media, has focused attention on when or if a Human Rights Commission should not speak out.

The debate starts by looking at the Long Title of the Human Rights Act 1993 "... to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants and Conventions on Human Rights". In another section, reference is made to determinations within the "spirit and intention" of the Act. The purpose of the Act suggests that we need to have longer vision than just those human rights issues spelled out in the Human Rights Act 1993.

This is further clarified with reference to s 5(g),

> The Commission is mandated to inquire generally into any matter, including any enactment or law or any practice or any procedure whether governmental or non-governmental *if it appears to the Commission that human rights are or maybe infringed* thereby,

and in s 5(c),

> To make public statements in relation to any matter affecting human rights, including statements promoting an understanding of, and compliance with the Act.

Note the statute does not suggest that these provisions do not apply during election periods but affirms the status of the Commission as an independent statutory body not part of the public sector and therefore not bound by public sector conventions.

The Christian Coalition Party categorically stated at the commencement of their campaign that they would provide special assistance by way of carer's allowances and tax breaks to couples with dependent children who were married.

The Commission's position is dictated by the criteria laid down in the international instruments. Without going into these in detail, the Covenant on Economic, Cultural and Social Rights in art 10(3) in particular states,

> Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other social condition.

Discrimination on grounds of marital status is clearly unlawful in the terms of our domestic legislation. The preferential treatment in caring for children set out in s 74 of the Act does not in itself justify providing that treatment in a discriminatory manner. It is acknowledged that parliaments can amend and create legislation if they can command a majority but New Zealanders have respect for our international agreements and domestic law and would not expect governments to turn away from them without comment from the independent Human Rights Commission.

How does Grant Huscroft expect the Commission to respond to the journalist's question? Would a provision benefiting only children of married couples breach international and domestic law? Is the answer "we don't know" good enough? It is worth remembering that the context in which the Commission's open letter was sent was created by the Christian Coalition. In response to the simple answer to a question from a journalist the party poured invective on the Commission and subjected the public to a campaign of

continued on p 400

EVENTS

NZ LAW LTD'S SCHOLARSHIP IN LAW

The inaugural awards of NZ Law Ltd's Scholarship in Law have been announced. The scholarships are awarded to a student at each Law School but the recipients must be resident in towns where NZ Law Ltd has a member firm. Each scholar must be a student of good character with a sound academic record who shows exceptional ability and promise. Each receives $1,000 to help with the following year's studies.

The five winners were:

Auckland	Sheryl Daly of Omokoroa
Canterbury	Rebecca Morgan of Blenheim
Otago	Eric France of Hamilton
Waikato	Ani Undine Bennett of Tauranga
VUW	Dean Knight of Ashurst

The photograph shows Dean Knight on the occasion of the presentation of his award at Johnston Lawrence Elder in Wellington. To Mr Knight's left is John Stevens, Managing Partner of Johnston Lawrence Elder and to the right is Kerry Goldstone, Chair of NZ Law Ltd and a partner of Chamberlain's, Auckland.

continued from p 399

misinformation and misinterpretation of human rights law. The open letter in the interests of transparency gave everyone the same information at the same time.

In response to the ensuing attack from the Christian Coalition Party, author, academic and long time human rights advocate Marilyn Waring commented in the *Evening Post* (10 September) that "a key to promoting human rights has been to safeguard populations from the potential fundamentalist extreme elements who might at any time, legitimately or otherwise, come to power and believe that they can change domestic laws and have no human rights accountability".

It is my fond hope that when the light is turned out on freedom of speech, human rights and the rights of our children, the last light will be that of the Human Rights Commission. It is sad but it seems that the light of academic illumination will have gone out long ago. ❑

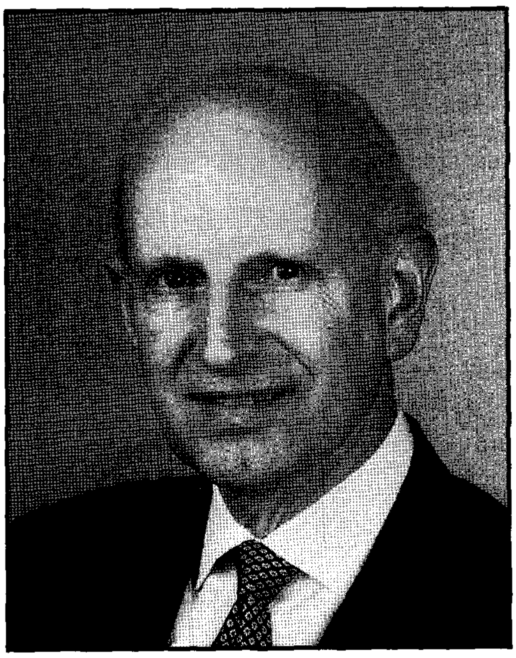
IAN HAYNES PRESIDENT-ELECT OF NZLS

Ian Haynes, of Kensington Swan, Auckland was elected President-Elect of the New Zealand Law Society in the first ballot on Friday 8 November. Mr Haynes received a straight majority of the votes from a majority of the District Law Societies. He said later that he was greatly heartened by the support and confidence which District Law Societies had placed in him, but he also thought it fortunate that two other practitioners of the calibre of Sam Maling and Richard Worth had put themselves forward.

Mr Hayne's period of office does not commence until next March. Barring unforeseen disaster, the major matter facing him will be the E-DEC report on the purposes and functions of law societies which, as he says "is likely to occupy centre-stage for some time". "It is vital" says Mr Haynes, "that we respond to the E-DEC recommendations in a measured and constructive way. It is essential that the governance of the profession be suited to the twenty-first rather than the nineteenth century".

Mr Haynes also said that he regarded women's issues as of great importance to the whole profession. He believed that the legal profession had done much better in this field than others but still had a long way to go.

A brief biography of Mr Haynes and his pre-election statement appeared at [1996] NZLJ 365.



ROGER CHAPMAN LEADR LEADER

Roger Chapman, a senior litigation partner of Johnston Lawrence Elder in Wellington, was recently elected Chair of LEADR (Lawyers Engaged in Alternative Dispute Resolution). Mr Chapman is well known for his promotion of ADR which has included writing articles in this *Journal* as well as presenting seminars on the topic. He was an organiser of the recent Mediation Week run in Wellington with the cooperation of the High Court.

Mr Chapman is the first non-Aucklander to occupy the Chair of LEADR and succeeds Miriam Dean.

COMPANIES OFFICE AGENCIES RETURN TO COMMERCE

The Registrar of Companies has announced that all Companies Office services currently provided by Land Information New Zealand (LINZ) would return to the Commercial Affairs Division of the Ministry of Commerce with effect from 30 November.

Adam Feeley, Solicitor for the Ministry of Commerce, said that there were two main reasons for the transfer. First, the existing agency arrangement could not provide the level and variety of service enjoyed by clients elsewhere and secondly, LINZ was itself being restructured.

It was now possible for anyone anywhere in New Zealand to search the details of any registered company in New Zealand via the Internet, said Mr Feeley, and there was no need to provide a service in certain areas whereby clients had access only to the local register. The imported services included twenty-four hour access to the Internet service and same day name approval. It was also possible to be linked to other public databases.

Mr Feeley said that there would continue to be consultation with those affected by the changes. ❑

FIDUCIARY RELATIONSHIPS: LITIGATOR'S DREAM OR NIGHTMARE?

Sir John Balcombe, formerly a Lord Justice of Appeal of England

gave his view of developments in a paper at the Commonwealth Law Conference, reprinted with the kind permission of the Canadian Bar Association

INTRODUCTION

I have always believed – and my belief was strengthened by my own experience on the Bench – that most Judges approach the case before them by first asking themselves what justice requires should be done in the circumstance of the case and then asking whether the law permits them to reach what they consider to be the just solution. Within those common law jurisdictions, and at those levels, where the doctrine of binding precedent applies, a Judge who is intellectually honest will not seek to bend the law to meet the justice of the case, but will rather seek a solution within those established rules of law which are sufficiently flexible to allow him or her to attain the desired result.

This would seem to me to be a reason for the more relaxed attitude which in recent years some jurisdictions have taken in their approach to fiduciary relationships. The English Courts, however, have maintained a more conservative approach, in part at least because the House of Lords has felt itself free to develop other doctrines, such as common law restitution, where the justice of the case so requires.

This tendency of the English Courts not to introduce equitable principles into commercial law is well exemplified by the recent decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council.* [1996] 1 All ER 961. The case concerned a transaction known as an interest rate swap. Without going into the technical details, the effect of the transaction was to achieve a form of borrowing uninhibited by the statutory controls applicable to local authorities. The agreement between the parties required Westdeutsche ("the Bank") to pay £2.5m to Islington ("the Council") in June 1987, which was done, and for Islington to make a series of payments to the Bank over an extended period. By June 1989 the Council had paid to the Bank a total of £1.355m when in another case it was decided that such transactions were ultra vires the local authorities which had entered into them and were void. By that time the payments by the Bank to the Council exceeded those by the Council to Bank by £1.145m. In the action the Bank claimed repayment of that balance with interest and it succeeded in both the High Court and the Court of Appeal. By the time the case reached the House of Lords the Council no longer sought to challenge the decisions of the Courts below that it was under a common law liability to make restitution of the principal sum to the Bank. What was then at issue was whether the sum should be repaid with simple or compound interest. However both parties considered that they were bound by *Sinclair v Brougham* ([1914] AC 398) and that compound, as opposed to simple, interest was payable only if the Council received the money from the Bank as a fiduciary.

The House of Lords, taking the bit between its collective teeth, decided of its own motion that it would not follow *Sinclair v Brougham*, most of the Law Lords taking the view that it was wrongly decided. All of them were agreed that the Bank failed to make good its claim that it had an equitable cause of action against the Council for breach of duty as trustee or fiduciary (at 1018). Lord Browne-Wilkinson articulated most clearly the philosophy that the Courts should be slow to introduce equitable principles, such as the finding of a fiduciary relationship, into ordinary commercial transactions, especially where an effective personal remedy at common law was available. As he said:

> ... wise Judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs ... (at 987).

He was particularly concerned that equitable principles usually led to proprietary remedies, which could work very unfairly in a commercial context. And Lord Lloyd of Berwick said:

> As one who has in the past attempted to keep open the availability of equitable remedies in commercial disputes, I am now conscious of the strength of the arguments the other way. (at 1021)

THE CHARACTERISATION OF A FIDUCIARY

The English Courts have not attempted to define what constitutes a fiduciary relationship. As long ago as 1911 Fletcher Moulton, LJ warned against the danger of trusting to verbal formulae in this context and pointed out that fiduciary relationships are of many different types. (*Re Coomber* [1911] 1 Ch. 723, 728) Lord Mustill has recently said at [1994] 3 NZLR 385:

To describe someone as a fiduciary, without more, is meaningless. As Frankfurter J said in *SEC v Chenery Corp* ... cited in Goff and Jones, *The Law of Restitution* (4th edn, 1993) p 644:

> To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge those obligations? And what are the consequences of his deviation from duty?

For my part I would accept Professor Paul Finn's definition:

> A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of his own several interest. (Fiduciary Law and the Modern Commercial World in McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) p 9.)

So everything will depend upon the particular circumstances of the case before the Court and, as I have already suggested, whether the Judge considers that the finding of a fiduciary relationship is necessary to enable justice to be done in those circumstances. In recent years English Courts have been slow to find that justice does require the finding of a fiduciary relationship, especially in the context of a commercial agreement. I refer again to the speeches in the House of Lords in *Westdeutsche.*

Kelly v Cooper [1993] AC 205, is a recent example of a case where the Privy Council was unwilling to find the existence of a fiduciary relationship. The plaintiff had instructed the defendants, a firm of estate agents, to sell his house (Caliban). Unbeknown to the plaintiff the defendants had also accepted instructions from the owner of the adjacent property to sell his house (Vertigo). The defendants negotiated sales of both properties to the same purchaser (Perot), but at no time did they inform the plaintiff of this fact. After completion of the sales of both properties the plaintiff discovered what had happened, refused to pay the defendants the commission due to them, and sued them for damages for breach of duty. His case, as summarised by Lord Browne-Wilkinson was:

> (1) The defendants were the plaintiff's agents for the sale of Caliban and as such owed him contractual and fiduciary duties to disclose to him all material matters concerning the sale so that he would be able to make an informed judgment as to what price to accept for Caliban. (2) The defendants were also under a fiduciary duty not to put themselves in a position where their duties to the plaintiff were in conflict with their own interests or those of any other of their clients. (3) The fact that Mr Perot had made an offer and agreed to buy Vertigo (subject to contract) was of the greatest materiality .... (4) In breach of their duties, the defendants failed to disclose that material fact to the plaintiff. (5) In breach of their fiduciary duties they put themselves in a position where there was a conflict between their duty to the plaintiff to inform him and their personal interest in ensuring that they obtained commission on both Vertigo and Caliban. (at 211-212).

The plaintiff won at first instance, but lost in the Court of Appeal of Bermuda. He then appealed to the Privy Council who dismissed his appeal, but on grounds different from those of the Court of Appeal. The essence of their decision is to be found in the following passage from the judgment:

> ... in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of their contract of agency.
>
> Applying these considerations to the present case, Their Lordships are of the view that since the plaintiff was well aware that the defendants would be acting also for other vendors of comparable properties and in so doing would receive confidential information from those other vendors, the agency contract between the plaintiff and the defendants cannot have included either (a) a term requiring the defendants to disclose such confidential information to the plaintiff or (b) a term precluding the defendants from acting for rival vendors or (c) a term precluding the defendants from seeking to earn commission on the sale of the property of a rival vendor. (at 215).

An English case at first instance which seems to go against the current trend is *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, purchasers (subject to contract) of a property applied in the name of and "as agent for" the owners of the property for planning permission to develop the property, but did not inform the owners of what they had done. Contracts for the sale of the property were then exchanged, planning permission was granted (but still without the knowledge of the vendors) and the sale was duly completed. When the vendors found out what had happened they sued for an account of the profits which had accrued to the purchasers by reason of the grant of the planning permission and succeeded in their claim. The core of the judgment of Slade J is found in the following passage:

> Where during the course of negotiations for a contract for the sale and purchase of property, the proposed purchaser, in the name of and purportedly as agent on behalf of the vendor, but without the consent or authority of the vendor, takes some action in regard to the property ... which, if disclosed to the vendor, might reasonably be supposed to be likely to influence him in deciding whether or not to conclude the contract, a fiduciary relationship ... arises between the two parties. (at 399).

While I can readily understand the Judge's anxiety not to allow the purchasers to get away with their unattractive behaviour, I cannot but agree with Professor Finn's description of this case as a "colourable finding" of [a] fiduciary relationship ... to gain access to equitable, but particularly profit-based, remedies (op cit at 8).

FIDUCIARY AND COMMON-LAW OBLIGATIONS

Here again Lord Browne-Wilkinson has cast an illuminating light upon the subject. *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, the House of Lords in a series of actions brought by Lloyd's Names against the managing agents of their underwriting syndicates. The plaintiffs framed their claims under three heads: contract, tort and breach of fiduciary duty. A claim based in tort or breach of fiduciary duty could have certain advantages for limitation purposes. All the Law Lords took the view that a tortious duty of care could arise notwithstanding the contractual relationship between the parties and, unless the contract between the parties precluded him from doing so, a plaintiff who had available to him concurrent remedies in contract and tort was entitled to choose that remedy which appeared to him to be the most advantageous. In those circumstances the majority of the House (as well as the Courts below) did not find it necessary to address the question of fiduciary duty. However Lord Browne-Wilkinson chose to do so, and although his remarks must be obiter, coming from such a source they clearly carry great weight. He said:

> The derivation from fiduciary duties of care of the principle of liability in negligence where a defendant has by his action assumed responsibility is illuminating in a number of ways. ...The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description ....
>
> ... the derivation of the general principle from fiduciary duties may be instructive as to the impact of any contractual relationship between the parties on the general duty of care which would otherwise apply. The phrase "fiduciary duties" is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case. ... the extent and nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties. ...The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source); but the contract can and does modify the extent and nature of the general duty that would otherwise arise. (at 543-544).

EQUITABLE COMPENSATION AND DAMAGES AT COMMON LAW

The equitable obligation to remedy the infringement of some equitable right is primarily to make restitution and is usually, although not invariably, a proprietary remedy. As will have been seen from *Westdeutsche*, the fact that the remedy was a proprietary one was a dominant reason for the rejection of an equitable obligation (fiduciary relationship) in that case. However the House of Lords has recently taken a significant step in assimilating the rules for equitable compensation and common law damages. In *Target Holdings Ltd v Redferns*, [1995] 3 All ER 785, solicitors for mortgagees had wrongly released to the mortgagors their clients' moneys (£1.525m) before the mortgage documents had been executed. The documents were subsequently executed, but the mortgage security proved woefully inadequate. The mortgagees then sued the solicitors, claiming restitution of the whole sum of £1.525m which they, in their capacity as fiduciaries, had wrongfully paid away (because no mortgage had then been executed). The Judge at first instance and the Court of Appeal (by a majority) allowed the mortgagees' claim, but this was reversed by the House of Lords. Again the leading speech was given by Lord Browne-Wilkinson, who appears to have established a corner in this particular area. He posed the problem in the following way:

> Is the trustee [who commits a breach of trust] liable to compensate the beneficiary not only for losses caused by the breach but also for losses which the beneficiary would, in any event, have suffered even if there had been no breach? (at 788).

Later he answered that question in the negative and, in doing so, brought together the principles of law and equity:

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation. ...Although, as will appear, equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same. (at 798).

Thus there is continued the process, started by the Judicature Act 1873, of assimilating the rules of law and equity. Whereas at one time it used to be said that they were two streams which had, since 1873, flowed in the same channel, it appears that they have now merged into a single stream.

UNDUE INFLUENCE

Some aspects of the doctrine of undue influence are closely allied to the doctrine of fiduciary relationships. Class 2 of the classification approved by the House of Lords in *Barclays Bank plc v O'Brien* [1993] 4 All ER 417, 423 is presumed undue influence, where the presumption arises because of the relationship between the parties (eg solicitor and client) or where there is a de facto relationship of trust and confidence. The proximity to fiduciary relationships is obvious. However, in my view the doctrine has in recent years been applied in such a way as to produce injustice. The typical case is where the matrimonial home has been mortgaged to secure a sole debt of the husband and the wife alleges, when the mortgagee seeks possession of the property so as to realise its security, that she was induced to enter the mortgage transaction, either as co-owner of the property, or so as to subordinate her rights of occupation to the rights of the mortgagee, by the undue influence of her husband. Notwithstanding that the husband and wife may still be living amicably together in the matrimonial home this plea has all too often succeeded. (See, eg *Raphael Zorn Hemsley v Brown (No 2)* [1966] 2 FCR 107).

