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Z v Z

Readers are referred to the opening of Mr Pardy's article in this issue for a statement of the traditional model of judicial decision making. To this might be added that the common law process is aimed at supporting the autonomy of individuals. It is for litigants to decide what arguments to run, and hence to risk losing a case rather than run a particular argument. It is for litigants to assess the probability and value of a particular result and hence whether to invest their private resources in pursuing it. Other parties cannot be joined to an action unless they qualify under strict rules.

The task of the Court is then to decide the issue before it on the basis of the evidence and arguments the parties have chosen to raise. The task of an appellate Court is to consider an appeal against an order made in a lower Court on grounds stated by the appellant. These limitations are important. When a Judge is faced with a limited issue and with limited information the Judge will be conscious that it is impossible to predict the practical effect of the result of the case on given individuals or classes of people in future. We can therefore hope for law to be generated which applies equally to all.

This traditional model of judicial decision making is supported by some traditional conventions. These include that judgments are criticised, not Judges; that criticism is in terms which respect the difficult position of Judges in deciding marginal cases; and that Judges' political beliefs are not inquired into, at the time of appointment or otherwise. There are also conventions, of which the Judges have in recent memory claimed the benefit, protecting their remuneration, including superannuation. Like the others, those rules were designed to support the Judges in the role assigned to them by the traditional model.

In *Z v Z*, both in the way in which the hearing was conducted and in the content of the judgment, the Court of Appeal stepped so far beyond these bounds that the Judges are presumably content to surrender the benefit of the accompanying conventions. One cannot argue that the limitations of the traditional judicial role are outmoded but that the benefits are not.

The problems in *Z v Z* began with the hearing. Without the consent of the parties, the Court appointed the Auckland Women's Lawyers Association and the Solicitor-General as amici curiae. Subsequently applications were made and allowed for other pressure groups to be represented but no public opportunity was given for the making of submissions. On the assumption that such cases involve exposing people's very private lives, the Act requires such hearings to be in private. The Court had now turned the event into a public policy conference. Nonetheless one of the pressure groups apparently felt able to start objecting to the presence of certain other people in the courtroom. It also appears that one of the pressure groups, but not the others, was allowed to speak in the courtroom by dint of being asked questions.

As a result of comments made during the interlocutory stages and because of comments in the Solicitor-General's submissions, affidavits were submitted on an issue on which the parties had agreed and which was not dealt with in the order appealed against, namely the valuation of one party's position in a partnership. The procedural device by which this issue was then canvassed in the judgment was for the Court of Appeal to turn itself into the High Court and order certain questions of law (which had not been before the High Court in the original appeal from the Family Court) to be removed into the Court of Appeal for argument. This was said to be done "following consultation with the parties" (p 22 of the judgment). This is somewhat disingenuous, since the consultation evidently included people not even described on the face of the judgment as parties and the stimulus for the new questions appears to have come from them. Furthermore, this procedure was by memorandum, after the hearing, inviting response from the parties within days and making clear that there would be no further argument on the issues raised, issues quite different from those on the basis of which the oral hearing had been conducted.

So who can now be confident that if an appeal to the Court of Appeal raises issues which hit the headlines the case will not be redirected by outsiders and by a Court of Appeal which apparently has the power to turn itself into a High Court, ask itself questions it, rather than the parties, wants answered, and then turn itself back into the Court of Appeal and answer them?

The Court of Appeal dismissed the original appeal in a few paragraphs. Most of the remainder of Section II of the judgment is a kind of apologia for having come to the "wrong" decision. The Court then went on to consider the question the parties had agreed on, namely the valuation of one party's position in a partnership. In the course of this, reference was made to sociological research and to the role the Judges have taken upon themselves of interpreting legislation in the light of the "needs of society" and taking a wide range of cultural, family, economic and international factors into account in order to achieve the "fairest outcome".

If the Court of Appeal is to pursue these paths then one expects to see some erudition in disciplines such as economics. Unfortunately, that is not forthcoming. Instead the judgment is pervaded by elementary economic fallacies. Of these, the chief is that an item of property can have an "actual" value different from the value assessed by the parties to a

transaction. (p 59) This is even in conflict with the Court's own assertion that something can have a value in use rather than in exchange. It must surely follow that the value can only be assessed by the person to whom it is going to be of use.

There are also elements of the reification of property to be found. This especially appears at p 61 in the sentence "After all, the benefits of use of property under lease or licence undoubtedly are themselves property and have value although there is no ownership in the property used". This is an argument frequently met in anti-law and economics writing designed to show that property rights are not exclusive as landlord and leaseholder both have rights to the same property. The answer, of course, is that the property is in the "right" not in the thing and that landlord and leaseholder each have property rights which are exclusive and tradeable. Furthermore, it is the "right" not the benefits which are "property".

This leads to the fallacy which has most impact in the judgment. This is that a job is a good, rather than a transaction (p 45 at which litigation is invited on various issues). Following from that it appears that the benefits of a job extend to the whole of the pay. Following from that the benefit of a position in an internationally renowned partnership extends to the whole of the earnings that one obtains in that partnership in excess of what one might earn out on one's own or in a less well connected partnership.

The fallacy that a job is a good is beloved of politicians and media commentators, but not of economists. A job is a transaction. One side gives up leisure and control of time and the other hands over payment. Since the transaction was entered into voluntarily one can say that, subject to current constraints, the employee values the pay more than the leisure, but how much more is often imponderable. Likewise, some accountants and lawyers choose to practice in big city partnerships and others as sole practitioners. Frequently those sole practitioners earn less than they might earn in a large firm, but they do not have to work from 7 am till 10 pm if they do not feel like it; they do not have to attend partners' meetings, they do not have to supervise teams of junior staff and they do not have to take the financial risk of a partner's defalcations or negligence. Presumably those who do work in large firms value the extra money more than freedom from those worries, but how much more is imponderable; some people even like living on adrenalin. For an excellent discussion of some of these matters readers are referred to (1997) 147 *New Law Journal* 7, on the merits of practice as a barrister from home rather than from chambers. One thing is certain and that is that the extra remuneration does not by itself represent the net benefit of being a member of a firm.

The idea that it does comes out most clearly in the astonishing suggestion from Crown Law that the economic role of a professional partnership in someone's life is the same as that of a business or fishing quota. But if I have a business valued at one million dollars I could, if I wished, sell it and put my feet up for the rest of my life. If I have a position in a partnership which someone else is going to value at one million dollars I have only the right to earn income by continuing to work myself into an early grave.

Nonetheless, the Court's advice on how to value a position in a partnership appears predicated on the idea that the extra remuneration that might be attributable to one's position in a firm represents the net benefit of that position. This is difficult enough to calculate, but once the considerations above are taken into account the exercise becomes impossible. The Court says that the fact that a value is difficult to arrive at does not mean that there is none. That is, in an abstract sense, of course correct. But for a private party faced with the question of whether to invest in a valuation exercise of uncertain outcome, the decision to treat the value as nil may well be a sensible one and no state agency has any business ordering otherwise. Even Courts cannot engage in an unconstrained pursuit of abstract truth, let alone private parties.

So what is to happen now? In a year or so, some hapless High Court Judge will be faced with a raft of conflicting expert evidence on the theory of the firm and other matters the Court of Appeal failed to canvass. There is some probability that the valuation arrived at will be small or even negative. For the privilege of arriving at it the wife will have paid out a great deal of money. The only certain beneficiaries are the witnesses and counsel.

There is much else to discuss in this judgment. What for example, is the role of the sociological research referred to (which itself falls into some of the traps above), about the position of women post-divorce, if the question before the Court is the valuation of future earnings or positions in partnerships? Does it mean that such a valuation exercise will not be called for in a case where intuition tells the Court that the female party will not benefit from it? If the approach in this case is to be applied even-handedly then it will not invariably redound to the wife's benefit, in fact increasingly will not. So either the result is legally just, in which case no reference to sociological research is called for, or it is an exercise in "social justice" which means that the Court is prepared to visit injustice not just on men but on a proportion of women in the expectation that, in aggregate, women will benefit. But Courts are not for deciding matters between aggregates, they are for doing justice between individuals.

The Court's approach to statutory interpretation (obiter since it had no effect on the outcome) was based on a self-serving quotation from the *Report of the Judiciary*. We are told that the Courts are entitled to take into account the "needs of society". This is dangerous nonsense. It is nonsense because there is no entity called "society" which has needs. Only individuals can have needs. It is dangerous because, since there is no clear way of articulating the "needs of society", they can be whatever the person speaking wants them to be. As Humpty-Dumpty says, all that matters is who is to be master.