CONCLUSION

It may already have become apparent that if I had to answer the question posed by the title to this paper, I would do so in the negative. All too often the doctrine of fiduciary relationships has been to make good some perceived deficiency in the general law, with the result that the doctrine, and hence the law, has become distorted. In my view the way ahead is that so ably expounded by Lord Browne-Wilkinson in the cases I have cited. If the law is deficient reform it; do not stretch the doctrine of fiduciary relationships beyond what it can properly bear. ❑

AN AFFIRMATION OF THE FIDUCIARY PRINCIPLE

Justice E W Thomas

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A FUTILE QUEST

The fiduciary relationship is the law's sensible response to the requirements of individual justice and the reasonable expectations of the community. It is an exemplar of the social utility of the law.

The problem lies not in the concept of the fiduciary relationship itself, but in the quest of Judges, lawyers and academics for a precision which the law is incapable of delivering. This limitation is not, of course, restricted to the fiduciary concept. To a greater or lesser extent uncertainty is common to all areas of the law. It is inherent in a discipline which is not a science, which is administered by judicial officers with different judicial approaches and philosophies, and which reflects the standards, needs and expectations of a society which is "in a flux typically faster than the law". (K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962) at 55-57, referred to by the author in *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy* (1993) VUWLR Monograph 5, at 32.

The nature and scope of the fiduciary relationship has been subjected to extensive examination. In no other area of law is the lawyers' penchant to analyse, define, classify, categorise, and then to reanalyse, redefine, reclassify and recategorise, so conspicuous. The "pigeon-hole" approach is endemic. Such a description may be slightly harsh in that the system's adherents are in pursuit of a unifying principle. Sir Anthony Mason's famous amorphism describing the fiduciary relationship as a "concept in search of a principle" has, it seems the force of an injunction. (Mason, "Themes and Prospects" in Finn (ed) *Essays in Equity* (1985) 146.

It also would be somewhat unfair to suggest that the search is not legitimate. What is not legitimate is the desire to define or describe the fiduciary principle in unrealistically exact terms. Despite numerous attempts by numerous theorists and jurists it remains incapable of precise definition. Indeed, the imprecision has led some commentators to deny that the fiduciary concept is sufficiently distinct to rank as a distinct legal concept. (see Teele, "The Search for the Fiduciary Principle: A rescue operation" [1996] Aust, Bus. LR, 110. Nor are the aspirations of the theorists necessarily able to be realised. Professor Finn has suggested that it is impractical to expect a synthesis capable of revealing a universal principle matching the law to the needs of the community in the manner that *Donoghue v Stevenson* [1932] AC 562, provided a synthesis for the law of negligence (P D Finn, "The Fiduciary Principle" Youdan (ed) *Equity, Fiduciaries and Trusts* (1989).

As with all equity's principles and remedies, the fiduciary concept evolved to supplement the shortcomings of the common law and fulfil the reasonable expectations of the community. Commonly held notions of justice, if not plain common decency, demanded that persons who have undertaken responsibility for the property or affairs of another should not be permitted to exploit their position and profit at the expense of their charge. The core notion of a duty of loyalty which would preclude such exploitation was inevitable, and the law would be sadly deficient without it.

It is the underlying theme of this paper, then, that the fiduciary relationship is not capable of close definition. Even if it were, it should not be closely defined. Its elasticity is to be perceived as a significant advantage. As Lord Chelmsford observed in *Tate v Williamson* (1986) 2 Ch App 55, at 61:

> The Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise.

Without this flexibility the fiduciary concept would lose much of its utility.

At the same time, it also must be accepted that the fiduciary obligation will overlap with other heads of liability. It will frequently be difficult to determine whether a factual situation should be governed by the law of contract, the law of tort, or the law of trusts. But it is wrong to perceive this difficulty as the product of a law in disarray. Why should not the same factual situation give rise to contractual, tortious or fiduciary obligations? What is referred to in New Zealand as the "intermingling" of law and equity (*Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, per Cooke P at 301-302) virtually guarantees overlapping liability. It is a phenomenon which equity has long accepted. And concurrent liability is now accepted in contract and tort (*Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761, and see *Rowlands v Collor* [1992] NZLR 178 and *Dairy Containers Ltd v NZI Bank Ltd* [1995] 1 NZLR 30, at 74. Why not concurrent liability in contract, tort and equity?

It follows that it is a futile exercise to seek to define the fiduciary relationship or expose its unifying principle by eliminating those characteristics also present in other areas of the law. By its very nature the fiduciary concept, while retaining different features and having a different focus or function, will share some characteristics with the law of contract, some with the law of tort, and some with other equitable principles such as unconscionability, duress, and undue influence. It is no more sensible to deny the fiduciary concept its place in the law because it may at times overlap with, say, contractual liability, than it would be to challenge the integrity of contract law because at times it may embrace certain of the characteristics of a fiduciary relationship.

THE FIDUCIARY PRINCIPLE

What then is this broad fiduciary obligation which defies closer definition? Its essence is to be found in the demand for loyalty. The fiduciary duty of loyalty in a relationship ensures that the interests of the other party are recognised as being paramount (Maxton and Rickett, "Equity" [1995] N Z L Rev. 246, at 253). Other duties, such as the equitable duty of care, may be attached to this key attribute so as to seemingly present what has been called a "spectrum of obligations", (Rickett, "Where are we going with Equitable Compensation?", paper presented at a Conference on Trends in Contemporary Trust Law at the University of Cambridge, 6 and 7 January 1996, at 26), but the underlying principle remains constant; the fiduciary is required to subordinate his or her own interests to the promotion of the interests of the other. The law regulates the fiduciary's power in the relationship so that he or she cannot utilise their position to their own advantage or to the other's detriment (Finn, n 5, at 55). Under the fiduciary standard the fiduciary must act solely and selflessly in the interests of the beneficiary (*D H L International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10, per Richardson J at 23).

Nor is anything gained by seeking to restrict the fiduciary relationship to defined categories, such as company directors, solicitors, partners and agents. The fiduciary concept embraces relationships based on status but it is not restricted to them. Fiduciary obligations have been recognised in diverse factual situations (Maxton, "*Contracts and Fiduciary Obligation*", at 4) for a wide variety of circumstances in which fiduciary obligations have been imposed). Nor should the relationships which will attract a fiduciary obligation be regarded as indivisible. One or more aspects of the relationship may be regarded as fiduciary but not other aspects. An example is a contractual relationship in which the Courts import a fiduciary obligation, such as, for example, in the case of a mortgagee in possession.

Ultimately, the relationship of fiduciary and beneficiary will exist whenever the circumstances are such as to require the imposition of a fiduciary obligation on the ascendant party to prevent him or her unfairly exploiting their position to their own advantage. In determining whether the circumstances give rise to this fiduciary obligation, or duty of loyalty, the Courts will have regard to a number of factors, such as the power, dominance and influence of the ascendant party, and the trust, dependence, reliance and vulnerability of the weaker party. In the end the task of determining whether the circumstances give rise to a duty of loyalty is not significantly different from the task of determining whether the circumstances give rise to a duty of care in negligence. These are exercises with which the Courts are familiar and which they are well-equipped by training and experience to perform.

Emphasis on this core duty of loyalty, which precludes the fiduciary from exploiting his or her position to their own advantage or to the detriment of the beneficiary, explains the wide range of remedies available to the Courts. Thus, exploitive breaches of the fiduciary obligation can be met by restitutionary remedies such as the constructive trust and an accounting of profits. Apart from compensating the beneficiary, such remedies are designed to enforce the standard required of the fiduciary to discharge his or her duty of loyalty and to deter the fiduciary, as well as others in a like position, from departing from that standard.

This latter observation exposes the large public policy element inherent in the fiduciary concept. It reflects the community's expectation of what is acceptable and desirable social behaviour. It maintains the integrity and utility of those relationships in which one party is perceived to be in the service of the interests of another (Finn, at 27). The morality of the market place is not sufficient to deter the unfair exploitation of others in a fiduciary relationship or to enforce upon such exploiters the abnegation of their profits (Wynrib "The Fiduciary Obligation" (1975) 25 U of Toronto LJ 1 at 3). The law steps in to fill the breach.

Once this element of public policy is acknowledged, the full expanse of the fiduciary principle becomes apparent. The Courts need not be overly concerned to adhere to the original notion of a trust in which one party has the custody or management of another's property or affairs. Lawyers' fidelity to the trust analogy, which can lead to futile debates such as whether or not a company director is a trustee, need not persist. The concept can be advanced, and with it the equitable remedies, under the rubric of public policy to meet the reasonable expectations of the community.

The implementation of this policy is evident in Wilson J's judgment in *Frame v Smith* (1986) 42 DLR (4th) 81. She held that the fiduciary principle should be applied to the family situation under consideration on the basis that a cause of action for breach of fiduciary duty would create a strong incentive for custodial parents to exercise their custodial rights so as to further the best interests of their children and to recognise that their children were entitled to an ongoing relationship with the other parent (*Teele*, at 123). Then again, in *Norberg v Wynr* (1992) 92 DLR (4th) 449, at 499 McLachlin J declared that fiduciary principles "are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests". No alarm need be expressed at such extensions of the fiduciary principle. Just as considerations of public policy may dictate its expansion, so too will they guard against extending the law of fiduciary obligations too wide (*Surrey County Council v Brooder Homes Ltd* [1993] 3 All ER 705, per Steyn LJ at 715).

Professor Finn's hierarchy of standards has considerable appeal. In ascending order of intensity these standards are described as "the unconscionability standard", "the good faith standard" and "the fiduciary standard" (Finn, at 3). Common to each is a concern with the extent to which one party to a relationship is obliged to acknowledge and serve the interests of the other. Each provides a different premise. "Unconscionability" permits one party to act self-interestedly in his or her actions towards the other but then precludes excessively self-interested or exploitive conduct. "Good faith" permits a party to act self-interestedly, but requires that party to have regard to the legitimate interests of the other. The "fiduciary" standard charges one party to act selflessly and with undivided loyalty in the interests of the other. There is, as Finn points out, a progression from selfish behaviour to selfless behaviour (ibid, at 4). It is difficult to conceive of a legal system without such a progression and inevitable that the concepts should vie with each other for application to the facts of a particular case.

RESISTING A CLOSER DEFINITION

There are three principal reasons why a close definition of the fiduciary relationship should be resisted. The first is that a precise definition, as with all definitions in the law, will lead to injustices in individual cases. This truism is demonstrated by reference to the inexorable evolution of the fiduciary concept. The learned authors of Goff and Jones *The Law of Restitution* (1986) at 634 speak of the growing recognition that "Courts have never allowed a just claim to fail and have found a fiduciary relationship between the parties because it was necessary". The corollary is that, if the Courts had not done this, just claims would have failed. There is no reason to contemplate that the situation will be any different in the future.

In the second place, a perfect definition would inhibit the Courts' ability to apply the fiduciary principle so as to meet the needs and reasonable expectations of the community. The community's perception of what standard of conduct the law should exact from those who assume ascendancy or dominance over the property and affairs of others will change with the passage of time. This "moral" component of the fiduciary concept has been noted in commenting on the fiduciary concept's empathic kinship with public policy. An elastic definition permits these changing community perceptions to be encompassed in the law.

The third reason why the imperfectly defined boundaries of the fiduciary concept should not be more closely prescribed relates to the shortcomings of the existing law. While the more apt solution to the perceived deficiencies in the law might be the principled evolution of suitable concepts rather than have the Courts strain to find a fiduciary relationship (Teele, at 123) such developments in the law are likely to be retarded for so long as Judges, lawyers and academics insist upon a rigid application of the doctrine of stare decisis and adhere blindly to an unachievable measure of precision in the law. While these shortcomings in the law exist, therefore, the fiduciary concept is able to perform the essential function of equity which La Forest J described as the "traditional role of filling gaps in the law or improving the remedies available for breach of duty" *Canson Enterprises Ltd v Broughton & Co* (1991) 85 DLR (4th) 129, at 144.

Many commentators persist, however, in viewing the process by which Judges are inveigled into extending the fiduciary concept, as a process which corrupts the true fiduciary relationship. The extensions are seen as being contrived, diluting the purity of the concept in that it is no longer reserved for situations in which the high fiduciary standard of conduct is expected. It is asserted that the concept is increasingly manipulated to serve goals other than the exaction of this higher standard of conduct. Teele has advanced the thesis that, instead of seeking to define the fiduciary principle by identifying characteristics common to relationships which have been held to be fiduciary in nature, the focus should be placed on whether the stringent fiduciary standard is appropriate in the particular circumstances of the relationship in question (Teele, v, at 110).

Such strictures are not necessarily appropriate, however, once it is accepted that the concept is inherently elastic and that there is nothing untoward in acknowledging that there is no logical or necessary reason why the fiduciary concept should possess an exclusive domain in the law. Its capacity to fill the "gaps in the law" is to be seen as desirable for so long as those deficiencies exist.

"FILLING THE GAP"

Deficiencies in the law governing obligations can be identified in both the substantive law and in the remedies which are available for a breach of such obligations. Thus, the fiduciary concept has been used as a means of intervention where no other doctrine was available or perceived to be adequate. The obligation to disclose information in the possession of a party who knows or has reason to know that the other party is relying upon him or her in a dealing is one obvious instance (Finn, at 18-20). An example pointing to the inadequacy of the available remedy is to be found in the equitable doctrine of unconscionability. It evolved to regulate dealings requiring fair dealing on the part of one or other of the parties to the relationship falling short of the high fiduciary standard. The prevalent view is that the remedy is limited to the avoidance, either total or partial, of the transaction and does not give rise to a claim in damages (ibid, at 9). Again, in New Zealand and Australia a cause of action for unjust enrichment has not been developed to the extent that it has been in Canada. There, the Courts, once a claim for unjust enrichment has been established, will determine whether a proprietary or personal remedy is the more suitable remedy in the circumstances. In New Zealand, however, it has been intimated by the Court of Appeal that the usual remedy for unjust enrichment is personal in the form of restitution by a money award (*Investors Protection Co Ltd v Roy Courtney Architects Ltd* (1993) 7 PRNZ 1, at 3). Shortcomings, or perceived shortcomings, such as these provide a fertile ground for the growth of the fiduciary obligation.

Another important deficiency or perceived deficiency in the general law which contributes to the expansion of the fiduciary obligation is the absence of a developed doctrine of good faith in contractual relationships. In the United States the doctrine has taken root (*Uniform Commercial Code* (1977) s 2-302; American Law Institute, *Restatement (2nd) of Contracts* (1981) (s 205). In Canada it has long had its proponents (eg Reiter, "Good Faith in Contracts" (1983) 17 Valparaiso U L Rev. 705) as it does in Australia. In *Renard Construction (ME) Pty Ltd v Minister for Public Work* (1992) 26 NSWLR 234, at 268 Priestly JA suggested that the law in Australia should recognise good faith independently of any implied term and aver that duties of good faith and fair dealing are expected in all contractual relationships. Gummow J took a different view in *Service Station Association Ltd v Berg Bennett and Associates Pty* (1993) 117 ALR 393, at 401-407 holding that an obligation of good faith may be implied in a contract but is not an independent doctrine. The doctrine has seemingly been shunned in the United Kingdom, notwithstanding that it was the great Lord Mansfield who said that good faith is "the governing principle applicable to all contracts and dealings"; ... (*Carter v Boehm* (1766) 3 Burr 1905. But see also *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 per Bingham LJ at 439 and 445). In New Zealand it has fared little better. The lone judicial endorsement of an independent doctrine of good faith has seemingly passed unnoticed (*Livingstone v Roskilly* [1992] 3 NZLR 230, at 237-238).

In the absence of a clear doctrine of good faith it is inevitable that the Courts should resort to the fiduciary principle. A classic example of an attempt to implant the fiduciary concept in a contractual setting is the recent *Goldcorp* case (*Liggett v Kensington* [1993] 1 NZLR 257 (CA), and *Re Goldcorp Exchange Ltd (In Receivership): Kensington v Liggett* [1994] 3 NZLR 385 (PC)). Goldcorp dealt in gold and other precious metals. Its customers agreed to purchase bullion for future delivery, but no bullion was actually set aside or appropriated to the individual contract. Instead, customers received a "certificate of ownership". In the accompanying brochure representations were made verifying the customer's ownership of the metal and stating that physical delivery could be taken upon seven days' notice on payment of nominal delivery charges. Goldcorp also represented that its stocks of metal were audited monthly to "ensure that there are sufficient stocks to meet all commitments". There can be no doubt that the company created the impression that ample bullion was stored in its vaults to satisfy the individual contracts of its customers. They could reasonably believe that they had an interest in the bullion pending physical delivery to them.

But the representations did not accord with reality. Goldcorp did not retain sufficient bullion to meet its commitments. The Bank of New Zealand appointed a receiver and the company, being insolvent, went into liquidation. A floating charge held by the Bank crystallised and left nothing for the unsecured creditors. Goldcorp's customers pursued a number of arguments designed to establish that they had a proprietary claim to the bullion and the money which they had paid to Goldcorp. The Court of Appeal held that the company stood in a fiduciary relationship to the non-allocated purchasers giving rise to a duty to protect their interest by holding bullion stocks on their behalf as represented. The fiduciary received the moneys from the moment of their payment, upon trust, the purpose of which was the setting aside and holding of sufficient bullion for all the claimants. The Court saw it as a constructive trust on orthodox lines. The Privy Council renounced this reasoning; the obligation existed in contract, not in an imported fiduciary relationship. The argument that the company was a fiduciary was, the Privy Council held, nothing more than an assertion that Goldcorp had failed to conscientiously and honestly discharge its contractual obligations. The bullion was unascertained property and, whether in law or in equity, property cannot pass under a contract for the sale of unascertained goods. The customers failed.

If the law incorporated a developed doctrine of good faith, Goldcorp could have been held to have been in breach of the obligation to perform its contractual obligations with due regard to the legitimate interests of its customers. Of course, such a breach would not avail the customers unless the Courts could also award a proprietary as well as a personal remedy for its breach. The "basket of remedies" approach referred to below would achieve that end.

In keeping with the high standard demanded of fiduciaries, the fiduciary concept provides an extensive range of remedies. They include rescission, injunctive relief, an account of profits, equitable compensation and the constructive trust. The constructive trust, in particular, is a valued remedy. It deprives the fiduciary of any gain, irrespective whether or not the plaintiff has suffered harm, and confers the increased value of the asset in issue on the plaintiff. It entitles the plaintiff to trace the proceeds, and it has the effect of allowing the plaintiff's claim to be met ahead of general creditors where the defendant is in liquidation. While these remedial advantages exist, the lure of the fiduciary concept will be as irresistible as the Sirens singing song for song. Illustrations abound of the Courts' struggle to do justice in the instant case or otherwise satisfy the reasonable expectations of the parties and the broader community by reaching for the most appropriate remedy. In *Nordberg v Wynrib* for example, a claim by a patient against her doctor for assault and battery, McLachlin J recognised the advantages of the fiduciary relationship when both contract and tort were inadequate to cover the wrong or provide a complete remedy. *English v Denham Vale Properties* [1978] 1 All ER 382 provides another example. Negotiations between vendor and purchaser were characterised as fiduciary to enable an account of profits to be taken.

Once again the preferable solution would be to expand the law's approach to remedies. Permitting Judges to have at hand a "basket of remedies" means that, once the wrong has been established, the remedy which is more appropriate can be selected and applied (Hammond, "The Place of Damages in the Scheme of Remedies" in *Essays on Damages* (1992 ed. Finn) at 223). Such an appraisal is, of course, entirely feasible with the merging of law and equity. The sharp distinction between the remedies available for each head of obligation need not exist. For as long as they do exist, however, the fiduciary concept will tend to be expanded beyond its traditional or doctrinal boundaries.

A MORE PRINCIPLED APPROACH

A more principled approach is emerging. It recognises that the various heads of obligation necessarily overlap and therefore relate to the same conduct. It is perceived to be more important to identify the substance of the liability than defer to its historical provenance. Once this approach is adopted it follows logically that the Courts should be able to adopt the most appropriate remedy to rectify the wrong.

The tendency to move away from a formalistic and historical approach in New Zealand was expressly indicated in the dicta of Cooke P and Tipping J in *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* ([1995] 1 NZLR 22, at 26 and 34 respectively). Both Judges indicated that the substance of the right claimed by a plaintiff is where the cause of action is to be found and, then, accurately articulated, rather than any historical formulation of the cause of action which often brings with it unhelpful baggage (Rickett, at 3. See also Maxton, "Intermingling of Common Law and Equity" in Cope (ed) *Equity: Issues and Trends* (1995) at 25).

The same approach may be evident in England in the insightful contribution of Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd; White v Jones* [1995] 1 All ER 691 and *Target Holdings Ltd v Redferns*; [1995] 3 All ER 785. In the first two cases Lord Browne-Wilkinson drew attention to the close connection between tortious obligations and equitable obligations. In the last he identified the remedial similarities between these two heads of liability.

In *Henderson v Merrett Syndicates Ltd* his Lordship held that the liability of a fiduciary for the negligent transaction of his or her duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act or advise others. In the past, he said, the historical development of the rules of law and equity have caused different labels to be stuck on different manifestations of the duty. Yet, that duty arises from the circumstances in which the defendants were acting, not from their status or description, and it is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold. These observations were elaborated in *White v Jones*.

continued on p 412

DECISION-MAKING IN THE EMPLOYMENT COURT

Chief Judge T G Goddard

This is a revised version of an address to the Employment Law Institute in Wellington on 28 August 1996

This paper was intended for an audience of professional advocates. It was meant to be technically stimulating. I thought that advocates must be presumed to want to know how they can be at their most persuasive, how they can acquire the knack of knowing which buttons to push in particular situations. On reflection, however, I have found it necessary to narrow the scope of the topic and to be rather less specific in general but rather more specific in particular areas. I want to begin with the latter by talking about a curious aspect of advocacy in the employment institutions. Here is a new jurisdiction and one that has been affected by sweeping statutory changes twice in five years. It is therefore not surprising that advocates ordinarily take a conservative approach and have initially presented arguments along traditional lines. Thence there were few immediate examples of recourse to the Fair Trading Act 1986 where an employment contract has resulted following deceptive or misleading conduct in pre-contractual negotiations. There must be many cases in which such a point could have been taken and it is now a familiar feature, (see *George v Attorney-General* [1994] 1 ERNZ 933, and *Hansen v Attorney-General* unreported, 21 August 1995, Goddard CJ, WEC57/95) although not available, as a result of the judgment of the Court of Appeal in *Conference of the Methodist Church of NZ v Gray* [1996] 1 ERNZ 48, where no employment contract has resulted but damage has flowed just the same from the deceptive or misleading activities.

Also under-utilised are the anti-discrimination provisions which link to the Human Rights Act 1993, a measure with potential to cast light on the traditional and largely unsatisfactory (from any viewpoint) approach to terminations on the grounds of physical or medical disability.

Another point still to be argued is whether the Court's decision on an appeal from the Employment Tribunal is in general final, in other words whether an appeal lies as of right to the Court of Appeal or only by leave. Under the Labour Relations Act 1987 and earlier statutes, appeals on questions of law were by way of case stated. That system was abolished so that appeals lie in the same way as from the High Court and are governed by s 66 Judicature Act 1908. The concluding words of ss 132, 134, and 135(1) all say that s 66 is to apply to any such appeal. Obviously, it must apply with necessary modifications because s 66 Judicature Act 1908 is concerned with appeals from the High Court. That section provides that, subject to the provisions of that Act, the Court of Appeal has jurisdiction to hear and determine appeals. Section 67 to which s 66 is subject, provides that the determination of the High Court on appeals from inferior Courts is final unless leave to appeal is given by the Court appealed from or, if refused by that Court, by the Court of Appeal. The developed jurisprudence holds that, where the case does not involve an interest beyond its own subject-matter, leave should not be granted, but it should be where wider interests are involved: see *McGechan on Procedure* J67.04.

This argument is not guaranteed to succeed. But, so far as I am aware, it has never been raised and the Court of Appeal has, without objection, heard a number of further appeals in cases originating in the Employment Tribunal. The reason for such a restriction is twofold:

- It is confusing for the Employment Tribunal if its decisions are to be subject to two appeals as a matter of course. The result is that it cannot, with confidence, act upon the decision of the Employment Court on the first appeal until the second appeal has been heard or it can confidently be said that there is no second appeal.
- Run of the mill cases should not have two appeals available. The basic and most common method for the disposal of cases is by the Tribunal that hears the witnesses and not by appellate Courts. This is especially so where questions of credibility and of degree are at issue – features particularly acute in, but not unique to, personal grievances based on sexual harassment and gender and race discrimination. Generally speaking, leave would be granted only in those cases involving a matter of principle of general application or a genuinely difficult question of law on which guidance is required for the future. Cases under the Holidays Act 1981 spring to mind.

By contrast, areas have been developed, which were not readily apparent from a reading of the statute but which have been held to exist under the equity of the statute: a full and proper reading rendering it duly efficacious.

For instance, because the Court is given power to issue injunctions to prevent strikes and lockouts, it can enforce the injunctions it has issued by any means available for the enforcement of injunctions, including imprisonment, even although that is nowhere stated in the Act.

An early innovation under the Employment Contracts Act 1991 was the issue of injunctions to preserve the status quo immediately after a dismissal that is being contested by way of an action for damages in the Court or a personal grievance in the Employment Tribunal.

Having said that, however, it needs also to be noted that, while there is room for novel arguments, these should be reserved for cases to which they are appropriate. In all other cases, the successful advocate will follow the simplest path and will resist the temptation to introduce unnecessary complications. It is the introduction of such complications that can turn a straightforward case into a legal morass.

Coming to the more general aspect of my topic, I want to stress that the Employment Court has a special jurisdiction which calls for special decision-making techniques differing markedly from those used in other Courts. That is not to say that they are better or worse but it is to say that they are different. The difference may not seem as great as in the past because in the last two decades some of the methodology developed by the Court and its predecessors – which at one time may have been almost unique – has now been conferred on or assumed by other Courts. The difference is still substantial.

We can consider the differences under three headings:

- Special jurisdiction and powers of the Court
- Section 126(1)
- Sections 138 and 140

SPECIAL JURISDICTION AND POWERS

This is a reference in part to the exclusive jurisdiction of the Employment Court to hear and determine any proceedings founded on an employment contract other than such as are entrusted to the Employment Tribunal: ECA s 3(1). However, it is more than that because the combined effect of Part II of the Act dealing with bargaining (much of it devoted to collective bargaining) and Part V of the Act (dealing with strikes and lockouts) shows that the Court has common law jurisdiction to award damages, equitable jurisdiction to grant injunctions, and statutory jurisdiction to make compliance orders in respect of conduct forming part of the bargaining process. That is significantly different from the normal commercial situation under which the law does not control the conduct of the parties during the bargaining process. It is true that it may intervene later to rescue one party or punish another as a result of unfair advantage through questionable conduct during the bargaining process, resulting in a contract. However, the law is capable of intervening only after a contract is made and not if there is a breakdown and a failure to agree. It is an important difference that in employment law, perhaps uniquely, there is a role for a Court to play before any contract is made.

Another important distinction is in the collective nature of the bargaining process in many instances. The Employment Contracts Act 1991 defines a collective employment contract as being part of the genus employment contract and therefore as a contract. Prior to the Employment Contracts Act 1991, collective instruments, whether described as agreements or not, were not regarded as contracts but required some kind of statutory underpinning for their enforceability. This is because the traditional legal view of a contract is that it is an agreement between ascertained persons and not with a group or class of persons which may from time to time shrink and expand as some employees leave and others are taken on. The notion of the collective contract as a contract is therefore something that has recognition only in the Employment Court among Courts.

Another of the special jurisdictions and powers of the Court (usually, but not exclusively, in its appellate function) is in relation to personal grievances and disputes. These are remedies that are contractual in form but statutory in nature and do not exist outside the employment relationship. They are particularly suitable for the equity and good conscience jurisdiction of the Court. It is here wearing its fundamental human rights hat, especially when dealing with unjustifiable dismissal, unjustifiable action falling short of dismissal, or discrimination on one of the prohibited grounds.

Unjustifiable dismissal and unjustifiable action are grounds of relief traceable to Conventions of the International Labour Organisation, while the other grounds for a personal grievance have a direct connection with human rights legislation, including cross-references to the Human Rights Act 1990.

Disputes are not merely about the interpretation or construction of contracts but also about their day to day application and operation and this, in the context of a continuing contract such as the employment contract, summons up special considerations.

SECTION 126(1) AND URGENCY

The liberal provision made for the reception of evidence, whether strictly legal evidence or not, unfortunately, has encouraged the giving of evidence which is not always relevant. As such, it is not evidence at all and should not be admitted. A good example of that is evidence, after a dispute has arisen, about the intention of the parties in wording a contract or a particular provision of a contract in a particular way. The Court has set its face against receiving such evidence. In one recent case, the Court ruled in advance of the trial on the application of one of the parties that it would not receive such evidence and struck out portions of briefs of evidence.

Such limitations are desirable in principle and because of the growing pressures on the Court arising from the greater number of cases, longer hearings, and smaller number of Judges available to hear them. This has been accentuated by the number of cases involving matters of principle to which it has been necessary to devote the resources of a full Court. There have been other cases which might well have qualified for a full Court but which have not received that treatment simply because the scarce judicial resource has already been allocated for the period during which the case, because of its urgency, has needed to be heard.

It is appropriate to mention not only the provision for full Court sittings but also the provision for urgency. This has been a feature of the work of the Court, and of the Labour Court before it, but it is questionable whether the Court can, or indeed whether it should, grant urgency in all the cases as frequently as in the past, sometimes overlooking considerable delays on the part of applicants for urgency. There are two situations in which urgency arises –

- Under the provisions of s 118 limited to application for compliance orders and damages and injunction actions in relation to strikes and lockouts and interlocutory proceedings for interim relief in relation to applications for review.
- Urgency may need to be granted under the transferred jurisdiction to make, in any proceedings founded on employment contracts, any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts. This customarily extends to the preservation of the subject-matter of the contract – the employment relationship – where it has been ended or breached by the unilateral actions of one of the parties.

In either case, advocates should, in applying for urgency, explain precisely how much urgency the case can reasonably be said to need. If the Court is left to guess, where it has to make a decision on the papers and ex parte, the applicant for urgency may get too much or not enough. The Court's ability to act with urgency has been attenuated in the past year, and its response has had to be rationed.

SECTIONS 138 AND 140

These are general provisions giving the Court the widest discretionary powers to grant extensions of time, to add and strike out parties, to amend or waive any error or defect in the proceedings, and generally to give all such directions as seem necessary or expedient to enable the Court the more effectually to dispose of any matter before it according to the substantial merits and equities of the case. The Court can act of its own motion or on the application of the parties, and it is required to act in the best way possible to achieve substantial justice between the parties. These are important powers and are possibly not exercised as often as they might be. The Court hesitates to dismiss a case when satisfied of its essential justice merely because it has not been framed in the way most appropriate to the remedy the Court is able, in the circumstances proved, to grant.

Thus the Court has issued from time to time interim judgments or opinions leaving it to the parties either to settle the case in accordance with those views or to present further argument or evidence, or even to amend pleadings as may be necessary to ensure that justice can be done, and that the case is not decided upon a mere technicality.

EQUITY AND GOOD CONSCIENCE

The technique of equity and good conscience is not universal to all proceedings before the Court. It cannot be used against a statutory rule or inconsistently with the provisions of any collective employment contract. It does not apply to proceedings under s 57 (dealing with harsh and oppressive contracts); nor to the transferred jurisdiction of the High Court in relation to injunctions and torts connected with strikes and lockouts, or to applications for review; nor to the exercise of any power to make an order that the High Court or a District Court might be able to make under any enactment or rule of law relating to contracts. By virtue of s 104(2), equity and good conscience is removed from any decision to cancel or vary a contract or any term of a contract. Such an order may be made only if the Court is satisfied beyond reasonable doubt that it should be made and that any other remedy would be inappropriate or inadequate.

Thus, equity and good conscience does not apply to validating or modifying orders under the Illegal Contracts Act 1970 or to modifying orders under the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979, the Fair Trading Act 1986, or under the doctrine of rectification. I have described this provision as bizarre.

The Court could be satisfied on the balance of probabilities that the contract that the parties have signed does not represent the contract that the parties made and yet be unable to give effect to the contract that the parties made because the evidence is not such as to satisfy it beyond reasonable doubt of the facts of which it is satisfied on the balance of probabilities. This has presented in particular a very great difficulty for the Court in making an order that the High Court might well have made in similar circumstances varying a restraint of trade that is unreasonable by substituting a more reasonable restraint.

Nevertheless, in the majority of cases the decision-making technique is that of equity and good conscience. It is important to bear in mind what that means. It does not mean arbitrary decision-making. It should not mean that different Judges would decide the case in totally different ways. What it means instead is that the Court systematically brings to the decision of each case a certain attitude of mind which is that it should endeavour to do that which is right in adjusting the position of the parties.

The standard of equity and good conscience is applied without great difficulty once the facts are established, although even then there may be differences of opinion between people looking at a stated situation from different perspectives. Where a real problem arises and where the sharpest differences can arise is in the application of this attitude of mind to the weighing of evidence.

The Court's approach to weighing evidence starts with the premise that people are unlikely, however much they may be tempted, to mislead the Court. They may be giving evidence from different perspectives, their recollection of events may be imperfect, they may exaggerate the good points of their case and minimise its weaknesses, but by and large they will be telling their story as they remember it. The Court has the unenviable task of deciding from the evidence, where it is in conflict, where the truth lies.

This is thrown up in sharp relief in certain grievance cases, especially those involving sexual harassment and other forms of discrimination. The employer or manager at whom the allegation is directed will often not be able to see that it or he or she has done anything wrong, or anything even worth mentioning. It is common in such cases for the applicant to present a chronology of events, all of which are denied or explained away by the respondent except those that cannot be denied where they take the form of some piece of physical evidence, such as a document.

The Court has to form a view about what actually happened. That in turn depends on how reliable the evidence is, which again is arrived at by inferential means – how likely is the applicant to have made up the story if it is untrue? How likely is the respondent to be denying it if it is true? How likely, having regard to the range of human experience, are the incidents described to have happened in the way described by one party or the other? Usually it is possible to arrive at an answer which does not involve a conclusion that one of the parties was prevaricating. Usually an applicant will be able to show that the incidents have made a big impression on the applicant while, in the case of the respondent's witnesses, these have been minor events in the course of their work and have made little impact and therefore are unlikely to be recollected.

The characteristic that distinguishes the Employment Court from other Courts is that it is not only entitled but required to decide the cases that come before it (with certain exceptions) in accordance with equity and good conscience as opposed to doing so by the strict application of the rules of law. There is no difference that it is possible readily to identify between good conscience and equity. Yet, the presence of both criteria has a cumulative effect strongly suggesting that the Court is not bound by strict rules or by analogies with rules of law in other branches of the law, is not bound by previous cases but, rather, is bound to decide each case on its own facts and circumstances and in such a way as will do justice between the parties, not according to any rule of law, but according to the Court's sense of right and wrong in the particular context of a requirement of probity, justice, and honest dealing in the employment situation. The Court is required to be reluctant to lend its approval to any course of conduct that shocks its conscience.

Equity is not very different. It has been said to denote a "spirit and a habit of fairness, justness and right dealing" in an American case cited in *Black's Law Dictionary* (6th edn) p 540. This also refers to equity as any system of jurisprudence, the object of which is to render the administration of justice more complete by affording relief where the Courts of law are incompetent to give it or to give it with effect.

Without adopting these definitions in any literal or dogmatic way, it can nevertheless be sensed that one of the attributes of the Court's jurisdiction is its flexibility and its ability to deal with any situation independently of the way in which other cases, having a superficial similarity, may have been dealt with. At the same time the Court, as a Court of equity and good conscience, endeavours to be as consistent as possible to enable those who have to advise litigants to do so with some confidence.

A Court of equity and good conscience is well aware that justice delayed is justice denied. Part of the Court's flexible approach to litigation is its sense of urgency in relation to the hearing of the cases before it. Unlike other Courts, the Court staff take an interest in managing every case from the time that it is filed and progressing it, if necessary, in a proactive way towards a hearing. It is in this area that the Court has encouraged the use of mediation, although ADR is not a tool given to the Court by its statute. In many cases resolution has been expedited with the co-operation of the parties; in one case mediation was at the request of one against the opposition of another.

The Court's ability to fulfil its urgent function depends on the extent to which it is deflected from routine cases, by matters of an unusual or urgent nature, and the extent to which it is resourced. The key words in s 118 are "as soon as practicable".

The topic of resources for Courts is a perennially difficult one, one of the issues being whether sufficient resources should be provided only to cope with the cases that are actually heard or whether the service should be more extensive and make provision also for time to be reserved for the hearing of cases which, however, do not in the end proceed. Most Courts compromise between the two with greater or lesser degrees of success. During the past seven years the Court has been able to keep to a relatively acceptable lapse of time between filing and hearing but that is becoming more and more difficult to achieve. Few Courts could cope for long if they suddenly found the number of their Judges reduced by one-sixth. Lest no one else acknowledges it, I should say that it is the energy and capacity for work of the remaining Judges that has made it possible to carry on efficiently in difficult circumstances. ❑

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continued from page 408

Thus, a duty of care exists in equity to ensure that the beneficiary's interests are protected (See *Norton v Lord Ashburton* [1914] AC 932). It can be perceived as being part of or arising out of the essential duty of loyalty, for true loyalty demands that the fiduciary should exercise care in discharging his or her responsibility for the property of affairs of the other. It would be an odd perception of loyalty to suggest that the fiduciary must subordinate his or her own interests and promote the interests of their charge, but that they can do so negligently. While historically these duties of care in equity and common law developed independently, they have influenced each other, the most notable example being the development of the head of liability developed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575. Lord Browne-Wilkinson's dicta would seem to confirm that the substance of the liability is now properly recognised as being more important than its historical origins (See also Maxton and Rickett, at 253).