It is further dangerous in a practical sense. It is often said that judicial processes are not appropriate to social and economic decision-making. The procedure is too artificial and the range of information too limited. The solution proposed or implied is that Courts should do as was done here. Hence we have the apparatus of amici curiae, Brandeis briefs, economic impact statements and so forth. There is an unstated premise in this argument and that is that bureaucratic and parliamentary procedures are appropriate to taking economic and social policy decisions and that their procedures should therefore be aped. But the lesson of this century is that governments can not take effective economic and social policy decisions. Time and again government social policy decisions achieve the exact opposite of what was intended. There are two main reasons for this.

The first is indeed, the problem of knowledge. The Soviet Union ably demonstrated that when the whole of society is geared to feeding back the information required by the

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LETTERS

Z v Z and statutory interpretation

Dear Sir

What a relief it was to read recently that the Court of Appeal had adopted the view expressed in the *Report of the New Zealand Judiciary*, 1995 on the Courts' role in statutory interpretation. I had become a bit worried that our Court of Appeal, with its high number of new members, might be forswearing its fundamental job of dispensing fairness and instead concerning itself with such trifles as certainty and the upholding of citizens' reasonably held expectations. My fears, though, were greatly alleviated when a colleague showed me the following passage from the judgment in *Z v Z* (unreported, CA 197/96, 20 December 1996, Richardson P, Gault, Henry, Thomas, Keith, Blanchard and Barker JJ):

> [The role of the Courts in statutory interpretation ...] was stated in the *Report of the New Zealand Judiciary*, 1995 in these terms:
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> The clear distinction here is that while Parliament makes the laws, the Judiciary, through the Courts, applies the law. In practice the role of the Courts is more complex as it inevitably involves interpretation and development of the law. While remaining subject to Parliament and its will, "there is nevertheless wide scope for the Courts to apply and interpret the law in accordance with the needs of society. Accordingly, Judges may take cultural, family, economic and international, matters into account, in order to give effect to the fairest outcome". (citation omitted)

Thankfully that seemed to me to mean Judges are free to consider *absolutely anything* they feel like when interpreting a statute. (Though I'm not sure whether the latest All Black score would count as a cultural, international or – with professionalization – economic matter.) And let us praise our lucky stars that the judiciary feels no great constraints in divining what the law should be. (Sorry, what the law *is*.) It must be hard enough to dispense fairness, justice, wisdom and to satisfy the needs of society without Parliament tying one hand behind their backs. Judges of New Zealand unite. You have nothing to lose but your chains!

Anyway, we all know what kind of people sit in Parliament. All that nonsense about Parliament being the main law-making body because it is elected and Judges confining themselves to making law interstitially, in the penumbra of uncertainty as it were, is just an opiate for the faint-hearted. What could be more legitimate than to have wise and fearless experts in the law, from the solemnity of their Platonic caves, take all the burdens of society on their backs while discerning the manifold needs of society and dispensing fair outcomes? You could hardly do all that without an LL.B, and at least a few years of practising law.

Now I know some few readers will balk and point to the doctrine of the supremacy of Parliament and the representative character of the legislature. But would you want people representative of Kiwis at large making law for you?

And while I'm at it, let me pour scorn on that old bugbear, "certainty". Only a few reactionary traditionalists from the deep south would think society better off when Judges interpret statutes so as to foster citizens' certainty in the law rather than interpreting them to increase fairness and justice. Those South Island neanderthals, who generally go on to point out that fairness and justice are elusive targets that shift with the point of view of the interpreter, are mere defeatists. Even if notions of justice, fairness and, yes, morality have till now seemed highly subjective and dependent on the particular evaluator, that is merely an argument for trying harder to find and discover those absolute truths and fair outcomes we all crave. I, for one, am confident that if anyone can find them it is our learned and impartial judiciary.

If there be any valid criticism of the Court of Appeal's statement of the role of Courts in statutory interpretation it is that they felt compelled to state this proper role via the *Report of the New Zealand Judiciary*. This, I am sad to admit, simply opens the Judges up to the charge that this *Report* was itself the product of Judges and hence that the whole move to interpreting statutes in terms of fairness – and away from certainty – is a bootstraps operation of immense proportions. (ie Judges citing Judges for the proposition that Judges can interpret as Judges think fit.)

Let me be so bold and lacking in humility, therefore, as to offer a remedy to this one flaw. In the next case that comes along, simply cite *Z v Z* as authority for the proper role of the Courts in statutory interpretation, noting as well that there were seven Judges in that case and so it must be of high precedent value. And then do it again. And again. Soon the 1995 *Report* will be long forgotten in the shadows of *Z v Z*. But of course I do not pretend to tell Judges how to do their jobs.

I hardly need add that the New Zealand Bill of Rights Act 1990 has made this noble pursuit of fairness and the satisfaction of the needs of that monolithic creature "society" so much easier. A few high-minded phrases about the rights of the individual and the need to find remedies for any breaches and a useful hush soon descends on the Beehive and its environs.

All would be as it should be in this "fairest" of all possible worlds were it not for one thing – the Privy Council. Will no one rid us of that troublesome body?

Yours faithfully

James Allan
University of Otago

Dame Silvia Cartwright

Dear Sir,

We write in response to your October editorial criticising Sir Thomas Eichelbaum and Dame Silvia Cartwright for "straying" into the political arena.

We wish to clarify the circumstances surrounding Dame Silvia Cartwright's involvement in the launch of the WIN on Poverty campaign. Because of her long association with and commitment to women's issues both here and in the United Nations, Dame Silvia was an obvious choice as guest speaker. Contrary to your assertions she did not have "her say at the taxpayer's expense" but gave up her personal time.

Neither the campaign nor Dame Silvia's speech support a particular political party line as you claim. They represent the consensus agreement reached by the widely differing groups that constitute the Women's Information Network (from the National Council of Women and Women's Division of Federated Farmers to Rape Crisis and the Prostitutes Collective).

You condemn the campaign's failure to tackle the big picture of the national economy claiming it "demonstrates a mindset for a start". We challenge this inference and suggest it says more about your own expectations of a campaign on poverty than it does about the WIN on Poverty campaign.

The notion that Judges should somehow be removed from the community is a questionable ideal. We do not accept that judicial accountability is compromised by Judges who participate in community life and we applaud the suggestion of the former president of the Court of Appeal, Sir Robin Cooke who encouraged Judges to use their powers to advance social equity as they see it.

While the fine line between acceptable judicial concern about social issues and unacceptable judicial bias makes for an interesting and (no doubt) ongoing debate, we do not believe that Dame Silvia acted improperly when she launched the WIN on Poverty campaign. Indeed if everyone of high office and influence took up her call and joined the community sector in a concerted effort to address poverty that exists in this country, we may even be able to eradicate it.

It is clear to us that Dame Silvia and Sir Thomas are being singled out for criticism because their words are perceived as a threat against entrenched privilege. What a sin. In the good old days people were crucified for doing things like that.

Yours sincerely

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Co-ordinator, WIN on Poverty

Marion Wood
Director, YWCA

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central planners, they still could not achieve the results they intended. It is clear that there is a widespread failure in New Zealand to understand that the Soviet Union gave the pursuit of social goals its best shot. It failed there and it will fail here when implemented by governments and a fortiori when implemented by Courts.

The second reason for failure is that the system is dynamic whereas the analysis is static. Once a rule is enunciated, people change their positions to accommodate it. Therefore the rule will not achieve its intended effect and new rules will have to be introduced. The result is ever changing rules as authorities pursue chimerae such as "social justice". This is not law, in fact it is the very negation of law.

Yet again we have to ask why we have law? And why do we have Judges, with all the privileges referred to above? The answer is that such a structure is necessary precisely to protect the individual from the whims of fashion and changing views amongst not just an increasingly powerful executive, but amongst the majority of the population, or at any rate of the "opinion forming classes". It is the role of politicians to bend before the wind and to try to please the majority and a recent survey shows the contempt into which they fall from so doing. Judges have, in the last fifty years, shown some courage in standing up to wayward politicians who have tried to circumvent the rule of law. But wayward politicians will meet their fate at the polls. The greatest threat to the rule of law comes from actions which are approved of by the majority. The record of the New Zealand Court of Appeal in the last twenty years in resisting the pressure of the politically correct opinion forming classes is notably less distinguished. But, if the majority is sovereign and there are no constraints on its power from moment to moment, then we do not need a concept of law and we do not need Courts. It is the job of Judges to uphold something called the law which, if it is to mean anything at all, must mean something different from the will of the sovereign. One is entitled to believe that there is or should be no such job, but in that case one should not take it on.

In terms of the Court's processes even the apparent unanimity in the judgment is probably undesirable. Those who have lived in organisations which attempt to work by consensus will know that the consensus seekers are constantly hostage to the most determined. The one argument for not producing individual judgments is to avoid the uncertainty bound to occur when different people try to say even nearly the same thing in different words. Then it is usual for an individual to write a judgment and for the other Judges to concur. The unanimous and anonymous judgment in *Z v Z* has certainly done nothing to produce certainty, save on the narrow issue to which it should have been restricted. The same criticism is levelled in this issue at the equally unanimous and anonymous judgment in *Grayson*. Such a judgment is bound to prompt speculation about the horse trading that may or may not have accompanied its composition. Was part B put in to buy off a dissent from X on part A? And so on. This kind of speculation is commonplace elsewhere, along with political appointment and investigation of Judges' personal and professional lives, but has not been part of the tradition here.

The Court of Appeal does have difficult cases to deal with. *Grayson* and the *Medical Council* case, both discussed with appropriate seriousness, in this issue, are difficult cases. But *Z v Z* was not a difficult case. It was an easy case. In fact the Court of Appeal dealt with the appeal easily. It never merited removal in the first place, let alone a seven Judge Bench. (But if, contrariwise, one considers this an important case, then it follows that it must merit leave to appeal to the Privy Council.) The Court brought the problems, and the resulting criticism, on itself. ❑

Same-sex marriage and the Human Rights Commission

Dear Sir,

Same-sex marriage is not legal anywhere in the world, but that may soon change. The Supreme Court of Hawaii recently held that the denial of a marriage licence to persons of the same sex violates that State's guarantee of the equal protection of the law (*Baehr v Miike*), but its decision was immediately stayed, and the case is likely to remain under appeal for some time. Meanwhile, similar litigation is in progress in Canada and New Zealand. This is currently the hottest issue in the law of discrimination.

That being so, one would expect the Human Rights Commission to have a position on the matter. For some reason, however, the Commission has been uncharacteristically silent. Indeed, it has shown no interest in *Quilter v Attorney-General*, and is apparently content to leave the issue to be litigated by the parties – several women seeking marriage licences, and the Attorney-General on behalf of the Registrar-General of Births, Deaths and Marriages, who has refused to grant those licences.

The argument in *Quilter* is straightforward: a refusal to allow same-sex marriage is an act of discrimination on the grounds of sex and sexual orientation, which is prohibited by s 19 of the Bill of Rights. Although s 4 precludes the Bill of Rights from overriding inconsistent legislation, s 6 requires that statutes be given a meaning consistent with Bill of Rights guarantees whenever that is possible. The provisions in the Marriage Act which govern the eligibility to marry are drafted in gender-neutral language. Accordingly, s 6 requires that the Marriage Act be interpreted as allowing same-sex as well as opposite-sex marriage.

The argument is plausible, but it was rejected in the High Court by Kerr J. His Honour accepted that limitations on marriage were discriminatory, but concluded that the Marriage Act could not be given a meaning consistent with the Bill of Rights guarantee of freedom from discrimination because Parliament's intention to limit marriage to opposite-sex couples was manifest. He therefore held that the Marriage Act prevailed over the Bill of Rights pursuant to s 4.

From the plaintiffs' perspective, *Quilter* is a good example of the limitations of a Bill of Rights which has only interpretive effect when it comes to inconsistent legislation. They lost even though Kerr J accepted that the traditional conception of marriage is discriminatory. But Kerr J paid little attention to the question whether limitations on marriage constitute discrimination. His conclusion that the Marriage Act could not be read as including same-sex marriage allowed this question to be glossed over. At the end of his decision, we know nothing more about the right to freedom from discrimination than we did at the outset.

The Court of Appeal has not previously had to address the meaning of freedom from discrimination under s 19 of the Bill of Rights, and the temptation to avoid the issue in *Quilter* will be great. Same-sex marriage is the very sort of issue that those who drafted the Bill of Rights hoped to avoid by prohibiting discrimination on limited grounds, rather than provide a general guarantee of equality. The government was uncomfortable with the concept of equality, and did not want the Courts to be able to interfere with matters of social policy. As *Quilter* illustrates, however, there is considerable scope for equality-based arguments despite the limitations on the Bill of Rights. Indeed, within the context of the prohibited grounds of discrimination – recently expanded by the Human Rights Act 1993 – there is probably no meaningful difference between a guarantee of freedom from discrimination, on the one hand, and equality/equal protection of the law on the other.

Quilter raises important questions about equality, the law of discrimination, and the interpretation and application of the Bill of Rights. So why hasn't the Human Rights Commission sought to participate in the case? There are several possible explanations, but none is satisfactory.

The Commission may consider that it has no role to play because the case was brought under the Bill of Rights rather than the Human Rights Act. But it would be surprising if the Commission were uninterested in a claim of discrimination simply because it arose under one Act rather than another. After all, the prohibited grounds of discrimination under the Bill of Rights are the same as those under the Human Rights Act. Moreover, the Commission successfully lobbied for the expansion of those grounds to include sexual orientation. In these circumstances, one would expect the Human Rights Commission to be interested in how those grounds were interpreted by the Courts.

The Commission may prefer to address the question of same-sex marriage as part of its "Consistency 2000" project. The Commission is currently examining statutes, regulations, policies and administrative practices to determine whether they are consistent with the Human Rights Act, and will report to the government on any inconsistencies by 31 December 1998. If the Commission considers that the law of marriage is discriminatory, it can report that to the government, and the government can amend the law. Thus, the Commission may consider that litigation on the matter is premature or inappropriate.

If the Commission does consider that the law of marriage is discriminatory, it is not clear why it should prefer the possibility of a future legislative solution to the opportunity to seek an immediate solution through litigation. Participation in the litigation would not compromise the Commission's Consistency 2000 project in any event.

Perhaps the Commission does not believe that the law of marriage is discriminatory. This seems unlikely. But even if so, it would be shortsighted to remain on the sidelines while the Court grapples with the concept of discrimination. *Quilter* might well establish a precedent which impacts on the law of human rights in New Zealand for years to come. It would be ironic if that precedent were established without input from the Commission.

There is another possibility. The Commission may consider it politically expedient not to intervene in the litigation. There is significant opposition to same-sex marriage, in the government and the community, and the Commission may wish to avoid the fray. This would be surprisi, but in the absence of a satisfactory explanation for its silence, some may well draw this conclusion.

The Court of Appeal should have none of it. The Human Rights Commission is supposed to have expertise on the law of discrimination, and the Court is entitled to the benefit of that expertise. If the Commission does not seek to participate in *Quilter*, the Court of Appeal should invite it do so, and thereby force the Commission's hand.

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ROLLING BACK s 21 OF THE BILL OF RIGHTS

Scott Optican, The University of Auckland

considers the implications of R v Grayson & Taylor

In *R v Grayson & Taylor* (CA 255/96 & 256/96, 28 November 1996), the Court of Appeal proved (once again) that hard cases make bad law. *Grayson* presented the Court with a significant opportunity to affirm the protection against unreasonable search or seizure contained in s 21 of the Bill of Rights. Instead, the Justices seized on the decision to stem a self-proclaimed "flood" of s 21 appeals. (p 6) The resulting judgment runs roughshod over many of the Court's own precedents, rolling back, in the process, years of rational development of the reasonableness rule. Indeed, *Grayson* renders it hard to predict which police intrusions will or will not violate s 21. It also undermines the integrity of the search warrant process, creates a questionable distinction between real and confessional evidence, and throws into doubt, without any viable alternative, the *prima facie* rule of exclusion for evidence obtained by breach of the Bill of Rights. Most disturbingly, *Grayson* signals police that, when a crime is classed as serious, Judges are prepared to sanction investigative activity which is manifestly illegal. In sum, though laying claim to a "principled" approach (p 6), the judgment adopts an ends-means analysis anathema to a principled view.