Selecting the appropriate remedy to meet the substance of the liability has been incipient in New Zealand since the Court of Appeal's judgment in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*. In that case, which involved a claim for breach of confidence, the Court held that for all material purposes equity and common law are now merged or mingled. For the breach of a duty imposed on the parties by law a full range of remedies should be available as appropriate, "no matter whether they originate in common law, equity or statute" (ibid, per Cooke P at 301. See also *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462, at 468). Thus, it has been claimed that the law of civil remedies is steadily evolving into a regime in which it is appropriate for a Court to evaluate which remedy is most appropriate in the circumstances of a particular case rather than adopt a doctrinaire or a priori solution. The process is seen to be one of "informed remedial choice" *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623, 631-632 per Hammond J.

A BROAD DOCTRINE OF OBLIGATIONS?

It would be unfortunate if the passion to draw lines of demarcation between contract and tort, should emerge with equal passion to establish firm lines of demarcation between the fiduciary obligation and contractual, tortious or any other adjacent equitable principle. The Courts' willingness to expand the fiduciary relationship to foreclose perceived inadequacies in the law to do justice in the instant case and meet the reasonable expectations of the community, may be indicative of an underlying progression towards a broadly based law of obligations.

The inclination to examine the substance of the liability and then select the appropriate remedy in New Zealand, and Lord Browne-Wilkinson's observations in the cases referred to above, are perhaps evocative indications of this current. Under such a regime the focus will be on the nature of the pre-existing relationship between the parties, the assumption of responsibility by the defendant, the reliance of the plaintiff on the defendant's undertaking and the detriment suffered by the plaintiff (See *Rowlands v Collow* [1991] 1 NZLR 178, at 183). These elements will dictate the standard required to discharge the resulting duty.

But then again, perhaps, we are not yet ready for such an overt advance to a general law of obligations. Better, perhaps to stumble towards it, unwittingly succumbing to the dynamic of the common law and equity, amicably intermingled, to develop to meet the needs of the community which the law seeks to serve. ❑

DIRECTOR'S DUTIES UNDER THE COMPANIES ACT 1993

TRANSACTIONS

edited by

Brian Keene

In the recent NZ Law Society seminar on *Directors' Duties and Shareholders' Rights* presented by Peter Watts and Hugh Rennie QC, Watts addressed a number of issues relating to directors and their obligations under the 1993 Companies Act. His presentation addressed, among other topics, two fundamental concepts.

1. Who are directors? [s 126]
2. The directors' duty to act in good faith and in the best interests of the company [s 131].

WHO ARE DIRECTORS?

As the 1993 Act imposes duties on "directors", it is important to know who falls within that category. The answer is not clear cut and is different under the new legislation than that applying under the 1955 Act.

Under the 1955 Act there was, in s 2, an extended definition of director. Under s 126 of the 1993 Act, the net is cast more widely. Associate Professor Watts suggests the new Act envisages at least six categories of directors.

De jure directors: persons formally appointed as directors under the Company's constitution.

De facto directors: persons acting as such by whatever name given.

Shadow directors: those who customarily direct or instruct directors or who may require directors to follow their instruction.

Constitutional directors: persons entitled to exercise or control the exercise of directorial powers but who do not necessarily exercise the powers.

Delegates: persons acting under delegated powers from the Board or with its acquiescence.

Master directors: persons who control shadow directors and/or delegates.

Section 126 is not easily worded and deals with quite complex direct and indirect relationships of control of the company. For example:

- Nominators of nominee directors (often shareholder blocks) are likely themselves to be directors under s 126, unless their nominee has a free reign in performing directorship functions. On this basis commentators have suggested that cases such as *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 and *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (where employees of the nominator were directors) may now be differently decided. Whether that is so will depend upon whether the nominator exercises control over that employee in the discharge of the directorship function;
- Section 126(2) and (3) can mean shareholders become directors for the purposes of ss 131 to 138 of the Act if the constitution of the company confers upon them a power which would otherwise be exercised by the Board, and the shareholders in fact exercise the power. Under s 126(3), even if the power is to be exercised by a director, any shareholder who takes part in the exercise of that power can be deemed, in relation to that exercise, to be a director.

  In both s 126(2) and (3) the deemed director extension is limited to the particular decision or set of decisions during the course of which the shareholders meet the necessary tests. From this limitation, practical and conceptual problems can flow. For example, a medium or long-term decision could be made with the necessary participation of a shareholder. Over the period needed to give it effect the external environment, the company's circumstances or other factors may render the decision inappropriate or even foolish. Difficult questions would arise on whether the responsibility for subsequent loss or damage to the company flows from the shareholder-participating decision or the failure of the Board to review that decision in the light of changing circumstances;
- Section 126(1)(c) will require judicial interpretation on how far it extends. The section provides that a person to whom the Board delegates a duty and so consents, is deemed to be a director in carrying out that duty. But how far does that extend? Taken literally, it may potentially include many classes of senior employee of a company. In larger companies, for example the CEO, CFO, Human Resources Manager, Health and Safety Officer and many others, will be delegated individual responsibilities by the Board. A fine distinction may be possible in that the delegation must be of a power or duty of the Board directly delegated by it. However, many of the functions of these senior people are apt to qualify under that test. For smaller companies the distinction between employee and Board delegate may become even more blurred and difficult.

It is apparent from s 126 that the 1993 Act intends to capture within the concept of "director" a wider range of control and responsibility mechanisms than was formerly contemplated under the 1955 Act. Persons associated with the company, and particularly an at risk company, need to consider their participation in its affairs carefully in terms of the extended definitions. Clearly those who nominate and control directors and those to whom the directors have delegated a power or duty can be made liable. They also need to review their actions and responsibilities most carefully in view of these extended obligations.

SECTION 131 – THE DUTY TO ACT IN GOOD FAITH AND IN THE BEST INTERESTS OF THE COMPANY

Section 131(1) of the Companies Act 1993 provides:

> Subject to this section, a director of a company when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.

A number of points must be made about this section.

- First, it is likely to become a cornerstone section, pivotal to the liability and responsibilities of directors. For this reason it behoves all lawyers to be fully familiar with both its terms and underlying concepts.
- The classic formulation of former common law duty by Lord Greene MR in *Re Smith & Fawcett Ltd* [1942] Ch 304,306 was that the directors must act in the interests of the company and not for any collateral purpose. Whether there is a significant distinction between "the interests of the company" and its "best interests" will be seen as cases under the section develop.
- What is meant by "the company"? It is this entity in whose best interests the director is required to act. Is it the shareholders as a body or the commercial enterprise itself? Whilst there are indications that the Law Commission's Report which was the foundation of the new Act intended the reference to be to the commercial enterprise itself, Associate Professor Watts concluded the preponderance of authority favours the company as being identified with shareholders as a whole. The retention of pre-existing rights of ratification by the shareholders of directors' decisions (s 177(4)) tends to be supportive of such an approach.
- There is a reference in s 131 to "good faith". What state of mind is needed for "good faith"? This is not a concept that is at all straightforward. The issue opens questions of degree of culpability for decisions not made in good faith ranging from gross negligence through recklessness to dishonesty and mala fides. Associate Professor Watts referred to the decision of Perry J in the Supreme Court of South Australia in *State of South Australia v Marcus-Clark* (1996) 19 ACSR 606. Under an exculpating section of their legislation, the Court was required to determine whether the defendant had acted "in good faith". Perry J observed that it was inappropriate to use words such as "gross negligence" to describe circumstances in which a director acting honestly may, nonetheless, fail to prove that he/she was acting in good faith. The factors going to good faith were said to be so varied that they could not be properly limited to those which might fall within the rubric of "gross negligence". The Judge concluded:

  > However it seems to me that if a director is acting in breach of his or her fiduciary duty, a breach of which, on the authorities, can clearly occur even although the director concerned believed that in "his own lights he may have been acting honestly", he could not be regarded as acting in good faith.
- The reference to directors' obligations to act in what they consider to be the best interests of the company implies a subjective test of the director's belief. Cooke J stated in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242,253:

  > It is important to remember that directors have a legitimate sphere of discretion given good faith and a decision which could reasonably be regarded as in the interests of the company as a whole and not likely to cause loss to creditors, the matter was one for the directors, not the Court.
- However, the Courts have not left the field entirely to the views of directors. There is a body of decisions in Australia, England and New Zealand under s 321 Companies Act 1955 on the subject of "default or breach of duty or trust" in exercising directorial powers.
- Illustrative examples include the need to have regard to the interests of creditors where a company is insolvent or nearly so (on its own difficult, complex and vexed topic), the decision made by a related company (whether parent or subsidiary) to support by guarantee or otherwise the activities of or financial accommodation to another company in the group where no direct financial benefit accrues to the subject company (now specifically sanctioned under the 1993 Act for companies with adequate provision for this in their constitution). Obviously the best interests of the company are likely to be compromised when one or more of the directors makes the decisions based upon balancing of the company's interests against any other interest (whether personal or otherwise extraneous to the subject company). In such situations the "best interests" test is unlikely to be met. Apart from these categories, the overriding principle is perhaps best stated by Pennycuick J in *Charterbridge Corporation v Lloyds Bank Ltd* [1970] 1 Ch 62,74.

  > The proper test, I think, ... must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.
- Finally, the "best interests" test must be read in conjunction with s 133 Companies Act 1993 which requires a director to exercise any power for a proper purpose. That requirement has a further qualification in s 131(1). Although "good faith" and "proper purpose" are not the same, they are related concepts which throw light upon the propriety of the director's actions (and their liability).
- Likewise s 134 (director to act in accordance with the Act and the company's constitution) and s 137 (duties of care, diligence and skill) will form a background to the application of s 131.

The concepts underpinning these new sections are not novel and have their counterparts in existing legal and equitable principles. However, the policy which the Courts will derive from the Act has yet to be formulated in any coherent body of case law. No matter how much law reformers believe that their formulations in legislation merely embody existing law, there are invariably surprises when Judges get down to the business of applying specific provisions to individual cases.

RECENT CASES

Share valuations and arbitration practice

Davern v James Davern Ltd (CA 47/96 and 79/96, 24 April 1996) provides an interesting insight into the Court of Appeal's view on the appropriate principles to apply to its valuation of shares and preparedness to intervene in arbitrations concerning the technicalities of this rather complex area.

The parties were father and son, locked into an acrimonious dispute about the purchase of a minority interest in James Davern Ltd

A *Tomlin* order was made in proceedings under s 209 Companies Act 1955 (minority oppression). The order provided that Messrs Hagen and Frankham, two senior and responsible accountants, should first attempt to reach an agreement on the value of the son's parcel of shares. If that failed, a third accountant was to be appointed as referee under s 15 Arbitration Act 1908. By this process, either an agreed or arbitrated value for the shares would be fixed.

Mr Hagen's summation of the test for valuing the shares was warmly endorsed by the Court of Appeal.

> Fair value is based on the desire to be equitable to both parties. This recognises that the transaction is not on the open market, the buyer has not been able to look around for the lowest price, nor has the seller been able to hold out for the highest price. Fair value recognises that the seller gives up in value and what the buyer acquires through the transaction.

In addressing the implementation of the test Hagen observed that the purchaser of the minority interest (25%) would normally attract a significant discount to reflect both the lack of the control attaching to the parcel of shares and (in the instant case) that they carried no voting rights. However, he gave no such discount because the orders were made under s 209 proceedings. Such a discount presumably would fail to give weight to the important context of minority oppression. He assessed the value of the shares on a purely pro rata basis.

Frankham, for the majority argued interest, accepted Hagen's valuation but arguing for a discount. The parties went back to the Court under leave reserved in the *Tomlin* order to argue this (and some other) "legal issues".

In the High Court Williams J issued no fewer than five judgments which then immediately became the subject of appeals and cross-appeals. The referee also sought clarification from the Court on various matters including whether or not he could hear evidence relating to the question of oppression.

Neither party was satisfied with the High Court's ruling and they both appealed to the Court of Appeal. The upshot was that the Court held Mr Hagen's conceptual approach to the valuation was correct except that the existence of oppression and/or the need to give a discount for minority interests and lack of voting rights should be left in the hands of the referee. It was not the place of the Court to constrain the referee who should "not [be] beleaguered by a multiplicity of 'legal' rulings". The Court concluded that its intervention in the valuation process should be limited:

> Principles of valuation are not, of course, a science. No precise or any one "right" answer is always available. At times the valuation must proceed with common sense and a readiness to accept that a measure of compromise may be necessary. The three valuers who have been appointed in this case will all be fully aware that this is so. The fact that leave has been reserved to apply to the Court does not mean that the parties, or their advisers, or the referee, can be forever running back to the Court seeking "legal" answers to difficult questions arising in the course of valuation ....

These robust rulings reiterate long-standing principles under which the Courts have steadfastly declined to take over the arbitral process under the guise of settling "legal" issues. Public policy behind this is clear. The parties having agreed their tribunal cannot recant and under the guise of "legal" issues change their forum to a Court. With the growing expansion of arbitration and alternative dispute resolution such principles need to be firmly applied to secure finality and avoid the proliferation of litigation.

GST: implied terms and mistake

Denning v Tri Star Customs and Forwarding Ltd (CP 81/95, 25 June 1996, HC Auckland) is an interesting example of versatility of judicial approach. It may also serve as a salutary warning to parties to contracts, or their solicitors, on remaining silent on topics in the hope of a favourable outcome.

The parties negotiated an agreement to lease which incorporated an option for the plaintiff to purchase the realty for $720,000. The option was silent on the question of GST and Salmon J's judgment addresses the issue of whether the price was to be inclusive or exclusive of GST.

The pleadings were obviously extensive and encompassed the interpretation of the Goods and Services Act, implied terms of contracts, rectification, estoppel and a plea under ss 6 and 7 of the Contractual Mistakes Act 1977. Only the last cause of action succeeded.

Salmon J found that throughout the purchaser had intended that the option price would exclude GST. The vendor, on the other hand, had contemplated his yield would be net of GST but otherwise had not explicitly addressed the impost of the tax.

The Court accepted the starting point is that where GST is not mentioned a price is deemed to be inclusive of the tax. It further held that implied term, estoppel and rectification all failed as they presumed a mutually held view on GST. No such shared or common view existed.

The position with mistake was different. The purchaser, Tri Star, had "at least constructive knowledge" of the plaintiff's belief that the price excluded GST. Salmon J gleaned that from a number of factors not the least of which was that yield calculations to be meaningful would have to utilise an option price net of GST. He observed further that Tri Star's solicitors who prepared the agreement omitted reference to GST, indicating a desire not to draw this point to the vendor's attention.

Salmon J concluded that the purchaser did not have actual knowledge of the vendor's mistake but:

> Approaching the matter on an objective basis they should have been aware of the mistake, that is to say,

they had constructive knowledge of it.

Salmon J held that constructive knowledge by the purchaser of the vendor's true position was sufficient to satisfy the test under s 6(1) and establish that the existence of the mistake was known to the other party. Accordingly, relief was granted to the defendant.

With the greatest respect, this decision seems to stretch the wording of s 6(1) of the Act significantly in two respects.

First, s 6(1) requires that "the existence of the mistake was known to the other party" but on the facts the best that can be said is that the purchaser ought to have inferred a mistaken belief by the vendor that he would get his price plus GST. "Was known" in s 6 tends to connote actual knowledge specifically not found on the facts.

Secondly, the issue was the correct interpretation of a reference in a contract to a sum of money that was silent on GST. That, with respect, seems to be a mistake by the vendor that the monetary amount would automatically have GST added to it. But s 6(2) provides that a mistake under s 6(1) does not include a mistake as to interpretation. Hence how could such a misunderstanding of the agreement lead to relief?

Difficult practical questions are posed by this decision. It appears that parties cannot rely upon the wording of the contract being interpreted and enforced by the Court subject only to any known (or shared) mistake of a party or the parties. Now the further enquiry may be necessary, namely has anything happened that will cause me to infer that the other party to the contract has misunderstood something? If so, on this decision relief may be granted.

This view departs from the traditional position of individual responsibility for contractual certainty. It tends to create obligations to be one's brother's keeper, to protect or understand more fully the negotiating position of the other party. As a development it strikes at the heart of contractual certainty and will lead to commercial people not knowing their positions clearly and finally. Consequent obligations may arise upon advisers to have their clients made aware of risks in negotiating contracts and securing advantages were one side is more astute than the other.

The decision is subject to appeal.

Solicitors' liability for lodging caveats

In *Gordon v Treadwell Stacey Smith* (CA 217/95) 8 July 1996, Thomas, Blanchard and Doogue JJ, the responsibility of solicitors lodging caveats on behalf of their clients is examined. C agreed to sell a flat for $204,000 and build a house to a value of $135,000 in consideration of a purchase of a property. Four months later C, without warning, procured the defendant firm to lodge a caveat against the title of the flat which he sold in part consideration of purchase of the house. The basis of the caveat was an interest as vendor under the flat agreement allegedly in default, which clearly did not support a caveatable interest. The Court of Appeal addressed the question of whether solicitors or other agents could be liable for compensation under s 146 of the Land Transfer Act 1952 which renders "*any person lodging any caveat without reasonable cause*" liable to the person sustaining damage.

The Court referred to the need for honesty in the solicitor's belief of reasonable cause underpinned by the standards of a reasonable conveyancing practitioner. The facts showed no reasonable basis to support a caveatable interest in the subject property. The Court therefore held the defendant firm liable for the payment of compensation; the measure of damage being reimbursement of the removal expenses fixed at $3,185.

The case illustrates the dangers of practitioners themselves signing caveats except in the clearest cases. Where there is a prospect that the caveat may not be upheld, appropriate advice should be given to the client who may then sign or not sign the caveat at his/her own risk.

In the instant case, on the facts the measure of damage was modest. However, had the existence of the caveat interfered with other commercial intentions of the registered proprietor, losses could have been considerably more substantial. No comfort should therefore be taken by practitioners from the small measure of damages in this case as any compensation case will be determined on its facts.

BOMA rent review clauses compulsory or discretionary?

The Court of Appeal (Richardson P, Gault and Henry JJ) in *AMP v Bridgemans Art Deco Ltd* (CA 112/95) were asked to consider whether a rent review clause created a mandatory obligation or a discretionary right on the lessor to review rent. The clause in question was standard to the BOMA form of clause which has widespread use amongst commercial property owners and developers throughout New Zealand. It provides:

> The lessor shall notify the lessee in writing of the lessor's assessment of the current market rent to apply from that particular review date.

The lessor, faced with a falling value for the rent, argued that it did not have to review the rent (downwards) by exercising its rights under the clause. It argued, despite the mandatory nature of the wording ("shall notify") it was not required to exercise any right under the review clause, in which event the rent fixed for the prior period would continue to apply.

The majority decision of the Court of Appeal held that the word "shall" was to be given its normal meaning as imposing an obligation on the lessor to review the rent. In doing so, it differed from the decision of Doogue J at first instance, who accepted that the term was used in a facultative and not mandatory sense. It is worth noting that, in a dissenting judgment, Henry J held that the clause was not mandatory in the sense of requiring a review, merely mandatory in requiring timely notice before such a review was initiated.

There is a considerable precedent effect of this decision across many leases currently in force in the New Zealand commercial property market. It is interesting that, of four Judges, two have ruled the review right as discretionary and two that it is mandatory.

Important issues are at stake not only in achieving commercial certainty across this existing range of leases but also in reaffirming for commercial draftsmen that the use of the word "shall" imposes an obligation and does not merely confer a discretion. It is fortunate that the majority of the Court of Appeal have upheld the mandatory construction. However, given the significant financial implications of the interpretation of these "ratchet clauses" across this popularly used range of leases, it is unlikely that the final judicial word has yet been uttered on this topic. ❑

STANDBY LETTERS OF CREDIT: AUTONOMY

Penelope Zohrab, Victoria University of Wellington

this is the first of a series of two articles on this vital factor in international commerce, the second of which was published at [1996] NZLJ 392

INTRODUCTION

Standby letters of credit play a vital role in international commerce. As a quick and certain means of securing performance, these instruments and their functional equivalent, unconditional performance bonds and bank guarantees, are virtually unmatched.

Fortex Group Ltd (in receivership and in liquidation) v New Zealand Meat Producers Board (unreported CP 118/95, High Court, Wellington, 16 June 1995, Doogue J) is a pivotal case in the law relating to standby letters of credit and unconditional performance bonds and bank guarantees. The issues it raises are important to bankers, lawyers and any users of standby letters of credit or unconditional performance bonds or bank guarantees. These issues extend to the heart of abstract payment obligations, to the lifeblood of international trade itself – the documentary letter of credit.

Fortex is significant because it deals with the circumstances in which a Court is justified in intervening to block payment under a standby letter of credit or unconditional performance bond or bank guarantee.

Courts almost invariably refuse to intervene to block payment by a bank because they are committed to the "autonomy principle". The autonomy principle holds that the payment obligation contained in a standby letter of credit or unconditional performance bond or bank guarantee is separate from, and independent of, the underlying contract. This means that Courts must enforce these instruments according to their terms irrespective of contractual disputes arising from the underlying contract. There is, however, one significant exception to the autonomy principle – fraud by either the beneficiary or the bank. For a discussion of the other exceptions see: Goode "Abstract Payment Undertakings" *Essays for Patrick Atiyah* (Cane and Stapleton 1991) 209, 225-234.

The fraud exception is, however, extraordinarily difficult to invoke because the Courts believe the interests of commerce are better served by applying the autonomy principle and enforcing standby letters of credit, unconditional performance bonds and bank guarantees according to their terms. They believe maintaining business confidence in the speed and certainty with which banks honour their payment obligations is more important than intervening to protect business people from the consequences of the abuse of these instruments.

Faced with the Courts' commitment to the autonomy principle where injunctive relief is sought to block banks paying under standby letters of credit or unconditional performance bonds or bank guarantees, account parties have redirected their efforts to induce the Courts to intervene. Rather than attempting to block banks from paying, they have attempted to block beneficiaries claiming payment. In doing so, account parties have challenged the strength of the autonomy principle by arguing that, as between the contracting parties, either the autonomy principle should be moderated or the fraud exception should be liberalised. In *Fortex*, the account party argued the latter.

Doogue J's decision in *Fortex* is significant because, in rejecting the account party's argument, His Honour rejects the concept of *degrees* of autonomy. In other words, the autonomy principle applies with equal rigour irrespective of whether, in seeking to block payment, it is the bank or the beneficiary which the account party attempts to injunct.

Fortex provides timely local guidance on the strength of the autonomy principle. Doogue J's decision in *Fortex* suggests that New Zealand Courts are likely to consider the interests of commerce to be better served by applying the autonomy principle and enforcing standby letters of credit or unconditional performance bonds or guarantees according to their terms irrespective of whether, in seeking to block payment, it is the bank or the beneficiary which the account party attempts to injunct.

The decision in *Fortex* must be correct if you contend that the interests of commerce are best served by the strict application of the autonomy rule. Unless the autonomy principle is consistently applied, an account party may short-circuit the principle simply by choosing (where possible) to injunct a beneficiary rather than the bank. To accept degrees of autonomy would be to defeat the contracting parties' expectations and their allocation of risk, thereby depriving the beneficiary of much of the value of a standby letter of credit or unconditional performance bond or guarantee. Moreover, allowing an account party to indirectly undermine the autonomy principle would also threaten business confidence in bank payment obligations, including the documentary letter of credit. This, in turn, would threaten the commercial viability of these instruments and their ability to fulfil their important role in international commerce.

This article examines the nature of standby letters of credit and unconditional performance bonds and bank guarantees, the autonomy principle and the Courts' commitment to that principle when faced with attempts to prevent beneficiaries claiming, and banks making, payment under these instruments. The application of the autonomy principle in *Fortex* will be examined in detail next month. Additionally, the author will examine the fraud exception to the autonomy principle, in particular the nature of the fraud exception where an attempt is made to injunct the beneficiary of a standby letter of credit or unconditional performance bond or bank guarantee.

THE FACTS

Fortex involved a dispute concerning an agreement establishing the Meat Planning Council and an export franchise system (the MPC agreement). The MPC agreement required Fortex, (the account party) to arrange for a "performance bond ... or other alternative security" to be issued to the New Zealand Meat Producers Board (the Board). Fortex arranged for the Board, to be issued an irrevocable standby letter of credit.

Standby letters of credit and unconditional performance bonds or bank guarantees are security devices intended to provide security against default in performance of the underlying contract

The MPC agreement allowed the Board (the beneficiary) to draw down upon the standby letter of credit should any meat company, granted a franchise, breach the terms and conditions of the franchise and/or consistently disregard any marketing plan produced under the MPC agreement.

To draw down upon the standby letter of credit, the Board was required to produce a certificate signed by two officers stating, inter alia, "... that the amount claimed [represented] an amount which [was] payable to ... [the Board] ... in accordance with the agreement establishing the Meat Planning Council" (at 2).

The Board alleged Fortex exceeded its allocation under a marketing plan established under the MPC agreement. It thereby incurred a $177,884 penalty. Fortex disputed its liability and refused to pay. The Board gave notice that it intended to draw down upon the standby letter of credit for the sum. Fortex responded by applying for an injunction to prevent the Board from so doing.

Fortex's argument (as summarised by Doogue J) was that "the contractual web of the MPC agreement and the marketing plan [did] not give the [Board] the legal entitlement to draw down on the letter of credit" (at 8). As there had been "no breach ... of the MPC agreement" it was "... entitled to an injunction on the basis that there [was] a seriously arguable question that the first defendant [had] no right to use the letter of credit" (at 9).

The Board argued that it was entitled to draw down upon the standby letter of credit "as it [had] an honest belief that the monies [were] payable under the MPC agreement, and that [was] all that [was] required" (at 8). The Board maintained Fortex was not entitled to injunctive relief unless it could show that, in drawing down the standby letter of credit, the Board was acting fraudulently.

In considering whether injunctive relief was available against Fortex, Doogue J relied heavily upon English case law concerning attempts to prevent beneficiaries claiming, and banks making, payment under unconditional performance bonds or bank guarantees.

THE COURTS' RESPONSE

How, then, have English Courts responded to attempts to block payments?

Faced with attempts to prevent payment under unconditional performance bonds or bank guarantees, English Courts have treated these instruments as the equivalent of irrevocable documentary letters of credit. They have therefore generally applied the autonomy principle subject only to a narrow fraud exception.

The Courts' approach is hardly surprising given the apparent similarities between documentary letters of credit on one hand, and unconditional performance bonds, bank guarantees and standby letters of credit on the other.

Documentary letters of credit, unconditional performance bonds, bank guarantees and standby letters of credit are all abstract payment undertakings. They are all promises of payment which the Courts hold to be binding upon communication to the beneficiary, apparently without the need for acceptance, consideration or reliance. The bank's payment obligation embodied in all these instruments is separate from, and independent of, the underlying contract and is triggered by the presentation of one or more specified documents.

There are, however, fundamental differences between documentary letters of credit and standby letters of credit or unconditional performance bonds or bank guarantees.

The first lies in their respective commercial use. The documentary letter of credit is a payment mechanism under which payment and shipment are contemporaneous. If there is a dispute, the documentary letter of credit ensures that the buyer bears the credit burden. The documentary letter of credit can be viewed as "... analogous to delivering to the bank, in escrow, a bag of cash, to be delivered to the seller in exchange for the shipping documents": G B Graham and B Geva "Standby Credits in Canada" (1984) 9 CBLJ 180, 194-195. The bank's payment obligation is primary in both form and intent.

Standby letters of credit and unconditional performance bonds or bank guarantees are, by contrast, security devices intended to provide security against default in performance of the underlying contract. They are a less expensive method of providing security for performance than the cash deposits or funds held in escrow accounts they replace. While a standby letter of credit and unconditional bond or guarantee is primary in form, it is secondary in intent. The beneficiary should only demand payment if the account party defaults in performance of the underlying contract.

Additionally, the kind of documentation which initiates drawing under the standby letter of credit and the unconditional performance bond or bank guarantee is radically different from that which initiates drawing under a documentary letter of credit. Drawing under a documentary letter of credit is initiated by documents which minimise the risk of a beneficiary obtaining payment unjustifiably. The documents, some of which are generated by independent third parties and which provide evidence of shipment of goods, will typically include a bill of lading or other stipulated document of title: See ADJ Barclay "Court Orders Against Payment Under First Demand Guarantees Used in International Trade" (1989)3 JIBL 110,113.

In contrast, the documentation which initiates payment under a standby letter of credit or unconditional performance bond or bank guarantee is not necessarily generated by the underlying transaction. Payment may be initiated merely by the beneficiary's written statement that the account party failed to perform or, in some cases, a beneficiary's bare demand for payment. This documentation does not ensure the same level of investigation or control: See N Horn and E Wymeersch *Bank-Guarantees, Stand-by Letters of Credit and Performance Bonds in International Trade* (Kluwer, Deventer, 1990) 8-9. Additionally, the simplicity of the documentation means that, unlike the documentary letter of credit where the majority of tenders fail to conform to the credit on first presentation, it will be difficult to fault its presentation.

Just in a documentary letter of credit, theoretically at least, the account party controls the documentary requirements under a standby letter of credit or unconditional performance bond or bank guarantee: See Graham and Geva, above text, 210. The account party may therefore insist on documentary controls which prevent the beneficiary making a discretionary demand, thus minimising the risk of an unfair or unjustified call without qualifying the unconditional nature of the bank's payment obligation.

(Goode "Unconditional bonds: the common law", *The Liability of Contractors* Centre for Commercial Law Studies (1986), 99 ff.) In practice, however, many of these instruments are payable against the simplest of documentation, even a bare demand for payment: Bennett "Performance Bonds and the Autonomy Principle,"(1994) JBL 574, 576.

These basic operational differences mean a standby letter of credit or unconditional bond or guarantee expose an account party to much greater risk of unfair or unjustified payment. The documentary letter of credit contains inbuilt checks and balances which minimise the risk of unjustified or fraudulent payment. Conversely, the standby letter of credit or unconditional performance bond or bank guarantee creates a very real risk of a fraudulent or unjustified demand.

Kerr J in *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* ([1978] 1 QB 146,150) described unconditional performance bonds as "astonishing" and Lord Denning MR in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* ([1978]1 QB 159, 170) considered them "virtually promissory notes on demand".

These basic operational differences have not, generally speaking, deterred the English Courts from applying the principle of autonomy to these instruments.

THE PRINCIPLE OF AUTONOMY

The principle of autonomy was developed in documentary letter of credit case law. It is the principle that the bank's undertaking to the beneficiary is legally separate and distinct from the underlying transaction between the account party and the beneficiary. The documentary letter of credit "... constitutes a [separate] bargain between the banker and the vendor of goods, which imposes upon the banker an absolute obligation to pay": Graham and Geva, above, 190-191.

The Courts' application of the autonomy principle is largely responsible for the "unique value" of the documentary letter of credit: Donaldson MR, *Bolivinter Oil SA v Chase Manhattan Bank* ([1984] 1 Lloyd's Rep 251, 257). It provides the beneficiary with the security of certain payment because (assuming the terms of the credit are complied with) the bank must honour the credit irrespective of disputes about whether or not, for example, the goods comply with the contract. "In requesting his bank issue a letter of credit ... the customer is seeking to take advantage of this unique characteristic", ibid.

As a swift and reliable payment mechanism, the documentary letter of credit plays a vital role in international commerce, facilitating huge volumes of trade. In the Courts' view the need to protect this "elaborate commercial system" justifies rigorously applying the autonomy principle. The Courts fear this system "would break down completely if a dispute as between the vendor and the purchaser were to have the effect of 'freezing' ... the sum in respect of which the letter of credit was opened": Jenkins J, *Hamzeh Malas & Sons v British Imex Industries Ltd* ([1958] 1 All ER 262, 263). The Courts also justify the autonomy principle on the basis that the account party has accepted the risk that the beneficiary may obtain payment notwithstanding defects in performance: GA Fellinger "Letters of Credit: The Autonomy principle and the Fraud Exception"(1990)1 JBLFB 4, 9. If the Courts allow an account party to block payment on the basis of a breach of the underlying contract, they undermine the parties' expectations and their contractual allocation of risk.

STANDBY LETTERS, UNCONDITIONAL PERFORMANCE BONDS, BANK GUARANTEES AND AUTONOMY

Edward Owen Engineering Ltd v Barclays Bank International Ltd ([1978] 1 QB 159) is the classic English case concerning unconditional performance bonds or bank guarantees. Here Lord Denning MR affirmed the power of the autonomy principle where an injunction is sought to prevent a bank paying under an unconditional performance bond or bank guarantee. His Lordship said:

" ... the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question of whether the supplier has performed his contracted obligation or not; nor with the question of whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is where there is clear fraud of which the bank has notice" (at 170-171).

Given that the commercial functions of standby letters of credit and unconditional performance bonds or bank guarantees differ from documentary letters of credit what, then, justifies the Courts' application of the autonomy principle?

The commonly cited justification is that the contracting parties have chosen the standby or on-demand guarantee or bond as opposed to a conditional bond. In agreeing to use a standby letter of credit or unconditional performance bond or bank guarantee, contracting parties intend to give the beneficiary the benefit of an autonomous commitment. (G Penn "On-demand Bonds – Primary or Secondary Obligations", (1986)4 JIBL 224, 226.)

There is another, very practical, reason underlying the English Courts' application of the application of the autonomy principle to unconditional performance bonds and bank guarantees. This is the very existence of the standby letter of credit itself. As a competitive response to standby letters of credit, it is important that unconditional performance bonds and bank guarantees be indistinguishable in effect from the standby letter of credit.

The practical effect of the Courts' application of the autonomy principle is to place the account party at the mercy of the beneficiary. The standby letter of credit or unconditional performance bond or bank guarantee may not reflect the fact that beneficiaries may only legitimately call these instruments if they have a genuine right to compensation. The only formal condition for payment may be a beneficiary presenting a written statement that the account party has failed to perform or, in some cases, a bare demand for payment by the beneficiary.

While an unjustified call may breach the underlying contract, the Courts' application of the autonomy principle means that the breach is not the basis for an injunction to prevent a bank paying. To test a beneficiary's claim prior to payment, the account party must invoke the fraud exception. The fraud exception, however, is so narrow that it is, in practice, virtually impossible for the account party to prevent the bank paying the beneficiary.

> ***The fact that an action under the main contract is likely to be time consuming, expensive and often practically impossible does little to sway the Courts***

The account party's recourse is an action against the beneficiary under the underlying contract. The fact that an action under the main contract is likely to be time consuming, expensive and often practically impossible does little to sway the Courts. The Courts see these instruments as a risk-distributing device. The account party assumes these tactical litigation risks.

As between the beneficiary and the bank, at least, the English Courts' policy is to enforce these instruments according to their terms, subject to the fraud exception. The English Courts' application of the autonomy principle may be supported on the basis that the strength of the beneficiary's position is not merely a by-product of the instrument, but the commercial justification for the instrument and the key to its utility. These instruments are intended to fulfil the same function as a cash deposit and therefore must function as its near equivalent.

Closer to home, in *Wood Hall Ltd v The Pipeline Authority* ((1979) 141 CLR 1443) the High Court of Australia affirmed that the autonomy principle (subject to a narrow fraud exception) applied where an account party sought to block payment by a bank. Later Australian cases, however, indicate that something less than fraud may found injunctive relief. See: *Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Ltd* ([1985] 1 NSWLR 545) and *Tenore Pty Ltd v Roleystone Pty Ltd* (unreported, Supreme Court, NSW, September 1990).

THE AUTONOMY PRINCIPLE AND INJUNCTING BENEFICIARIES

When faced (as was Doogue J in *Fortex*) with attempts to injunct beneficiaries, the English and Australian Courts have, however, been less committed to the autonomy principle. It would seem the Board's contention that Fortex was entitled to injunctive relief only if it could show "fraud on the part of [the Board] in seeking to rely on the letter of credit" is not as clearly supported by the case law as might have been expected (at 10).

Almost from the outset the English Courts' commitment to applying the autonomy principle as between the account party and the beneficiary appeared to falter. In *Elian & Rabbath v Matsas & Matsas* ([1966] 2 Lloyd's Rep 495) an account party successfully obtained an injunction to prevent a beneficiary claiming or receiving money under a bank guarantee.

The English Courts' commitment to applying the autonomy principle as between an account party and a beneficiary was again called into question in *Potton Homes v Coleman Contractors* ((1984) 28 BLR 19).

There, Eveleigh LJ regarded as undecided (at least as between the account party and the beneficiary) the extent to which a bond was to be regarded as independent of the underlying contract. In Eveleigh LJ's view, the unconditional performance bond or bank guarantee was still in its infancy and "[w]hile from the point of view of the bank the underlying contract is irrelevant and the bank's contract with the seller is independent of it, none the less as between the buyer and seller the underlying contract may not be irrelevant" (at 26).

His Lordship continued: "... in terms of principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the Court restrain the buyer" (at 28). On the contrary, Eveleigh LJ considered there may well be circumstances (apart from fraud) where a Court may be willing to grant an injunction restraining a beneficiary from calling on a bond or dealing with its proceeds. "If the contract is avoided or if there is a failure of consideration between the buyer and seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between the seller and the buyer, the seller should not be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand" (at 28).

May LJ applied the autonomy principle. On the facts the Court denied the account party an injunction. Eveleigh LJ's observations are, therefore, dicta.

In the earlier Australian case of *Wood Hall* a majority of the High Court of Australia was similarly reticent about disregarding the underlying contract as between the account party and the beneficiary. While the High Court of Australia affirmed the autonomy rule applied between the bank and the beneficiary, Stephen J and Gibbs J, with whom Mason J agreed, appeared to leave open the possibility that, as between the account party and the beneficiary, the beneficiary's rights to make demand could be restricted by the underlying contract. Stephen J said: "Had the construction contract itself contained some qualification upon the Authority's power to make demand under a performance guarantee the position might well have been different. In fact the contract is silent on the matter"(at 459). (See also *Hortico* and *Washington Constructions Company Pty Ltd v Westpac Banking Corporation* ([1983] Qd R 179).