THE FACTS

Grayson and Taylor were charged with growing 1650 large cannabis plants on Taylor's kiwifruit orchard in Tauranga. The police learned of the operation from an adult informant who reported "suspicious activity" on the property, "namely the erection of shadecloth ... and the construction of an electric fence ... ". (p 2) The informant also claimed that his children had seen small cannabis plants growing on the land. Believing that this tip was insufficient to secure a search warrant, officers entered the orchard, on 12 December 1994, to investigate the information they had received. To effect entry, police were required to "[negotiate] electric fences and also heavy vegetation which formed the shelter belts". (p 2) Once on the land, officers sighted the plants. They then relied on these observations (along with other facts) to obtain a search warrant for the property. The warrant was issued on 20 January 1995. However, rather than executing it immediately, police made further covert entries into the orchard to videotape the grounds. (They also searched through and made a videotape of the contents of a caravan they discovered.) After several days of such surveillance, officers finally executed the warrant on 3 February and seized the cannabis plants.

In pre-trial proceedings, the District Court held that the drug evidence obtained pursuant to the warrant was admissible. The defendants appealed, claiming that the evidence had been seized in violation of s 21. Specifically, they alleged that the entry onto Taylor's property on 12 December was unreasonable and that any information obtained from that search could not be used in support of a warrant. The defendants argued that, without the tainted facts, the application for the warrant issued on 20 January must fail. Accordingly, the warrant was itself invalid and could not support the admissibility of any drug evidence seized.

THE DECISION

It was accepted by the Court of Appeal (and not disputed by the Crown) that the initial police entry onto Taylor's land was made to confirm a suspicion of illegal activity and constituted a trespass "without ... justification" at common law. (p 14) It was similarly conceded that the information leading to the intrusion "was insufficient to support either the issue of a [search] warrant under s 198 of the Summary Proceedings Act 1957 or the exercise of the powers of [warrantless] search contained in s 18(2) of the Misuse of Drugs Act 1975". (p 14) Previous cases had established that, where the precondition for the lawful exercise of a search power did not even exist, it "compels the conclusion" that the intrusion was unreasonable: *R v Laugalis* (1993) 10 CRNZ 350, 355. Nonetheless, the Court held that, in all the circumstances, the 12 December search did not violate s 21:

> Police presence on the property on this occasion was of short duration, approximately five minutes according to the evidence of the officers which was accepted by the Judge. It was confined to the orchard, and did not involve any building structure, vehicle or other physical property. Entry was at a point distant from the caravan, which was the only structure with the characteristics of a dwelling. The entry was not forcible, caused no damage and did not interfere with the enjoyment of the land by any occupier. The occupiers, by their actions, had created the suspicion of criminal activity. The police actions were carried out in the course of the investigation of possible serious criminal activity. The search, although a term which can properly be applied to the activities in question, was no more than an observation made from inside the boundaries of the property of what was growing on the land. Legitimate expectation of privacy, viewed objectively, may perhaps be infringed by such a temporary entry, even when onto an orchard which has no dwelling-house immediately adjacent to it. This particular infringement, however, is not in the circumstances we have

> detailed of such seriousness as to call for condemnation as being unreasonable and therefore in breach of s 21 ... We therefore hold that it was open to the Judge to find that the entry on 12 December 1994 was not unreasonable, and therefore not in breach of s 21 of the Bill of Rights. (p 15)

Little discussion occurred regarding the multiple covert entries conducted by police *after* the 20 January warrant had been obtained. Asserting such surveillance to be valid, the Court relied on the generally worded language of s 198(3) and (5) Summary Proceedings Act 1957. Those provisions state that a search warrant authorises "any constable at any time or times within one month from the date thereof to enter and search ... with such assistants as may be necessary" and "to seize any thing referred to in subs (1)". The Court found that s 198 "thus expressly contemplates multiple entries and searches" and permits "surveillance, planning and entries, searches and seizures, each extending over several days". The only limit on such activity is that "all the authorised steps be completed within one month of the issue of the warrant". (p 12)

Though unnecessary to dispose of the case, the Court went on "to consider the position had the entry on 12 December been in breach of s 21". (p 16) The Court accepted, as presaged in previous decisions (see *R v H* [1994] 2 NZLR 143, 150), that evidence obtained in an unreasonable search "would have to be excluded from the content of the application for the [20 January] search warrant". (p 16) There was also no dispute that, absent the information obtained from that intrusion, the evidence rehearsed for the warrant was insufficient to meet the standards of s 198. Accordingly, "the warrant would likely be held to be incorrectly issued and liable to be set aside". (p 16)

Previous cases suggested that, where a warrant had been issued on insufficient or improperly obtained grounds, a search undertaken in reliance thereof would breach s 21. See *R v H* at 150; *Auckland Unemployed Workers' Rights Centre Inc v AG* [1994] 3 NZLR 667, 724 (per Cooke P). Nonetheless, the Court found that any search pursuant to the invalid warrant would have complied with the reasonableness rule. In support of their conclusion, the Justices noted that, although police knew they had obtained the information as the result of a trespass, they could nonetheless "reasonably assume that the warrant was valid for their purposes". (p 17) Moreover, police had disclosed in the warrant application how their evidence had been obtained and were in possession of "additional undisclosed information" supporting the request to search (those facts coming from a neighbour who, after the 12 December entry, told police that he had observed cannabis plants growing on Taylor's property). It was also held to be relevant that the intrusion was carried out in a "reasonable manner" and that "significant real evidence was found". Finally, the Court reiterated its conclusion that, while central to the warrant application, the search of 12 December "was not a gross or serious invasion of privacy even assuming it infringed s 21". (p 17)

Grayson's final pages contain a direct assault on the judicially created (and by now well entrenched) remedy of *prima facie* exclusion of evidence obtained in violation of the Bill of Rights. See *R v Butcher* [1992] 2 NZLR 257, 266 (per Cooke P). In dicta likely to have a far reaching effect on future cases, the Court stated that it would be prepared "to re-examine the *prima facie* exclusion rule". (p 20) In its place, the Justices hinted at a flexible set of remedies "fashioned to bear some relationship to the nature and seriousness of the breach". (p 20) These could include an order for costs, a reduction in any penalty imposed, police disciplinary proceedings, criminal prosecution, or a civil suit for damages. (p 18) Finally, the Court suggested that, contrary to existing practice, distinctions could be drawn among the *types* of evidence generated by a Bill of Rights breach. *Grayson* concludes with the observation that "[w]hether there should be the same response to breaches of rights in the course of activities resulting in the discovery of real evidence as to breaches of rights in the course of obtaining, for example, confessional evidence ... requires careful consideration". (p 20)

ANALYSIS

It will be useful to deal with the four principal aspects of *Grayson* in turn:

The reasonableness of the 12 December search

In holding that the initial entry onto Taylor's property did not violate s 21, *Grayson* radically extends the divorce between legality and reasonableness established in cases such as *R v Jefferies* [1994] 1 NZLR 290 and, more recently, *R v Faasipa* (1995) 2 HRRNZ 50. The decision is, however, an extreme one: no previous case had ever found reasonable such blatant and knowing police misconduct. In fact, by condoning a deliberate, covert trespass to uncover evidence of crime, *Grayson* undermines the very reasons why laws exist to control investigative activity in the first place. It does this, in a somewhat perverse manner, by allowing an illegal intrusion to confirm suspicions falling short of establishing lawful grounds to search. Indeed, if it is reasonable for officers to break the law in this fashion, it undermines the efficacy of *all* statutes designed to control evidence gathering by the police.

Grayson seems to recognise this anomaly by noting that "it would *ordinarily* be unreasonable to conduct a warrantless search in violation of an express statutory requirement or where those searching could not meet the test specified in a directly applicable statute". (pp 10-11) (Emphasis added.) Yet the Justices give no real guidance as to why *Grayson* itself is an extraordinary case. Instead of a principled approach to reasonableness, we are treated to an *ad hoc* litany of factors subjected to little analysis or review. Indeed, contrary to the Court's conclusion, many of the facts said to show reasonableness seem irrelevant to the privacy values underlying s 21. Why should it matter, for example, that the trespass was of "short duration", that "the search was no more than an observation made from inside the property ... of what was growing on the land", or that officers conducted no "detailed examination ... such as is usually associated with a police search"? (p 15) An unlawful invasion of privacy is not rendered any less objectionable merely because it can be accomplished quickly, efficiently and covertly by the police. Similarly, on the facts of the case, there seems little reason to reward officers for what the Court obviously believes was a minor violation of law. Even assuming that characterisation as true – and it is open to vigorous dispute – such transgression was simply all that police required to accomplish their illegal goal.

Conspicuously absent from *Grayson* is the kind of hard balancing exercise previously enshrined by the Court at the core of the reasonableness rule. See *Jefferies* at 319 (per Thomas J). Indeed, there is little attempt in the judgment to

weigh up the community's need to detect and investigate crime with the defendants' privacy interests in land surrounded by electric fences, heavy shelter belts and shadecloth. Though paid brief lip service, privacy rights actually figure little in the Court's decision making. At least as important to the assessment of reasonableness is the fact that "[t]he occupiers, by their actions, had created the suspicion of criminal activity" and that the police were investigating a "serious" criminal offence. (p 15)

Though undoubtedly true, this kind of ends-means reasoning says little more than that the defendants were dubious characters who deserved what they got. Moreover, it is precisely in serious cases – where the temptation of police to get results is greatest – that Courts must most vigorously apply s 21.

While prior search and seizure decisions could be rationalised along certain predictable lines, *Grayson* suggests that, in many instances, the determination of reasonableness will now be up for grabs. Indeed, the decision subverts prior case law without substituting any fixed approach to s 21. As a result, *Grayson* will probably create more confusion than clarity for trial Judges and the police. Ironically, this means that the Court may find itself deluged with just as big a "flood" of s 21 appeals as ever. The difference, however, is that the Crown will now be likely to prevail on most sets of facts. In fact, if the type of conscious, illegal conduct evident in *Grayson* is reasonable, it is hard to know exactly *what* police have to do to violate the reasonableness rule. The unfortunate (though clear) message to constables is that Judges are prepared to condone knowing and substantive violations of law when significant enforcement results can be achieved. By holding the 12 December search to comport with s 21, the Court has, sadly, given police an incentive to test rather than comply with the existing boundaries of law.

The post-warrant surveillance of the Taylor property

Though rating only a paragraph in the overall judgment, the Court's approval of the continuing, post-warrant entries onto Taylor's property threatens to transform s 198 into a new repository of surveillance powers for the police. There is, however, little reason to agree that the wording of the section – allowing constables to enter property "at any time or times" to locate the object of a search – authorises the kind of intelligence operation conducted *after* the 20 January warrant was issued in the *Grayson* case. As s 198 makes clear, the purpose of a search warrant is to allow police to trespass on private property to gather clearly listed evidence of crime. That they may do this "at any time or times" merely recognises the reality that more than one intrusion may be needed fully to execute the warrant. However, with little consideration of the policy issues involved, *Grayson* reads the language of s 198 to authorise covert, ongoing surveillance activities on private land rather than entries aimed at seizing specifically denominated proof. This is a significant expansion of official power to investigate unlawful activity and casts doubt on the role played by warrants in *controlling* searches by the police. As summed up by Schwartz at *Public Law Bulletin*, No 10 (9 Dec 1996) p 7:

> [T]here is a critical difference between entry to conduct a search and seizure, and repeated trespasses designed to set up and conduct secret surveillance and monitoring of business activities, with no immediate intention of seizing property ... As s 6 of the Bill of Rights requires that a statutory provision should, wherever possible, be interpreted in a manner consistent with the rights in the Bill, the Court's finding of an express power to repeatedly invade a private dwelling and land, not to conduct a search and seizure, but for surveillance and investigation, in the absence of clear and unambiguous supporting language for such a power, is of concern.

Schwartz also notes that, "[i]n the United States, such 'sneak and peek' searches, as part of an ongoing surveillance, are only permissible where clearly authorised by statute, where the police advise the issuing magistrate of their intention to conduct such surveillance and where notice to the target of the surveillance is provided within a reasonable time thereafter". (p 7) None of these important protections played any part in the *Grayson* case.

The reasonableness of executing the 20 January search warrant

In dicta included for the sake of "completeness" (p 16), *Grayson* takes the somewhat perverse step of allowing as reasonable a search carried out in reliance on a warrant itself invalidated by a breach of the reasonableness rule. Supporting this extreme bootstrap is, another set of "relevant factors" subjected to no real analysis, or review. (p 16) For example, confusing form and content, the Court never explains why the reasonable execution of an improperly issued warrant suggests compliance with s 21. A similarly suspect test of reasonableness is that, when police carried out the warrant of 20 January, "significant real evidence" was found. (p 17) This kind of ends-means reasoning reverses the usual jurisprudence of a Bill of Rights, which is to elevate procedural protections over any particular result. Indeed, it is the grossest kind of consequentialist logic to peg violations of s 21 to whether police misconduct uncovers evidence "real" or otherwise, "significant" or not.

Adding to these concerns, *Grayson* sets up indicia of reasonableness which, ironically, appear to undermine the integrity of the warrant process itself. One of the fundamental procedural safeguards offered by s 198 is that any authority to search be based on facts actually presented to the authorising Judge, justice or Court registrar. How can it be relevant, then, that on 20 January police had "additional undisclosed information" available to support their application for a warrant? (p 17) Indeed, it subverts s 198 to suggest that s 21 of the Bill of Rights can be complied with on the basis of material not used by police in their initial application to search. Similarly, it is difficult to understand why the fact that police disclosed their trespasses in the warrant application should help establish the reasonableness of their subsequent investigative conduct. This is tantamount to saying that the securing of a warrant can somehow "launder" any illegality on which the affidavit for the warrant was based. Such logic encourages unlawful behaviour by the police and threatens the neutral oversight function of the issuing party. This is particularly true in New Zealand, where search warrants are often granted by deputy Court registrars lacking formal and comprehensive training in search and seizure law. Indeed, without the benefit of adversarial process, such persons simply cannot be expected to scrutinise information presented in a warrant application for compliance with s 21.

Finally, it is disturbing to note the Court's conclusion that, although police knew they had broken the law to gather evidence for the warrant, they could nonetheless "reasonably assume" they were in possession of a valid authorisation to search. (p 17) How police could make such an assumption, much less hold it reasonably, is never really explained.

To the contrary, a constable charged with even a minimal knowledge of procedure should be aware that, among other requirements, warrants cannot be based on evidence obtained in violation of s 21: *R v H* at 150. Indeed, as the Court has itself recognised, to sanction a less than reasonable knowledge of legal rules encourages police ignorance of the law. See *R v Goodwin* [1993] 2 NZLR 153, 172 (per Cooke P). That is why in both Canada (*R v Silveira* [1995] 38 CR (4th) 330) and the United States (*US v Leon*, 468 US 897 (1984)), Judges have insisted that any "good faith" approach to official misconduct ask "what could reasonably have been expected of the police". Stuart, "*Burlingham and Silveira: New Charter Standards to Control Police Manipulation and Exclusion of Evidence*" [1995] 38 CR (4th) 386, 396. Recognising this objective test (see the comments of the Court on p 13), *Grayson* fails to explain how, in presenting tainted evidence to secure a warrant in this case, police showed a reasonably proficient knowledge of search and seizure law.

Alternatives to the prima facie rule and real v confessional evidence

Finally, *Grayson* signals the abandonment of the *prima facie* rule of exclusion for evidence obtained in violation of the Bill of Rights. This judicially created remedy – developed by the Court along with the law of s 21 – has been held to play an integral part in vindicating rights violated by the police. See *Goodwin* at 194 (per Richardson P). (It also functions to deter police misconduct (*R v H* at 150), although the Court has never given primacy to this aspect of the rule: *Grayson* at 10.) Nonetheless – and without specifying how – *Grayson* suggests that remedies such as damages, police disciplinary proceedings or orders for costs might provide an effective alternative to exclusion in any given case. The judgment also notes that, instead of an inflexible approach, remedies might function proportionally, bearing "some relationship to the nature and seriousness of the [Bill of Rights] breach". (p 20) None of the arguments for or against exclusion are addressed, nor does the Court examine how well – or badly – the *prima facie* rule has actually functioned in the last few years. Indeed, *Grayson*'s questioning of the rule smacks more of ideology than intellectual rigour: the distancing of a newly conservative Court from the more rights-orientated philosophy of Lord Cooke. See Schwartz at 6-7.

Whether one adopts a "police-deterrence" or "rights-vindication" approach (as the Court currently does), *Grayson*'s alternatives to exclusion seem unworkable and unreal. Can anyone really believe, for example, that convicted defendants will be able to mount successful lawsuits against the police for violations of s 21? Steiker writes that, in the United States, it was precisely the failure of states to provide "an effective scheme of civil remedies for police misconduct" which led the Supreme Court to apply the exclusionary rule in cases nationwide: "Second Thoughts About First Principles" (1994) 107 Harv LR 820, 849. Other remedies proposed in *Grayson* are similarly suspect. Indeed, Maclin notes that: "[i]n the real world, tort actions, internal police proceedings, criminal sanctions and civilian review boards are ineffective alternatives to the exclusionary rule". Maclin, "When the Cure for the Fourth Amendment is Worse than the Disease" (1994) 68 So Cal LR 1, 65.