The reservations expressed in *Wood Hall* about the beneficiary's ability to make demand, where the underlying contract qualifies the circumstances in which it can make demand, were applied in *Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales* (unreported, Supreme Court, NSW, 28 June 1982) and *Selvas Pty Ltd v Hansen and Yuncken (SA) Pty Ltd* ([1987] 6 ACLR 36). (For a discussion of some of the (mostly) unreported cases concerning this issue see: Barclay, above, 115 and R. Perrignon "Performance Bonds and Standby Letters of Credit: The

continued on p 432

THE LEGISLATIVE PROCESS

Ailsa Salt, Deputy Clerk to the House

describes the effect on the legislative process of recent changes to Standing Orders

The revision of the New Zealand House of Representatives' Standing Orders approved by the House in December 1995, while primarily designed to prepare the House for an MMP (Mixed Member Proportional) elected Parliament, made significant changes to the processing of legislation. Of particular benefit to the legal profession and the judiciary should be the enhancement of the information generated by both the Government, on the introduction of a Bill, and select committees, when reporting a Bill back to the House. There is also now a full record of the debate in the committee of the whole House. This article looks at the new processes, focusing on those for Government Bills.

First, changes to the way the business of the House is arranged should be noted. The Speaker of the House convenes a select committee, called the Business Committee, which has a leading role in arranging the business that is to come before the House, and can decide on the length of debates and the time individual members have to speak in debate. The committee makes decisions on the basis of unanimity or near unanimity, having regard to the numbers in the House represented by each member on the committee. "Near unanimity" means agreement has been given on behalf of the overwhelming majority of members of Parliament. The Speaker decides whether near unanimity has been reached and if it is not then the rules in the Standing Orders on the time of debates and speeches prevail.

INTRODUCTION AND FIRST READING

There is now no debate on whether or not a Bill should be introduced. When the Government wishes to introduce a Bill the Leader of the House advises the Clerk of the House by 1 pm on that day and the Bill is introduced into the House by being read a first time by the Clerk shortly after 2 pm on that sitting day. It is not debated at that time, but is set down for a second reading debate to be held at least three sitting days later. Therefore, if a Bill is introduced on a Tuesday, it is normally available for second reading on the following Tuesday, giving members time to gain a reasonable understanding of the Bill before it is debated in the House. Until these changes to the rules, members often had to take part in an introduction debate without any time to prepare for the debate. With large and complex legislation opposition members were at a distinct disadvantage.

EXPLANATORY NOTES TO BILLS

A new requirement by the Standing Orders Committee should provide the legal profession, the judiciary, and all those in the public interested in a Bill, with a better understanding of the intended policy of that Bill, rather than having to rely solely on the *Hansard* transcript of the debate. A Bill when introduced has an Explanatory Note printed on the front which, until this year, has generally been regarded as a technical explanation of the content and was normally prepared by the Parliamentary Counsel drafting the Bill. The note is now required to include discussion of the policy which the Government is proposing to implement or of problems to be remedied by the legislation. The material, which is prepared by departmental officials, should provide a good understanding of the proposed legislation and a clear picture of the Government's intentions.

SECOND READING DEBATE

The previous procedure saw the second reading debate on the principles of the Bill after it had been considered by a select committee. It was felt, however, that the debate on whether the House agreed to the principles of the Bill should be held before it went to a committee, to give committee members an understanding of the mind of the Government and the House prior to their consideration. This now occurs and if the House agrees that the Bill be read a second time it is then referred to a select committee. The debate on the second reading is limited to twelve 10 minute speeches unless decided otherwise by the Business Committee which has the power to shorten or lengthen the debate. If such a decision has been taken it is advised to members on the daily Order Paper.

SELECT COMMITTEE CONSIDERATION

All Bills, except for Appropriation Bills, Imprest Supply Bills and Bills for which urgency has been taken for all stages, are referred to a select committee for consideration. In the case of Appropriation Bills the accompanying Estimates are referred and scrutinised by committees. The process for committee consideration of Bills has not been significantly changed, except that committees must report all Bills back to the House within six months of their referral. Committees normally advertise through the main metropolitan and provincial newspapers for public submissions, usually giving a month for submissions to be received. Those making written submissions are normally asked whether or not they also wish to give oral evidence and, if so, time is made for them to do so. Committees quite often travel to other main centres to hear evidence should there be significant submissions from an area.

Amendments to Bills made in select committees have always been shown on the reprinted version of the Bill as reported, but the Bill now also shows whether the amendments have been made unanimously or by the vote of a majority of members. Committees now have the power to divide Bills and report such Bills separately. Previously they had required the permission of the House to do so.

NARRATIVE REPORTS ON COMMITTEE CONSIDERATION

It has also been decided that committees should make narrative reports on Bills they have considered. This report, called a Commentary, is normally on the front of the reprinted version of the Bill when it is reported back to the House. The report includes information on the submissions the committee received, witnesses that were heard, discussion on the significant issues which were raised and the reasons for significant changes to the Bill. Instead of having to second guess why committees made changes to Bills, members and those interested outside the House (particularly the legal profession), are now able to learn from the committee's own report why changes have, or have not, been made.

DEBATE ON THE COMMITTEE'S REPORT

Committee reports on Bills are now presented by delivering them to the Clerk of the House. This can take place at any time – on a sitting day or during an adjournment. They are then set down for consideration by the House on the following third sitting day. This aims to ensure that the debate on the report is well informed and members can be clear on the majority amendments, in particular, that they will be asked to agree to. The debate on the report again provides for twelve 10 minutes speeches unless the Business Committee agrees otherwise and it is led off by the Minister in charge of the Bill.

At the end of the debate the Speaker puts one or two questions, neither of which can be further debated or amended. If there have been majority amendments in the Bill the House is asked if those amendments should be agreed to. It is an "all or nothing" decision; the question cannot be amended to include some but not other amendments. If that is desired the changes will have to be made during the committee of the whole House.

The second question put by the Speaker is that the Bill do proceed. If this question is not agreed to the Bill is automatically discharged without further question.

COMMITTEE OF THE WHOLE HOUSE NOW REPORTED

The committee of the whole House stage is the only stage in the House in which a Bill is debated clause by clause and can be amended. Procedures here have not changed. There is no time limit on the debate unless the Business Committee should decide otherwise.

An important innovation this year, however, has been the reporting in Hansard of the full debate on Bills in the committee of the whole House. This had been recommended by the Standing Orders Committee as it felt the gap in the House's record of the debate on a Bill should be rectified. This record, together with the more expansive Explanatory Notes and Commentaries, should provide valuable information to those people interested in the development of legislation.

THIRD READING

The changes made to the third reading stage provide for the member in charge of the Bill to move as one question the third reading of all Bills that have been divided out of a Bill at the end of the committee of the whole stage, and for the debate to be time limited. Again twelve 10 minute speeches are provided for. Debates on the question for the third reading rarely go the full two hours.

FORM OF BILLS

Governments over the last 15 years have made great use of Law Reform (Miscellaneous Provisions) and similar Bills to effect substantive amendments to a number of non-related Bills within one piece of legislation. On some occasions these Bills included amendments to up to 50 different Acts which caused problems for the public who might be affected by and would wish to make a submission on amendments to a particular Act. While these Bills were divided prior to third reading, and there were no omnibus Acts, the House has agreed that such Bills should not continue. Omnibus Bills must now relate to one subject only unless otherwise provided for by the Standing Orders, and rules have been established for different types of Bills. ❑

"A RELATIONSHIP IN THE NATURE OF A MARRIAGE"

Elisabeth McDonald, Victoria University of Wellington, currently seconded to the Law Commission

***reviews the Court of Appeal decision on battered women and benefit fraud in* Ruka v Department of Social Welfare**

Isabella Ruka was convicted of benefit fraud in February 1995 and sentenced to 150 hours of community service and ordered to make reparation of $44,759.93 at the rate of $10 per week until in her eighties. Her case presented the Court of Appeal with the first opportunity to consider the effect of a battering relationship on non-violent criminal activity compared to, for instance, *Oakes* [1995] 2 NZLR 673 and *Witika* [1993] 2 NZLR 424. In those cases the Court of Appeal clearly struggled with the notion that a woman who was beaten and raped in her own home could rely on her resulting fear and trauma to deny criminal liability for her own violent acts, stating, in *Witika*:

> The position of battered women indeed calls for sympathy but there can be no justification for broadening the grounds on which the law should provide excuses for child abuse. (436)

The commonality of the experiences shared by Witika and Ruka might have received legal recognition if the Court of Appeal had ruled on the availability of necessity, which was not argued in the Courts below. The failure to do so, even as obiter, is regrettable and suggests it is easier to accept the relevance of "battered woman's syndrome" to property offences, at least in terms of outcome. Being beaten may excuse a later physical offence, but New Zealand jurisprudence in this area remains (mostly) resistant to the hard cases involving women's violence.

In *Ruka* (unreported, 1 October 1996, CA 43/96) a five Judge Court of Appeal was asked to consider the following questions:

1 Can "battered woman's syndrome" be taken into account in establishing whether she is living in a "relationship in the nature of a marriage" with the man who is battering her?

2 Can "battered woman's syndrome" provide the basis of a finding that a woman lacks the necessary mental commitment to a relationship so that she cannot be said the be living in a "relationship in the nature of a marriage" with the man who is battering her?

3 If so, could such a finding justify dismissal of the charges against her alleging fraudulent receipt of a domestic purposes benefit (DPB), when she was not entitled to do so because she was allegedly living in a relationship in the nature of a marriage? (2-3 of the judgment of Richardson P and Blanchard J)

There was no dispute that Ruka had received DPB while living with her abuser, referred to as T. There was also no dispute over the other relevant facts: that at no time did T offer any financial support to Isabella or their child; and, for nearly the whole duration of their 18 year "relationship" T viciously physically and psychologically abused Isabella to the extent that she developed "learned helplessness" and post-traumatic stress disorder. As a battered woman she exhibited many of the understandable responses, including the inability to seek help or to leave the relationship. Her attempts to do either of these were met with threats of death and more violence. The extent of her abuse and a discussion of her resulting psychological condition, as given in evidence by Dr Ratcliffe, are carefully set out in the judgment of Thomas J (6 – 21). Thomas J also acknowledges the need to "consciously eject" the "popular mythology" about domestic violence (such as a belief that women stay in violent relationships out of masochistic enjoyment) as it has "no place in the law". (9) In another welcome statement Thomas J recognises the danger of requiring every battered woman to develop "the syndrome". If it is too closely defined (as a standard) "the syndrome will come to be too rigidly defined by the Courts". (13)

Thomas J poses the right question in relation to the particular case, and in doing so provides a useful guideline for any future cases:

> *What is important is that the evidence establish that the battered woman is suffering from symptoms or characteristics which are relevant to the particular case.* In determining whether a battered woman is living in a relationship in the nature of a marriage, therefore, the ultimate question is whether the evidence establishes that she possesses those symptoms or characteristics which negative or tend to negative any element which would otherwise point to the relationship being one in the nature of marriage. (13, emphasis added)

In answering this question Thomas J held that Barker J in the High Court ([1995] 3 NZLR 635) had erred in law in two respects:

> First, he was in error in not accepting that certain characteristics exhibited by Ms Ruka as a result of Mr T's violence negated the basic mental and emotional commitment which is essential in a relationship in the nature of marriage. Secondly, he erred in not placing sufficient weight on the fact that Mr T made no financial

> contribution to the relationship and that there was otherwise no assumption by the parties of any financial responsibility or interdependence. (25)

The other two majority Judges (Richardson P and Blanchard J) focused almost exclusively on the "complete absence of any contribution of financial support on the part of the man and no willingness to contribute if needed" (12), which they held is an essential element of "a relationship in the nature of marriage for the purpose of the Social Security Act". (11) This factor was given prominence over any of the others set out by Tipping J in *Thompson v Department of Social Welfare* [1994] 2 NZLR 369, 373 and applied by Barker J in the High Court. In the judgment of Richardson P and Blanchard J, the abusive nature of the relationship is only used to explain why Ruka did not leave T and become eligible for DPB.

In their minority judgment Gault and Henry JJ questioned the usefulness of the continued "mental commitment" element of the test.

> In our view the continuing existence of the relationship cannot depend upon a subjective examination of the mental attitudes of the parties in this respect at a given point in time. What if one party is under temporary mental disability? The position can be no different when a party has lost, for whatever reason, the ability to leave an existing relationship. The principle is the same. We would therefore hold that where there has been a continuing relationship which has the character of a marriage relationship, *some outward and objectively discernible manifestation that it has lost that character would be required before it could be said to have ceased.* As with marriage there may come a point when it is apparent from the way the parties are living that their relationship has ended, *but that will not come about merely because one of them does not have a current positive mental approach to it* .... In our judgment that fact that the appellant developed the syndrome and consequently became trapped in the relationship and unable to make the break from it does not of itself negate the continuance of a relationship in the nature of a marriage. (6, emphasis added)

This passage is difficult. Surely it is possible to say at any given point in time that someone is no longer committed to a relationship? This will probably precede a physical separation, which may be what their Honours mean by "an outward and objectively discernible manifestation". It could well mean that they are no longer in a relationship in the nature of a marriage, in fact, this is probably exactly what they would say if asked. The fact that they are still sharing a home, a mortgage and children may mean it "looks" like a marriage, but it this enough? According to the minority it is as it would have "the character of a marriage relationship." This argument is circular. Under the *Thompson* definition it is the on-going mental commitment that helps decide whether two people are having something that has "the character of a marriage relationship". The minority may be arguing that there is no need to have a mental or emotional commitment to have a relationship in the nature of marriage, which seems a very cynical position to adopt if only for the purposes of this legislation. The minority, however, also support their approach to the case by stating that "[i]t is unlikely that the meaning will be found to differ statute by statute". (3)

Even applying the approach of the minority, it is difficult to understand why Ruka was viewed as still being in the relationship. Is continual beating and rape for 17 years to the point where she was too scared to leave not an "objectively discernible manifestation" that the relationship was no longer one in the nature of a marriage? Is it not significantly understating Isabella's psychological state to describe it as not being "a current positive mental approach"? Abuse over that period of time must not be consistent with a relationship that looks (or feels) like a marriage. Is all that is considered relevant the fact that they physically (mostly) shared the same roof?

The second ground on which the minority would have dismissed the appeal was the argument that "in today's conditions we do not think that financial interdependence is an essential feature of a marriage type relationship." (8) This argument has more merit, although in the context of social security legislation it is difficult to sustain. There is clearly a presumption of financial interdependence when two (heterosexual) people live together as a couple, otherwise there would not be a financial difference in the kind of benefit that is available. The same presumption clearly operates under the Child Support Act 1991 as the assessment formula is different when the liable parent (re)marries. It is certainly arguable, as the minority state (9), that even if there is no financial support there may still be a relationship (especially, I would argue, when there is otherwise a healthy emotional commitment). In the context of the benefit legislation, however, there is an expectation that financial support will be provided by the other party, if only to reduce the State's responsibility.

This is the final point made by Thomas J – that the phrase "a relationship in the nature of a marriage" may well have a different meaning depending on the context. Such an approach is welcome as it recognises the many and varied kinds of relationships that exist "in today's world". There are at present 16 Acts which use this phrase and it is proposed in two recent Law Commission discussion papers: *Evidence Law: Privilege* (NZLC PP 23, 1994) and *Succession Law: Testamentary Claims* (NZLC PP 24, 1996).

The Court allowed the appeal and quashed the convictions. The outcome is significant but the basis for the decision, the absence of financial support, is problematic. A more sustainable option was that argued by Thomas J and rejected by the minority: the lack of mental and emotional commitment. This argument recognises the untenable situation of battered women and does not require unravelling the difficulties round the requirement of financial interdependence. This argument also found favour with Judge Shaw in *Department of Social Welfare v Te Mounanui* (unreported, District Court Henderson, 18 March 1996) – a case with similar facts. Her judgment includes the following passage:

> I believe that to simply view the physical aspects of the relationship and draw an inference from those is to take a naïve approach to the complex and subtle dynamic which makes up a commitment between two people. In the late 20th century it is no longer appropriate that the definition of a marriage or a relationship in the nature of a marriage includes violence as an accepted ingredient; certainly not to the point where that violence means that the parties are only bound by fear. At the heart of this case is the term "commitment". This term implies a degree of mutuality towards a relationship ie that both parties want the relationship ... I cannot be satisfied that the defendant was committed to it. To the contrary she was bound only by fear and abuse. ❑

NEGLIGENCE, ACC AND EXEMPLARY DAMAGES – WHAT'S TOO BAD?

Geoff McLay, Victoria University of Wellington

examines the implications of McLaren Transport v Somerville

New Zealand tried to do away with tort. The 1967 Woodhouse Report concluded that tort failed to adequately compensate injuries. A broad social consensus swept away the old mixture of common law and ad hoc compensation and insurance schemes with the promise of a universal no-fault government run system. Compensation for injury passed from the dominion of the law to social policy. Woodhouse told us that the tort system looked to the behaviour of the defendant, while we should worry about the injured. Compensation's twin, deterrence, was dismissed as ineffective in the age of insurance and passed, if not into oblivion, at least into the hands of state regulatory bodies.

Tort refused to die. The Courts could not give it up. *Donselaar v Donselaar* [1982] 1 NZLR 97 retained exemplary damages for intentional torts meriting special punishment. Tipping J's recent judgment in *McLaren Transport Ltd v Somerville* 13 August 1996, High Court Dunedin, AP 2/96 asked whether tort law under the guise of exemplary damages could step back to the forefront of personal injury cases, remedying the unfairness of the present scheme. Tipping J's decision that exemplary damages are available for negligence is entirely consistent with previous New Zealand, Australian and Canadian case law. But his test of whether a particular case was "bad enough" to merit exemplary damages may lead to a pleading frenzy by plaintiffs attempting to get what Accident Compensation will not give them. Much of the decision needs urgent clarification from the Court of Appeal, which must finally decide what role exemplary damages have in our brave new world.

THE CASE

Somerville, a farmer and agricultural contractor, wanting a new tyre for his hay conditioning machine, took the wheel rim to the McLaren Transport garage in Patearoa. Discussion revealed that McLaren Transport had only 15 inch tyres while Somerville's rim was 15.3 inches. Understanding that an undersized tyre could be fitted to the oversized rim at McLaren Transport's garage at Ranfurly, Somerville proceeded there. In the absence of the usual tyre fitter and Somerville's desire to complete his present job, Stumbles, the foreman, attempted to fit the tyre. On the third attempt the tyre exploded under excess pressure of 80 psi, severely injuring Somerville, who had been helping out. The tyre contained the warning

> Tyre may burst with explosive force causing serious personal injury or death. Never exceed 35 psi when seating beads.