By proposing fainthearted alternatives to exclusion, *Grayson* portends far greater restraint in future judicial oversight of police misconduct. This is particularly evident in the Justices' preference for remedies "fashioned to bear some relationship to the nature and seriousness of the [Bill of Rights] breach". (p 20) Though appealing on its face, the idea of "proportional remedy" encourages police to gamble on equally "proportional" violations of law. It leaves trial Courts with few signposts to guide their remedial discretion, creates incentives to appeal, and gives Judges less sympathetic to rights license to nullify the exclusionary rule. Indeed, when the crime is serious, and the accused particularly unappealing, Courts will usually seek to admit evidence no matter how great the Bill of Rights breach. See Kamisar, "'Comparative Reprehendsibility' and the Fourth Amendment Exclusionary Rule" (1987) 86 Mich LR 1, 17-18.

Finally, it is difficult to accept *Grayson*'s conclusion that, in applying a remedy for violations of the Bill of Rights, distinctions might be drawn between breaches generating "real" and "confessional" evidence. A consistent feature of Canadian jurisprudence (see Stuart at 396; *R v Evans* (1996) 104 CCC (3d) 23, 36-37 (per Major J)), such differences are irrelevant to remedies grounded in, as the Court has stated, the "vindication of individual rights". *Grayson* at 10. As Mahoney puts it:

> [T]he desire to vindicate rights [does not] support any application of the *prima facie* exclusionary rule which distinguishes between forms of evidence ... When an accused's rights under the [Bill of Rights] Act have been breached, the efficacy of excluding the tainted evidence as a means of restoration, reaffirmation and compensation is unaffected by the sort of characterisation currently in favour under ... Canadian [law].

"Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights" in *Rights and Freedoms* (Huscroft & Rishworth, eds, 1995, p 455).

CONCLUSION

As with most Bill of Rights cases, *Grayson* could, of course, have adequately justified its results. In the United States, for example, Judges do not consider inspections of "open fields" to be a "search": See *Oliver v US* 466 US 170 (1984). And while finding that police had acted unreasonably, Canadian Courts might have admitted the drug evidence nonetheless. See *R v Evans*, (per Sopinka J). However, in both instances, the outcomes reached would have followed from a principled jurisprudence of rights. Lacking such an approach, *Grayson*'s results fall victim to the Court's haphazard way of achieving them. It will be left to subsequent decisions to try to sort out the mess.

No matter what future cases decide, it is worth remembering, as Steiker points out, (at 820) that "[i]ndividual liberties entail social costs". This is what makes *Grayson* a "hard" sort of case. Its difficulty arises not from any particularly complex legal question, but from the courage needed by the Court of Appeal to apply its own law. That this did not take place suggests a significant change in direction for judgments dealing with violations of the Bill of Rights. That shift, it seems, will be towards a contraction of individual rights, greater admission of improperly obtained evidence and increasing judicial rationalisation of police misconduct. The Court can also be expected to reconfigure the law of s 21 – and other substantive provisions of the Bill of Rights – to avoid what the Justices see as unpleasant results. This is a sad fate for a document devoted to defending individual liberties and controlling the enthusiasm of overzealous police. ❑

THE BILL OF RIGHTS & THE COMMON LAW

Don Mathias, Barrister, Auckland

provides another view of Grayson

Obiter remarks by the Court of Appeal (Full Court) in *R v Grayson* (CA 255/96, 28 November 1996) herald a revised approach to remedies for breaches of the New Zealand Bill of Rights Act 1990: "A robust and rights centred approach to individual rights is not necessarily inconsistent with flexibility of remedies where rights are breached." The Court concluded that on an appropriate occasion it would be prepared to re-examine the prima facie exclusion rule.

WHERE ARE WE GOING?

The prima facie exclusion rule requires modification. It was devised in recognition of the status required to be given to the rights contained in the Bill of Rights. It aims to excuse breaches of rights only in exceptional cases. Inconsistently, it attaches a lower standard of proof than it could have to the matters which the prosecution must establish. It raises issues of inconsistency with the common law approach to the admissibility of improperly obtained evidence. The Court's conclusion in *Grayson* presents an opportunity to smooth out these creases in the law.

BREACH AND EXCUSE

In *Grayson* the Court considered, again obiter, what it would have decided if it had found that matters of fact which had been advanced as grounds for the grant of a search warrant had been discovered by the police as a result of their unreasonable breach of the accused's rights under s 21 of the Bill of Rights. It is not proposed here to examine the Court's reasoning. Instead, this hypothetical raised in the judgment is background to the present discussion.

There are two basic questions: whether there was a breach of the Bill of Rights (and here we assume there was); and whether that breach should be excused in the sense that the evidence obtained consequentially should be ruled inadmissible. The first question centres on the accused's rights and the second on the trial. Broadly, the first question involves Bill of Rights jurisprudence, and the second involves common law jurisprudence; the unsatisfactory state of the present law has been caused by the spilling over of the former into the area governed by the latter. Indeed this is reflected in the way the second question is stated here. Common law discretionary exclusion of evidence is based on the judicially apprehended sense of the fairness of the proceedings and of the reputation of the administration of justice. It would be inappropriate for the conclusion as to the admissibility of evidence to be based on anything else. There must be room for inclusion of regard to breaches of the Bill of Rights within the common law discretion.

THE IMPORTANCE OF FLEXIBILITY

Circumstances of cases vary enormously. Rules will always require modification to yield appropriate results. Principles have the advantage of clarity and generality. What principles lack in certainty can be compensated for by careful judicial explanation of how they apply to each case.

I have discussed elsewhere the common law approach to evidence which has been obtained in an objectionable way: "Discretionary Exclusion of Evidence" [1990] NZLJ 25. Breaches of the Bill of Rights can take their appropriate place in the spectrum of circumstances. From decided cases it can readily be seen that such breaches will usually fall at the more serious end of the spectrum and evidence obtained as a result of them will be inadmissible. Some breaches, however, in particular contexts, may properly be placed in the "merely technical" area and will not require exclusion of the evidence. A similar area will be breaches which are inconsequential. It is suggested that the *Grayson* hypothetical illustrates this: the assumed breach of s 21 was both technical and inconsequential.

Various factors may bring what would otherwise be a serious breach of rights across to the "admissible" area of the spectrum. In addition to those mentioned above (merely technical breaches and inconsequential breaches) there will be occasions when emergency or urgency or other matters of public interest colour the breach. See "Excusing breaches of rights" [1994] NZLJ 133.

FLEXIBLE REMEDIES

The prima facie rule was seen as a means of giving an effective remedy to those accused whose rights had been breached. There is, however, considerable disparity in the results of cases. In some cases there may be insufficient other evidence of guilt and the accused is discharged, whereas in others there may be, fortuitously, independent evidence which is sufficient to (and does) convict the accused. The latter accused has received no real remedy for the breach of rights, whereas the former has received an unearned reward.

It is suggested that breaches of rights which do not require discretionary exclusion of evidence can properly be taken into account, in the event of conviction, in mitigation of sentence. The weight to be given to such a mitigating factor would of course vary appropriately from case to case. In the event of a failure of the prosecution case where the breach has not led to the exclusion of evidence, the accused might pursue a civil remedy. ❑

SOFTWARE AND COPYRIGHT: A QUESTION OF FUNCTION

Duncan Stewart, Massey University

discusses whether the words of a computer language are copyrightable expression

PRESENT LAW

Computer programs are protected as literary works under s 14 of the Copyright Act 1994 (NZ). As a result, the judgment of Smellie J in *International Business Machines Corporation v Computer Imports Ltd* 14 IPR 225, has been superseded. His Honour found that only the programming language at issue, the human-readable source code, was a literary work and so protected directly under copyright. The object code, or the machine-readable instructions that are stored as magnetic impulses on a disk, was treated as being merely a translation of the source code. Hence, the object code was protected only indirectly under copyright. Under the new Act both the source and object codes are protected as literary works, in accordance with article 10(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPs). This change is also consistent with the Australian Copyright Amendment Act 1984.

attention shifts from questioning whether computer programs represent literary works to the deeper question of whether they are expressions at all

The significance of these changes should not be underestimated. Piracy may be directed less at the source code than at the object code. The consumer may purchase a disk with only the machine-readable object code "written" on it. A competitor may then disassemble that object code to extract the *functional ideas* which underlie the computer program. Hence, the computer industry has tended to support the express protection of the object code. Copyright protection seems to have been preferred to patents as it is relatively inexpensive and quick to acquire.