In the District Court, Judge Everitt concluded that Stumbles had been negligent in not reading or following the warning. He also found that although Somerville had been actively involved in fitting the tyre, he was not contributorily negligent. As Stumbles had failed to take account of the potential danger to Somerville, McLaren Transport should be liable for exemplary damages of $15,000.

EXEMPLARY DAMAGES AND ACCIDENT COMPENSATION – CAN THEY BE A TOP-UP?

Donselaar told us that exemplary damages survive the Bar on actions for damages arising out of personal injury by accident because they focus on the behaviour of the defendant not on the injury of the plaintiff. Their aim is to denounce high handed or contumacious behaviour as unacceptable. As compensatory damages are barred, can we use exemplary damages to top-up the payments under the Accident Compensation scheme? Counsel sought to rely on a suggestion from Lord Cooke in *Donselaar* (at 107) that "as compensatory damages (aggravated or otherwise) can no longer be awarded, exemplary damages will have to take over part of the latter's former role".

The Judge, in orthodox style, reaffirmed that the Courts could not make up for inadequate compensation. Other cases like *Blundell v Auckland City Council* [1986]1 NZLR 732 make that quite clear. The Judge emphasised that Parliament had limited compensation and it was Parliament that should fix any problem. Judicial reform, however desirable, would only be piecemeal and might take away some of the demand for the surely necessary overhaul of the whole system.

However, what Lord Cooke was talking about was not compensation but deterrence. In the absence of the deterrence implicit in paying damages, exemplary damages might be moulded to deter certain kinds of behaviour, namely high handed or contumacious behaviour. *Donselaar* concluded that some intentional harming might merit such punishment.

Another way of looking at *McLaren Transport* is to ask to what extent exemplary damages should replace the lack of deterrence implicit in the Woodhouse model of Accident Compensation. Should they replace the economic deterrence of barred tort law? Or rather should they be a kind of moral deterrent, a marker to denounce only certain kinds of behaviour as unacceptable? Or a combination of both? In various judgments Lord Cooke has seemed to argue for the second. The persistent statements about the need to restrain awards, to prevent amounts awarded in punishment becoming compensation appear to confirm that.

EXEMPLARY DAMAGES FOR NEGLIGENCE

In *Taylor v Beere* [1982] 1 NZLR 81 and *Donselaar*, New Zealand followed Australia and Canada in rejecting the House of Lords attempts in *Rookes v Barnard* [1964] AC 1129 and *Broome v Cassell* [1972] AC 1027 to limit exemplary damages to official conduct or torts committed to produce a profit. Should New Zealand follow Australia and Canada in the next step and impose exemplary damages for negligence? Authorities in both countries have concluded that in rare cases, negligence might also involve the kind of high-handed or contumacious behaviour necessary to trigger punishment over and above normal compensation. In *Coloca v BP Australia Ltd* [1992] 2 VR 441 employees sought to establish that they were suffering cancer as a result of exposure to harmful substances. In *Robitaille* (1981) 124 DLR (3d) 228 a professional hockey team failed to provide adequate medical treatment to an injured plaintiff. But the classic (and perennially controversial) example is the Californian *Grimshaw v Ford Motor Co.* 119 Cal App 3d. 757,174 Cal Rptr 348 (1981). *Grimshaw* was the civil progeny of the Ford Pinto scandal. Ford had decided not to make a safety improvement costing $15.30 per car to the Pinto's fuel tank because of a cost benefit analysis which had balanced that cost with the cost of compensating deaths or injuries from fuel tank explosions because the tank would not survive certain rear end collisions. Grimshaw was badly burnt in that very kind of rear end collision. The jury, having been instructed that Californian law required a showing of malice or "conscious disregard of the consequences"(380-383, 806-812) found that Ford should pay some $US125m in punitive damages, the jury's estimate of what Ford might have gained by not making the proper safety improvements to the Pinto's tank. The trial Judge, however, reduced the award to $US3.5m. In upholding the trial Judge's decision, the Californian Court of Appeals described Ford's management's decision as "conscious and callous disregard of public safety in order to maximise corporate profits" and that rather than being just an act affecting one individual, Ford's acts had endangered "[the] lives of thousands of Pinto purchasers"(388, 818). $US3.5m was only a tiny amount compared to Ford's wealth even though Ford would have been liable, under federal safety laws for only $US50 fine as a first offence or $US100 for a second offence. In deference to the trial Court's discretion, the Court of Appeals was not prepared to increase the $US3.5m although (388, 818)

> [e]vidence pertaining to Ford's conduct, its wealth and the savings it realised in deferring design modifications in the Pinto's fuel system might have persuaded a different fact finder that a larger award should have been allowed to stand.

Choosing to run a risk with others' safety may be worthy of punishment in the same way as intentional infliction of harm. But these cases insist that on additional factors beyond negligence. In the Pinto case it was easy for the Judges or the jury to say that in valuing future drivers and passengers as if they were economic units, Ford was diminishing their humanity. *Robitaille* involved allegations that the club was almost to get value for their money and to some extent had ridiculed Robitaille for complaining. O'Bryan J, in *Coloca* allowed the claim for exemplary damages to remain if something more than negligence was alleged.

The line is not an easy one to draw. It has not been easy in other common law jurisdictions; it is harder here where there has been a deliberate decision to exclude the deterrence value of ordinary tort liability. Whenever the ignition key is turned or the green button on a factory machine pressed, there is risk. Tort law is not necessarily designed to stop behaviour that is risky but to reduce the risk to socially efficient levels by getting those who undertake the risks to absorb the costs of those risks or reduce the number of times they undertake that activity. But the horror of the Pinto case is that that very calculation was explicitly made. Indeed awarding exemplary damages for negligence is often seen as exposing the conflict between the moral and economic aims of tort. While exemplary damages can sometimes be looked at economically, they are really about marking out moral blameworthiness. That conflict to the extent it ever can be needs to be resolved by our Court of Appeal.

In this case, Tipping J quite easily concluded

> in my view the law of New Zealand allows a claim for exemplary damages for personal injury caused by negligence if the defendant's conduct is bad enough (p 19).

He referred to recent New Zealand cases emphasising remedial flexibility, remedies should fit the wrong committed or the harm suffered. It is a logical extension of Lord Cooke's desire in *Donselaar* to retain "a useful weapon in the social armoury" to award exemplary damages in some negligence claims. What is needed is a test of how to distinguish what merits punishment and what does not. This, he provides, by adapting the language of *Donselaar* –

> Exemplary damages for negligence causing personal injury may be awarded if, but only if, the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment. (p 23)

Whether this test does much more than the Judge's earlier "bad enough" standard depends, of course, on how it is applied.

EXEMPLARY DAMAGES AND ACCIDENT COMPENSATION

Tipping J spent little time on the impact allowing suits for exemplary damages in negligence cases might have on the Accident Compensation regime. Exemplary damages are an established part of the New Zealand torts scene. Theoretically *Donselaar* applies to negligence cases just as it does to intentional torts. Exemplary damages focuses on the behaviour of the defendant not the plaintiff's injury. Instead of the intention to harm the plaintiff being the contumacious behaviour as in the intentional torts, it is the defendant's indifference about harming the plaintiff. But the theoretical problem is not the only one problem our Courts face. Our Accident Compensation regime is a practical solution to the problems and expense of common law litigation. The scheme has at its root the efficiency gained by having to insure only once with the Corporation. It removes the uncertainty and the expense of tort actions. The advantage of restricting exemplary damages to intentional torts is that it would have provided a brightline for both Courts and potential litigants. Unless there was an allegation of intentional harm, a claim would be struck out without the expense of litigation. This is a screening process which automatically excludes the vast majority of tort claims. The case load and hopefully the expense might be manageable. The expense of successfully proving that you were not so negligent as to merit punishment may be greater than the damages you have to pay. It is easy to imagine litigation costs in a similar case might easily exceed a $15,000 award. If there is to be an extension beyond intentional torts, it should be to another brightline. Otherwise, plaintiffs will claim exemplary damage and the defendant will pay to be rid of the case. A loose standard will popularise what may now be happening now in a number of high profile cases like Cave Creek. But before there can be a brightline we need a theory about what transforms simple negligence into negligence that merits special punishment. Tipping J, in discussing the appropriate test for exemplary damages, talks of "spurious precision". It is very hard to impose a general test. There is a wide variety of actions that might merit punishment. But there are dangers in not having such a test, of leaving evaluations to a case by case factual analysis. The American experience does not lend much hope that juries can keep a balance when faced with the grim realities of an accident. A lot of the controversy there has come from the extension of punitive damages, as in *Grimshaw*, to product liability cases. As late as 1976 DG Owen felt it necessary to advocate that the same kind of abuse of power or disregard of human values that justified the award of punitive damages for intentional torts also justified their award in product liability cases (Owen "Punitive damages in product liability litigation" (1976) 74 Mich L R 1258). By 1982, that same author was staggered by the size of jury awards, "Problems in assessing punitive damages against manufacturers of defective products" (1982) 49 U of Chicago L R 1. He urged Courts to restrain juries from making awards, even suggesting in part that juries not hear evidence, like the profit calculating documents in *Grimshaw*, that might prejudice them. New Zealand Courts would not accept those high level of damages, Lord Cooke has repeatedly emphasised in cases like *Donselaar* and *Blundell* that tight control needs to be kept on juries. New Zealand Courts may, however, find it similarly difficult to ask a jury, having heard the horrific nature of an injury and knowing the lack of compensation to put aside any thoughts of inadequate compensation.

As Bruce Corkill suggested at [1996] NZLJ 314 and as he suggested as counsel before Tipping J, exemplary damages are seen by both litigants and lawyers as a way of remedying the problems of inadequate compensation. Tipping J accepted that is inappropriate. Without a brightline, the temptation will be always to plead that there are special "plus" factors. The "one-stop shop" nature of the Accident Compensation system might be seriously undermined.

WHEN SHOULD EXEMPLARY DAMAGES CLAIMS BE ALLOWED?

Whether the "too bad" test or the adapted *Donselaar* test provide adequate guidance is a matter of how they are applied to the facts. But Somerville's recovery does not give much hope that future claims will be "rare" or "exceptional".

On the facts as found, Stumbles appears extremely stupid. He did not read the warning on the tyres. Indeed he seemed blissfully unaware of the dangers of over inflation and of not using a tyre cage to restrain the tyre. He did not use the standard equipment. But is stupidity enough? This was not a Pinto type case of deliberate calculation of profit and knowledge of inevitable injury. It was not a *Robitaille* case of persistently refusing to answer a request for help. There are many stupid people who do not realise the risks of what they are doing. Are they really deserving of special punishment? Is stupidity really a "rare and exceptional circumstance"? The risk is that the failure to take proper care when viewed from hindsight may always seem "rare and exceptional".

What factors should we demand before considering an exemplary damages case? Perhaps a good starting point is ask what problems we are seeking to solve by imposing exemplary damages. Exemplary damages are traditionally awarded for the abuse of power, be it public or private, or against those people who commit torts for profit. They provide in economic terms deterrence over and above that provided by ordinary tort law. But in our model as Lord Cooke explored in *Re Chase* [1989] 1 NZLR 325, tort law in personal injury cases may be less concerned with money and more concerned with giving the disaffected a chance to heard and Courts the chance to decide right from wrong.

Stumbles appears to have thought that he was doing Somerville a favour. Stumbles' only power over Somerville was his supposed knowledge of fitting tyres. It might be appropriate to say that those who know that others rely on their special knowledge are in a position of power. We might want to deal, for instance with careless professionals, if we do not believe that they are sufficiently regulated already. One Canadian case cited by Tipping J, *Coughlin v Kuntz* [1990] 2 WWR 737, imposed exemplary damages where a doctor performed an experimental operation, which he knew he should not perform, on a patient who was not fully informed. But is fitting a tyre really that sort of special knowledge? Indeed Judge Everitt had found that Stumbles did not have that knowledge anyhow. Tipping J wrote of those findings (p 7)

> ... Stumbles lacked the experience and knowledge to be able to see that he was getting out of his depth in this dangerous area. The Judge found this was due to his lack of proper training in tyre fitting.

Might not Somerville done a little to look after his own interests? It might be true that he did not know enough to have been contributorily negligent, but Somerville does appear to have pressured Stumbles and voluntarily exposed himself to risk.

The classic exemplary damages case is the Pinto case, where Ford, knowing that severe harm was inevitable choose to run that risk anyway. We might look at businesses or government departments that make decisions not to put proper systems in place to save money. Such an approach would be consistent both with Lord Cooke's moral deterrence role for tort law in the Accident Compensation world and with the need to restrict claims to a manageable level.

A garage that deliberately does not properly train its staff might be different. Should we really be looking at mechanics trying to help a customer out?

The Court of Appeal needs to decide in what kinds of cases exemplary damages are a useful weapon and it needs to tell lower Court Judges when to allow cases to go to trial for exemplary damages. ❑

TAKEOVERS REGULATION

Peter McKenzie, Barrister, of Wellington

asks where we should go from here?

The Government's loss of nerve in relation to the Takeovers Act 1993 has left law and regulation governing takeovers in a most uncertain state. In the absence of the Takeovers Act 1993, takeovers in New Zealand are governed by four sets of provisions:

The Stock Exchange Listing Rules apply to listed companies only. These provide three alternative regimes, one of which a listed company must adopt. The regimes apply where there is a "restricted transfer". This takes place when a bidder has reached a 20 per cent shareholding in relation to a company's voting shares:

(a) The Minority Veto regime requires an offer to be made on the same terms and conditions to all shareholders, except where it is made as a stand in the market.

(b) General Notice and Pause regime which requires minimum periods of notice and information to be given on the making of an offer which involves a restricted transfer.

(c) The Insider Only regime requires the prescribed notice and information to be given only where the bidder is an insider.

As Quigg and O'Neill point out: *NZ Business*; August 1996, p 591, regimes (b) and (c) amount in substance to little more than the need to give a further substantial security holder notice.

Part I of the Companies Amendment Act 1963. This Act applies to both listed and unlisted companies. It covers only takeovers which are made "in writing" or to seven or more shareholders. It is now seldom used where a bidder acquires control of a listed company. In its submission to the Minister of Justice in June 1995 the Takeovers Panel provided details of 39 listed companies which experienced change in control between the period between 1993 and April 1995. None of those changes involved compliance with the Companies Amendment Act 1963. The use of this Act by listed companies is largely limited to cases where the party which has already acquired control wishes to move to 100 per cent or where, as in the case of a number of the power companies, there is widely dispersed shareholding in non-institutional hands.

The Companies Acts 1955 and 1993. These statutes contain no provisions in relation to the takeover process but provide certain remedies for minority shareholders. The 1955 Act s 208 retains the provision for compulsory acquisition where an offeror in a takeover offer acquires 90 per cent or more of the company's shares. There is no equivalent provision in the 1993 Act. From 1 July 1997 when the 1993 Act replaces the 1955 Act there will be no statutory provision for compulsory acquisition.

The Fair Trading Act 1986, s 9. An offer made in a prospectus or takeover circular may constitute conduct "in trade" in relation to the supply of goods: *CPB Industries Ltd v Bowker Holdings No 16 Ltd* (1987) 3 NZCLC 100035, *Power New Zealand Ltd v Mercury Energy Ltd* (1996) 7 NZCLC 260631 and *Fraser v NRMA Holdings Ltd* (1995) 13 ACLC 132. This legislation has a possible wide-ranging impact on offerors and directors of an offeree company in relation to statements and takeover circulars and directors' recommendations to offeree shareholders on the acceptance or rejection of a bid. This section also has an untested potential in relation to defensive tactics which could be brought within the description of "misleading conduct".

The Commerce Act 1986 and the Overseas Investment Regulations 1995 apply to certain takeover schemes, but will not be further considered in this paper.

SCOPE OF THIS PAPER

This paper will not revisit the debate on whether the Takeovers Code, with its "fundamental rule" for a mandatory offer to be made at 20 per cent, should be adopted. The paper assumes that for the present the regulation of takeovers in New Zealand is mainly to be provided by three options for listed companies under the Stock Exchange listing rules supplemented in the case of both listed and unlisted companies by the limited statutory "notice and pause" regime provided by the Companies Amendment Act 1963. In that context, this paper considers the following questions:

1. Will Part I of the Companies Amendment Act 1963 continue to apply after 1 July 1997 when its parent Act, the Companies Act 1955, will cease to exist?
2. Does Part I of the Companies Amendment Act 1963 provide an adequate notice and pause regime for governing unlisted as well as listed companies?
3. Is a statutory provision for compulsory acquisition at 90 per cent needed or do the Stock Exchange Rules provide an adequate procedure for companies in this respect?

PART I OF THE 1963 ACT

The Companies Act 1955 is repealed from 30 June 1997 by s 2 Companies Act Repeal Act 1993. In addition under s 2(2) a whole raft of Companies Amendment Acts were consequentially repealed with effect from 30 June 1997. These Acts include the Companies Amendment Act 1963 Part II (dealing with flat owning companies) but significantly the schedule does not include Part I of the Companies Amendment Act 1963.

One obscurity which arises following the repeal of the Companies Act 1955 is that s 1(1) of the Companies Amendment Act 1963 provides:

> This Act ... shall be read together with and deemed part of the Companies Act 1955 (hereinafter referred to as the principal Act).

If the Companies Amendment Act 1963 including Part I of that Act is to be "read together with and deemed part of the

Companies Act 1955" does this mean that the repeal of the 1955 Act consequentially repeals the whole of the 1963 Act, including Part I, notwithstanding the omission of Part I from the Schedule to the Repeal Act of 1993? Although this argument has a superficial attraction, it does not survive close examination of s 21 Acts Interpretation Act 1924 which states that in every unrepealed Act (eg Companies Amendment Act 1963 Part I) in which reference is made to any repealed Act (eg Companies Act 1955) such reference shall be construed as referring to any subsequent enactment passed in substitution for such repealed Act (eg Companies Act 1993). To similar effect is s 5(2) Company Law Reform (Transitional Provisions) Act 1994. That provides that a reference in any enactment to a provision of the Companies Act 1995 shall, unless the context otherwise requires, be read and construed as a reference to the corresponding provision of the Companies Act 1993.

It follows that Part I Companies Amendment Act 1963 survives the repeal of the Companies Act 1955 on 30 June 1997 and will continue to apply.

Part I of the 1963 Act has been amended in order to extend the application of that Act to companies formed under the Companies Act 1993. The definition of "company" in s 2(1) of the 1963 Act has been extended to cover 1993 companies and the reference in s 2(2)(b) to the definition of a subsidiary in s 158 of the 1955 Act has been extended to cover the corresponding definition in s 5 Companies Act 1993. The reference in s 3(a) to a private company (the shares in which are excluded from the operation of the Act if all offerees consent in writing) has been amended to refer to "a company not having" more than twenty-five members. The Act can, therefore, be consistently read as applying to 1993 companies and so as applying to all companies after the repeal of the 1955 Act.

Does this mean that an offer to purchase shares on the share market under the Exchange's matching order system constitutes an offer "in writing", since the offer is recorded in electronic form on the screen?

Weaknesses in the 1963 Act

The object of the 1963 Amendment Act is "to protect shareholders of offeree companies by ensuring that they are given enough time and information to make a proper decision": Casey J in *Carr v New Zealand Refrigerating Ltd* [1976] 2 NZLR 135, 137. That is also the stated objective of the "notice and pause" alternative provided by the Stock Exchange Rules. It is designed to ensure that once a general offer to shareholders is made shareholders will be provided with proper information on which to make an informed decision whether to accept the offer and will not be subjected to time or other constraints which would place them under unfair pressure to accept the bid. The Companies Amendment Act 1963 fails to achieve this purpose adequately and there are repeated examples of takeover activity in New Zealand, including a number of recent takeover offers which indicate the serious weaknesses in this legislation. In comparison with comparable regimes in the UK, Australia, Canada and the US it is manifestly defective. The following are some examples of deficiencies in the legislation which urgently need to be addressed.

Scope of the legislation

The Act is limited to takeover offers "in writing". It has been held by the Court of Appeal (*Multiplex Industries Ltd v Speer* [1966] NZLR 122) that it is only the actual offer to purchase shares from the shareholder which must be in writing. A verbal request by an offeror to an offeree to sign a written option to purchase was held not to be a written offer within the Amendment Act. The opportunity for ready avoidance of the Act in case of closely held companies is obvious. An offeror is able to avoid the application of the Act and therefore avoid the need to provide the prescribed information or give the prescribed time to offeree shareholders to accept an offer, by telephoning shareholders and requesting their immediate signature of a written option to purchase.

It is not clear whether a stand in the market or other offer on the Exchange is covered by the Amendment Act. It was held in *Tatra Industries Ltd v Scott Group Ltd* [1983] 1 NZCLC 98649 that the notice to the Stock Exchange of a stand in the market was not the making of a written offer, transactions on the Exchange at that time being conducted verbally under the open outcry system. That system has, however, since 1991 been replaced by an electronic market in New Zealand and transactions are matched on the screen. Does this mean that an offer to purchase shares on the share market under the Exchange's matching order system constitutes an offer "in writing", since the offer is recorded in electronic form on the screen? There is authority to support the proposition that words which are formed electronically, provided that they appear visually, constitute "writing": *R v Clifton* (1993) 10 CRNZ 356, 358. The issue is equivocal, having regard to the definition of "writing" in the Acts Interpretation Act s 2:

> "Writing", "written" or any term of like import, includes words printed, typewritten, painted, engraved, lithographed or otherwise traced or copied.

This definition is not exclusive. Words formed electronically are not referred to but neither are they excluded.

While it is arguable that an offer to purchase shares made through the Exchange's order matching system does constitute an offer in writing, the matter is far from clear. It is most unsatisfactory that a question of this kind on which the validity of major transactions can turn should be unclear.

First-come first-served offers

First-come first-served offers are regarded outside New Zealand as a coercive and undesirable form of takeover activity. Under this form of bid an offeror may inform offerees that the bid may be withdrawn after a certain percentage is reached or a lower price may be offered once the stated percentage is reached. Bids of this kind have been criticised as being coercive in that they put pressure on target shareholders to accept the bid or be forced into having a lower value put on their shares. Although views are sharply divided on whether an equal opportunity rule, such as provided by the proposed Takeovers Code under the Takeovers Act 1993 can be justified in economic or philosophical terms, few commentators consider that coercive bids can be justified. The competing policies are discussed in Clark, *Corporations Law*, Little Brown & Co, 1986, Ch 13. Two-tiered offers, discussed below, have a similar coercive effect. A bid of this kind would not be permissible under the minority veto regime in the Stock Exchange Listing Rules but a bid of this kind is still open in relation to the majority of companies which have adopted the general notice and insider only regimes and is open to all companies under the Amendment Act. The Market Surveillance Panel Annual Report for 1996 states that six listed companies have adopted the minority veto regime, 103 the general notice regime and 18 the insider only regime. Recent examples of the "first-come first-served" offer are the offer of Utilicorp NZ Inc for up to 7,573,511 shares in Power New Zealand Limited in May 1995, and the offer by Mercury Energy dated 19 June 1995. Utilicorp's offer informed target shareholders that Utilicorp would deal with applicants on a strict "first-come first-served" basis in accordance with the order in which their applications were received. Mercury in its offer informed Power New Zealand shareholders that once Mercury Energy had acquired a further 31.5 million shares, or approximately 20 per cent, its price would drop from $4.50 to $4 per share. Shareholders were therefore urged to "support the Mercury bid now. Sell to Mercury and realise the benefits". What shareholders now know is that Mercury's offer has since moved up to $8 per share. Those shareholders who sold out under a coercive first-come first-served bid in June/July 1995 can have little respect for the takeover regime operating in New Zealand.

Offers of this kind would not be permissible in Australia or Canada. In the United States the Williams Act requires pro-rating of acceptances above the stated percentage in the case of tender offers.

Two-tiered offers

A two-tiered offer is made where the bidder offers more to those target shareholders who accept by a named date or up to a named percentage and those who accept later are relegated to a lower price. Mercury's offer earlier referred to was on both a first-come first-served and two-tier basis.

Two-tiered offers are outlawed in Australia and the United Kingdom. They have attracted frequent critical comment in the United States. Although for certain purposes two-tiered offers are permitted under the Williams Act, this form of offer has been criticised because of its coercive effect of pressuring shareholders into accepting the offer in case they find themselves relegated to a lower price. The debate in the US in relation to the use of two-tier bids and the Williams Act requirement in s 14(d)(7) that all shareholders must be given the benefit of any increased consideration is discussed in Clark, *Corporations Law* (supra) 545-554. Two-tiered offers are not permitted under the Stock Exchange mandatory veto regime (except where there is a stand in the market), but can be made under the other two regimes. The Macarthur Committee in 1973 recommended that any offeror which increased the price of its offer should be required to give the benefits of this increased price to shareholders who had already accepted. Macarthur Report, *Special Committee to Review the Companies Act*, March 1973 para 354. This is the position in Australia (Corporations Law s 654) and Canada (Canada Corporations Act s 197).

Description of Securities

The Mercury Energy offer for shares in Power New Zealand Limited referred to earlier disclosed a further significant weakness in the Companies Amendment Act 1963. Mercury offered shareholders in Power New Zealand the option of either choosing a cash payment or convertible notes having a principal amount equal to the cash payment. No description of the convertible notes was given in the takeover offer. For an offeree to have discovered the interest rate or terms of redemption on maturity the offeree was obliged to read the circular which accompanied the takeover offer. This simply stated that convertible notes carried 9 per cent annual interest until "you want to cash them in" and offerees were informed notes could be cashed in at one week's notice. Under the heading "What Convertible Notes Look Like", the circular stated:

> As a Power New Zealand shareholder you will have a certificate for your shares. In its place you will receive a single, similar looking certificate, clearly indicating that it is a convertible note.

This was a quite unsatisfactory description of the security which was being offered. Nowhere were the offerees (many of whom were persons who had never ever previously held any form of share or tradeable security) told what a "convertible note" was. It was nowhere stated whether convertible notes were secured or unsecured. It was not stated whether there was a trustee or who the trustee for the convertible note holders was.

The Companies Amendment Act 1963 surprisingly does not require a description of the nature and particulars of the security to be stated. Part C of the Schedule sets out a number of additional matters which must be specified where securities of any company or other body corporate is offered as consideration. This statement requires a number of details to be given in relation to the issue of the securities which are being offered, but requires only very limited matters to be stated about the security itself in paras (e), (f) and (g). Urgent amendment is required to address this omission.

Selective offers

The Companies Amendment Act 1963 does not require a takeover offer made under that Act to be made to all shareholders. An offer can be made under that Act which excludes certain shareholders from the offer. Again, a recent example is the Mercury Energy offer which excluded Utilicorp and its related parties from the offer. This type of practice is condemned in other jurisdictions, in particular UK, Australia and Canada. It is however, permitted by the Stock Exchange Rules in relation to listed companies in New Zealand apart from companies which have adopted the minority veto regime. The practice of making selected offers was, however, banned under the earlier Stock Exchange regime and was the subject of consideration by the Court of Appeal in *NZ Stock Exchange v Listed Companies Association* [1984] 1 NZLR 699.

A stand in the market

There is some doubt whether a stand in the market comes under the Companies Amendment Act 1963. At present neither the Stock Exchange Listing Rules or the Companies Amendment Act deals satisfactorily with the open-ended offer. A recent example is the stand in the market by Amuri Corporation on or about 6 March 1996 for additional shares in Wairarapa Electricity. Amuri in its notice to the Stock Exchange of its intention to buy in the market indicated only that it would buy anything up to all of the shares it did not already own. No indication was given of price, the number of additional shares Amuri was seeking or the time for which it would stand in the market. Shareholders who were given such a vague indication of a bidder's intentions are clearly at a disadvantage. The Exchange, in relation to listed companies, should amend the listing rules in order to require a bidder who makes a stand in the market to state precisely the number of shares which it is seeking, the price at which it is currently offering to buy and the length of time for which its offer is open. In relation to unlisted companies similar provisions should be made in the Companies Amendment Act where general offers are made under that Act. The Companies Amendment Act 1963 does not require a bid to state what percentage or number of shares the bidder is seeking or the maximum period for which the offer is open. In 1973 the Macarthur Committee called for this weakness in the Act to be addressed: Macarthur Report, paras. 349 and 350.

Irrevocable powers of attorney

A further coercive tactic available to a bidder under the Companies Amendment Act is the use of an irrevocable Power of Attorney in order to lock in any acceptors, notwithstanding a later change in the terms of the offer. A similar provision was included in Utilicorp's takeover offer referred to earlier. That offer included the provision:

> Applicants shall not be entitled to withdraw their acceptances of this offer whether or not there has been any variation to the offer as permitted by s 9 of the Companies Amendment Act 1963.

Mercury's offer of 19 June 1995 contained a virtually identical provision.

The effect of this provision was that Mercury was at liberty to vary its offer by increasing its price for Power New Zealand shares so that any shareholders who had already accepted the offer at $4.50 were locked in and could not participate in the increased price or accept a competing offer. Utilicorp's offer had the same effect. Most jurisdictions, including Australia, have prohibited practices of this kind. They are permissible in New Zealand both under the Companies Amendment Act and under the Stock Exchange Rules. The Companies Amendment Act even permits the use of an irrevocable power of attorney before a bid becomes unconditional, thereby giving the offeror power to vote the shares even before being bound to acquire them: Macarthur Report para.352. A bidder should not be able to use this kind of coercive provision in New Zealand; both the Amendment Act and the Stock Exchange Rules should be brought into line with the accepted practice in this area in other jurisdictions.

COMPULSORY ACQUISITION AT 90 PER CENT

The Companies Act 1993 contains no provision corresponding to s 208 of the 1955 Act which gave power compulsorily to acquire the outstanding shares to a party acquiring 90 per cent or more of a company's shares not already held by that person and gave a similar power to the outstanding shareholders to compel the 90 per cent holder to acquire their shares. The Law Commission: *Report No 9, Company Law Reform and Restatement* para 300, considered that the policy of s 208 was not one which the Companies Act should adopt and if such a provision should be included in legislation then this was a matter for takeover legislation not the Companies Act. The Final Takeovers Code prepared under the Takeovers Act 1993 did make provision for compulsory acquisition but that Act and the Takeovers Code have not been brought into force.

From 1 July 1997 when the Companies Act 1955 is repealed, there will be no statutory provision in New Zealand providing for a general regime for compulsory acquisition at 90 per cent. In some limited circumstances an amalgamation may be possible under Part XIII of the 1993 Act but these provisions are not of general application. The only regime which will then be operative will be the regime applying to listed companies under the Stock Exchange Rules. There are a number of substantial unlisted companies in New Zealand with significant numbers of shareholders. It is a matter of concern that from 1 July 1997 there will be no procedure available on a takeover of such companies for a party acquiring 90 per cent of the shareholding to tidy up the Share Register by acquiring outstanding minority holdings. Similarly there will be no power on the part of any outstanding minority to compel the acquisition of their shares. The difficulties are compounded by the fact that under the previous companies legislation it was possible (although the process was not free from doubt) to use the procedure for arrangements and reconstructions under s 205 to effect the compulsory acquisition. That procedure is no longer available under the 1993 Act. Legislation should be introduced to address this deficiency prior to 1 July 1997.

> ***It is doubtful whether a procedure in the Articles or Constitution for expropriation of a minority shareholder's shares can ever be effective***

As far as listed companies are concerned the experience with the Stock Exchange Rules in the Whitcoulls Ltd compulsory acquisition was not encouraging. Those rules, unlike s 208, do not require the acquirer to offer the price and terms under which it attained its 90 per cent holding. Instead the acquirer can seek to acquire the outstanding shares at any price which it can justify to be fair and reasonable in accordance with an independent appraisal report. In the Whitcoulls case the majority holder, Rank Commercial Ltd, acquired its 90 per cent at an offer of $2.32 per share. It then, on the basis of an independent valuation, sought to acquire the outstanding shares at the same price. Difficult questions arose in that case as to the basis on which an independent expert was selected, on the proper approach to be taken in relation to valuation, and questions were also raised as to the Stock Exchange's jurisdiction to determine whether the price was fair and reasonable. The s 208 procedure had the advantages of:

- a clearly ascertained price at which the bidder is required to acquire the outstanding shares
- a clearly established process before the Court as an independent arbiter where dissenting shareholders challenge the price at which their shares are being acquired.

Section 208 has some obscurity in its wording and there are doubts as to the scope and application of the section which need clarification. These can be addressed as they have been in Australia and England: Corporation Law s 701, and UK Companies Act 1985 ss 428-430F.

There is also an urgent need for legislation on this matter because of doubts as to the validity of the Stock Exchange regime for compulsory acquisition. That regime rests for its effectiveness on the requirement that companies adopt the regime in their constitutions. The constitution must incorporate the default provisions which form the basis for companies to enforce compliance with the regime.

It is doubtful whether a procedure in the Articles or Constitution for expropriation of a minority shareholder's shares can ever be effective: *Brown v British Abrasive Wheel Co* [1919] 1 Ch 290; *Suspended Ceilings (Wellington) Ltd v CIR* [1995] 3 NZLR 143.

A further difficulty with the Stock Exchange regime is that it can be seriously questioned whether the directors of the company will utilise the company's own machinery to enforce compliance against the will of a 90 per cent controlling shareholder.

CONFLICT BETWEEN THE REGIMES

A further issue which needs to be addressed is the conflict which arises between the requirements of the Stock Exchange regimes and the statutory requirements of the Companies Amendment Act. It is not possible to contract out of the Companies Amendment Act, (s 12). Unless the Stock Exchange grants a waiver where a take-over offer is affected by the 1963 Amendment, the offeror and offeree company are put into a position of conflict with an obligation to comply with two different regimes which are subject to differing timing requirements and obligations. This issue needs to be addressed by the Exchange with clear guidance being given as to the obligations of listed companies.

Another difficulty is that the Market Surveillance Panel in its 1996 Annual Report impliedly criticised companies for simply embodying s 4 from the Listing Rules in their constitutions. The Panel says that the Exchange assumed that company constitutions would have fleshed out the bare principles in the Rules. The Exchange has, however, given no guidance on how companies should develop these principles in their constitutions.

CONCLUSIONS

The Companies Amendment Act 1963 will survive the repeal of the Companies Act 1955, and unless amended will continue to provide the basic takeovers regime for unlisted companies.

The Act contains a number of serious deficiencies which need to be urgently addressed. Recent experience has indicated the highly unsatisfactory nature of this statute. After 1 July 1997 there will be no statutory provision which provides generally for the compulsory acquisition of minority shareholdings by a person who acquires 90 per cent of the company, and similarly there will be no provision which would entitle the outstanding minority holders to compel the acquisition of their shares. A provision of this kind is needed in relation to unlisted companies which do not come within the compulsory acquisition regime provided by the Stock Exchange Rules. The doubts as to the validity of the Exchange regime indicate the need for a provision of general application which applies to all companies, both listed and unlisted. The improved version of s 208 Companies Act 1955 as set out in s 701 of the Australian Corporations Law provides a more satisfactory procedure for compulsory acquisition than the Stock Exchange regime for listed companies. ❑

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continued from p 420

Australian Experience" (1991) 2 JBFLP 157, 163-165.)

In *Tenore Pty Ltd v Roleystone Pty Ltd* Giles J was prepared to restrain a bank paying under an unconditional bank guarantee where the underlying contract restricted the circumstances in which the beneficiary was entitled to demand payment. Giles J accepted that, as between the bank and the beneficiary, the beneficiary was entitled to demand payment from the bank. Nevertheless His Honour was of the view that the bank could be restrained from making payment to the beneficiary on the basis that, as between the beneficiary and the account party, the beneficiary was not entitled to "make the demand having that result"(at 48).

Giles J said: "As between the purchaser and the bank, the purchaser was entitled to have the $15,000,000 paid to the nominated account. As between the purchaser and the vendor, the purchaser was not entitled to make the demand having that result. Equity will intervene to restrain the purchaser from obtaining the benefit of the demand and, the interlocutory injunction having prevented payment by the bank, will do so by restraining the bank from making the payment." Perrignon suggests that this decision cannot be interpreted as an application of the principle that equity will not grant an injunction to enforce a negative contractual stipulation. The Courts will only regard a stipulation as negative in substance if mere inactivity constitutes compliance. The mere restriction of the circumstances in which a beneficiary has the right to make demand under a bond does not satisfy the test.

Not *all* Courts have displayed the same degree of ambivalence toward applying (subject only to a narrow fraud exception) the autonomy principle as between the account party and the beneficiary. In *Bolivinter Oil* the English Court of Appeal commented that allowing the injunction preventing a beneficiary from making demand under an unconditional performance guarantee to stand had "... the effect of breaching the great and fundamentally important separation maintained by the Courts between the rights of the parties under the underlying contract ... and the rights of one of them under the independent banking contract" (at 256-257).

This approach is consistent with that adopted by the English Courts where an account party has sought injunctive relief against the beneficiary of a documentary letter of credit. See: *Hamzeh Malas v Raymet* ([1993] CA Transcript 945).

In an Ontario decision, *Aspen Planners Ltd v Commerce Masonry & Forming* Ltd ([1979] 100 DLR (3D) 546), Henry J refused to grant an interim injunction restraining a beneficiary from drawing down upon a standby letter of credit. His Honour commented: "... the chief characteristic of this device is its absolute reliability in the hands of the seller who is entitled, in the absence of fraud known to the bank on presentation of the proper documents, to receive payment"(at 548).

There is limited New Zealand authority on the point. In *JW Hartnell & Co Ltd v New Zealand Meat Producers' Board* (unreported CP 20/95, High Court, Christchurch, 21 February 1995, Doogue J) an account party successfully obtained an interim injunction preventing a beneficiary claiming payment. See also *New Forest Sawmilling Co Ltd v Timberlands West Coast Ltd*, (unreported CP 244/92, High Court, Christchurch, 22 July 1992, Fraser J). ❑