The extension of copyright to protect program function will not eliminate disputes in this area. Traditionally, copyright protects only expressions, leaving questions of usage to patent law. There is a tension which is left unresolved when programs are protected as literary works. Indeed, the cloning of function has been suggested to be the real issue in many copyright disputes that involve computer programs (see for example, Samualson et al "A Manifesto Concerning the Legal Protection of Computer Programs" (1994) 94 *Colum L Rev* 2308, 2430). The result may be that attention shifts from questioning whether computer programs represent literary works to the deeper question of whether they are expressions at all. This is indicated by an Australian case: *Data Access Corporation v Powerflex Services* (1996) 33 IPR 194.

BACKGROUND

Data Access created the Dataflex programs to facilitate the development of applications and databases. These features were held to represent, respectively, a compilation of a set of computer programs to perform specific tasks, and classes of information stored in a computer in an organised way (at 196).

The respondents created a compatible system which was first called Powerflex and later PFXplus. The advantage of compatibility is that users of one set of programs may readily learn, and so be more willing to purchase, the other. Indeed, evidence was presented that Data Access viewed the legal proceedings as one component of competition between the two companies (at 208).

THE EXPRESSION

The first dispute involved a claim that Powerflex Services infringed Data Access' copyright by reproducing words in the Dataflex programming language or source code. Justice Jenkinson found that the words were common to a number of computer languages and, even though some were suggestive of their function, they did not necessarily correspond to the same function (at 197). However, the words were found to represent an "expression of a set of instructions intended to cause a device having digital processing capabilities to perform a particular *function*" (at 197, italics added). Differences in the syntax and the semantics of the two codes were held to be immaterial. It was concluded that the instructions represented a computer program within the meaning of the Copyright Act 1968 (Aust).

No direct reference was made to the machine-readable object code, even though Powerflex Services may have used it to discover the function of the Dataflex programs. It may have been less costly for the Judge to consider the intentional use of the words than to investigate the connection between them, the object code, and the function. Therefore, treating

both codes as literary works in Australian (and New Zealand) law, may simplify the protection of program function under copyright law. In New Zealand, the task is further simplified as the term "computer program" is not defined in the Copyright Act, and so cannot be made redundant by technological developments (see Brown "The New Copyright Legislation – An Analysis" in: *Intellectual Property: Copyright Act 1994 and GATT Legislation 1994* (1995) p 15).

In reply, the respondents argued, in effect, that the words at issue were not expressions. Rather, it was suggested that these words were no more than a tool by which the computer operated; that is, a "method of operation" (at 198-199). Copyright was rejected for this reason in an American decision, *Lotus Development Corp v Borland International Inc* 49 F 3d 807 (1995). Such methods are expressly precluded from copyright under s 102(b), title 17 of the United States Code, but not in the Australian statute, to which Jenkinson J restricted his attention. The respondents also argued that a similar interpretation to that in *Lotus v Borland* was made in *Lotus Development Corp v Paperback Software International* (1990) 18 IPR 1. In *Data Access*, Jenkinson J found the reference to the American legislation in *Lotus v Paperback* was cursory, and formed a different conclusion.

Justice Jenkinson quoted at length (at 200-201) from the judgment in *Lotus v Paperback*. Following that case, the initial inquiry is whether the elements of expression are independent of the functional ideas which make that article useful. Once the existence of an expression is established, however, copyright can still be forfeited. This is so if the expression is not original, embodies ideas that are functional in a utilitarian sense, is obvious, or has merged with the function of the program. In *Data Access*, Jenkinson J held (at 201) that the words shared between the two programming languages "go beyond the functional elements of the ideas they express, and beyond the obvious, and are in my opinion elements of expression original and substantial and therefore copyrightable". Thus, the nature of a copyrightable expression would appear to have been clarified in Australian law.

CONCLUSION

Since Data Access was held to have copyright in the Dataflex source code, Justice Jenkinson's further conclusions are not surprising. His Honour found that there had been an adaptation of three commands or "macros" from an intermediate code of the Dataflex computer language (at 201), and of the instructions which determine file structure (at 203-4). In addition, a compression table which had been reproduced by the respondents was treated as a compilation of works and entitled to copyright (at 202). The similarity between the tables was held to result from a desire for compatibility rather than any merger between expression and function (at 203). His Honour also rejected the claims that there had been any implied license from Data Access for the production of PFXplus, that there was an inordinate delay in starting proceedings, and that there were grounds for using his additional statutory discretion (at 206-213). Thus, even though Jenkinson J made no determination of the liabilities of the individual respondents, and made no orders subject to further consultation with the parties, it would appear that copyrights owned by Data Access were infringed.

COMMENT

At first glance it may seem that a New Zealand Court would have reached the same conclusions from the facts in *Data Access*, if only given the similarity in legislation. The New Zealand Copyright Act concerns original works, and does not expressly exclude methods of operation as in Australia. In both countries, the subject and object codes are protected as literary works, as discussed above. However, it must be noted that the phrase "methods of operation" was included in article 9(2) of TRIPs:

> Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

This agreement was not considered by Jenkinson J in *Data Access*. In the absence of a direct refutation, and given that both the Australian and New Zealand governments are signatories to TRIPs, it seems reasonable to suggest that the phrase "methods of operation" could yet be persuasive.

a result of Data Access is that the public could be denied access to the improvements that Powerflex developed, as well as future improvements

If the American approach in *Lotus v Borland* were adopted, it would effectively reduce the scope of copyright. In particular, adaptations of function may not amount to infringement if treated as methods of operation. That is, the question of expression and so of adaptation need not be asked once a method of operation is identified. However, this approach may not be a solution to disputes in this area. First, the decision in *Lotus v Borland* is likely to be challenged (Bender, *Lotus v Borland* Appeal – On-Screen Program Menus not Copyright-Protected (1995) 11 *Computer L & Pract* 71, 72). Second, the Court in *Lotus v Borland* suggested that the material in question, a menu command hierarchy, might have been better protected under a patent. Hence, acceptance of judgment could just lead to another shift in argument, as patent law is also problematic (see Stewart, Computer Programs and the Potential for Patent Reform (forthcoming, (1996) *Aust IPJ*).

At the least, a see-saw in the protection of computer program function could highlight the different policies at the heart of each approach. On one hand, there is the desire to reward the mental labour of the author/inventor, and to avoid the under-production of information in the absence of protection. This would appear to be implicit in the outcome of the *Data Access* case. On the other hand, monopolistic protection may stifle the competitive use of information, and so again lead to under-production. In doing so, the community's access to information is restricted (see Stewart, "The Intellectual Property Rights Continuum" (forthcoming) *NZ Law Rev*). Indeed, a result of *Data Access* is that the public could be denied access to the improvements that Powerflex developed, as well as future improvements. In contrast, the decision in *Lotus v Borland* may favour the competitor and the consumer. Thus, the tension which results from protecting program function as expression is more than a matter of breaking with tradition. It represents divergent legal-economic policies that cannot readily be reconciled. Therefore, it seems that the legal profession will continue to be one of the main beneficiaries of the protection of computer program function under copyright law. ❑

PROFESSIONAL ASSOCIATIONS AND CHARITABLE STATUS

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reviews the Medical Council *case*

The fundamental requirements of charitable status are: (a) a purpose within the spirit and intendment (or equity) of the preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth); (b) a purpose of a public character, ie for the benefit of the community or a significant section of the community; and (c) a purpose which is exclusively charitable. The famous fourfold classification of charitable purposes articulated by Lord Macnaghten in *Special Purposes Commissioners v Pemsel* [1891] AC 531, 583, – the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community not falling within any of the first three – which dominates so much of the case law and text discussions of charity, was never intended as more than a descriptive classification of the areas into which the cases applying the Statute of Elizabeth could be placed.

There is no special law relating to the charitable status of professional bodies. Their status is determined by the application of the general law. But particular difficulties are posed for such bodies by the second and third of the three fundamental requirements. This is because such bodies generally have a defined membership, and it is necessary to circumvent the assumption that the focus and recipients of any benefit – even of a purpose which otherwise falls within one of the *Pemsel* heads – will be the members alone, or at most those defined by their (usually personal) link with the members. Further, that assumption trumps any element of exclusive charitableness, since the benefit accorded to the members by virtue of membership will be deemed private rather than public or charitable.

Most texts on charity law do not single out professional bodies for special mention. The major exception is Hubert Picarda QC, *The Law and Practice Relating to Charities* (2 ed), Butterworths, London, 1995. Picarda mentions such bodies in his discussion of the public benefit requirement (at 17), pointing out that societies which promote the interests of the members of a particular profession promote a private rather than public benefit, as do, in general, bodies formed to register and regulate the members of a profession. Picarda also has a useful two page section (at 212-214) on professional bodies in his discussion of the requirement of exclusive charitableness. He points out that "[s]uch bodies perform a dual role in seeing that the public get the highest standards of service from their members and in protecting the interests of their members". (at 212) There are, he continues, "many permutations" in deciding "which interest has the upper hand". (at 212) Picarda presents the permutations on a sliding scale. At one end the professional interest is the sole purpose, and any public benefit is merely a consequence of the purpose pursued but not a purpose in itself. There is no charity here. Moving along the scale, there are cases where there are mixed purposes, but the professional element dominates. Again, there is no charity. However, the majority of cases are cases in the middle, as it were, "where the Court has found the relevant body to be one with main objects which are mixed: partly for the public benefit and partly for non-charitable professional benefit". (at 213) The existence of mixed main objects prevents the body from being charitable because of the exclusive charitableness requirement. Moving further along the scale, there are cases where, although public and professional elements mingle, the public element is predominant. The body is charitable. And lastly, the clearest case of charity, where the public purpose is the sole one, and where any professional benefit is merely incidental.

There have been in New Zealand two recent important decisions specifically on the charitable status of professional bodies: the decision of Tipping J in *Institution of Professional Engineers NZ Inc v CIR* [1992] 1 NZLR 570 (the *IPENZ* case), and *CIR v Medical Council of New Zealand* (1995) 20 TRNZ 231, McGechan J, (the *Medical Council* case) appealed to the Court of Appeal, unreported 20 December 1996, CA 31/96. The 3-2 decision on appeal illustrates neatly the points made above: first, that we are dealing with the application of the general law of charity, and, second, that Picarda's sliding scale explains why there are apparent inconsistencies in the treatment of different professional bodies. It must be recognised at the outset that while Picarda's sliding scale is helpful in its descriptive function, it does not provide a normative test. In the end, it is usually a matter of fine judgment whether a body is charitable or not, as the split decision in the *Medical Council* appeal illustrates. Sometimes, the exercise of that judgment reveals underlying attitudes to the very concept of judging. Is it precedent or principle that matters? Is the decision to be determined only by finding an analogous case decided decades ago or is there a readiness to apply a more general substantive principle, such as that enunciated by Russell LJ in *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73, 88, that where an object cannot be thought otherwise than beneficial to the community and of general public utility, the question should be whether there

is reason to exclude it from the equity of the Statute of Elizabeth, rather than some more specific reason (like an analogous recent case) to include it within the equity. If this latter approach is adopted, the judgment will necessarily require to attend to a wider range of considerations, which will often include the Judge's perception of the public benefit.

At root, the determination whether a body is charitable is a matter of construction. Where does one go to find out whether the fundamental requirements are satisfied? How wide should one go before declaring the outcome? "It is clearly established that when one is considering the purpose or purposes for which an institution is established one must look first to its founding documents". (Tipping J in *IPENZ* at 572.) This is so whether the body in question has been established by legislative or non-legislative means.

In connection with a statutory body, Richardson J stated in *New Zealand Society of Accountants v CIR* [1986] 1 NZLR 147, 148:

> The ascertainment of the purposes for which a statutory body is established is essentially a matter of construction of the relevant constituting legislation. In that analysis regard may be had to the circumstances in which the legislation was enacted, that is the statutory setting, but the motives of the founders are irrelevant.

In the *Medical Council* appeal, Gault J, delivering a joint dissenting judgment with Richardson P, stated (at 11-12) that:

> when determining whether the purposes for which an institution has been established by statute are charitable the focus is upon the objects and functions the institution was established to carry out under the statute rather than the broad general object or purpose the legislature may have had in establishing it.

McKay and Thomas JJ (apparently concurred in on this matter by Keith J) on the other hand, seemed inclined to have regard to the wider objective of the legislature in determining that the Medical Council did have charitable status.

In *IPENZ*, Tipping J also held that, if the constituting documents did not themselves clearly indicate the main or dominant objects of a body, reference could be made to the activities carried out by the body (at 572-573). He examined both the relevant constituting documents and the activities and other publications of IPENZ. This extension beyond the constituting documents was not, however, accepted by McGechan J in the *Medical Council* case as covering statutory professional bodies. He stated (at 235):

> I am not prepared to allow activity to control statutory constitution. Whatever freedom may be allowed in non-statutory bodies, statutory bodies in the eyes of the law can have no functions beyond those which their constituting statutes permit.

Accordingly, His Honour refused to include as one of the Medical Council's purposes, the function it had taken upon itself of providing advice and administration services to the Minister of Health as required. See also *Presbyterian Church of NZ Beneficiary Fund v CIR* [1994] 3 NZLR 363, 370 (per Heron J) (the *Presbyterian Church* case).

The importance of construction in the case of professional bodies lies not only in determining whether there is a charitable purpose at all, but also in determining the weight to be given to any such charitable purpose if there are, as so often, other purposes which are not charitable. That is the point about Picarda's sliding scale. The scale only reflects the range of weighting decisions available to the Judge and is hence not normative. Tipping J was aware of this in the *IPENZ* case, when he stated towards the end of his judgment (at 583):

> Put very shortly, and perhaps too simply, the ultimate question in this field will often be whether the private non-charitable objects and purposes of the body concerned are significant in themselves or simply inevitable and undesigned consequences of the pursuit of the principal public and charitable purpose.

Mention should also be made of *Re Mason* [1971] NZLR 714, a particularly instructive example of the application of the general law of charity to a professional body. The specific issue required McMullin J to discuss, inter alia, whether the Auckland District Law Society was a charitable body. A charitable trust fund had as part of its purposes the constitution and maintenance of a library or libraries for the benefit of students of law. Could the trustees lawfully make grants for certain purposes (eg book purchases) to the Law Society? Was the Law Society a charity? McMullin J first held that that question could not be determined by applying the advancement of education and learning ground of charitableness. He suggested that *Smith v Kerr* [1902] 1 Ch 774 (Clifford's Inn held to be a charity providing legal education via a school of learning to students of the law) was authority for the proposition that even if the class of persons to be benefited was limited (the members of Clifford's Inn), a body would be charitable if it were fundamentally a school of learning. However, the Law Society did not conduct a school of learning. Thus, "if it is to be considered as a charity it can only be because its purposes are so largely charitable as to clothe it with that character". (at 721) This is clearly a reference to the fourth head of the *Pemsel* classification. McMullin J went on to a full review of cases dealing with professional bodies, drawing a key distinction. If an institution had as its main object the promotion and advancement of science (in a wide sense to mean education), it would be charitable. If, on the other hand, its main object was the protection and advantage of those practising in a particular profession, by for example regulating the profession, then it was not a charity. The District Law Society was a creation of statute and McMullin J correctly examined the relevant statutory provisions. He concluded (at 725):

> A consideration of the objects of the Law Society as set out in those sections leads me to the view that, while these objects are entirely wholesome and likely to lead to the ultimate benefit of the public in that the members of the legal profession will be encouraged to be more competent and more ethical in the practice of the law, they fall short of making the Society a charity.

In particular, His Honour cited the Scottish case *Society of Writers to Her Majesty's Signet v CIR* (1886) 2 TC 257, where a dominant theme in declaring the Society non-charitable was the private (pecuniary) benefit associated with membership. One became a member to further one's gainful profession, not for other reasons, such as, for example, the studying of literature or fine arts or science, or of being educated at all. On Picarda's sliding scale, this decision falls within the class of professional element dominant. Happily, however, McMullin J was able to legitimate grants from the trust fund to the Society for some fairly closely defined purposes as properly charitable, because some of the purposes of the Law Society library were charitable, even if the Society itself was not.

The distinction between truly public or charitable purposes and benefits to members has surfaced in a number of other recent New Zealand cases, not necessarily concerned with professional bodies. They are worth mentioning. In *Centrepoint Community Growth Trust v CIR* [1985] 1 NZLR 673, one argument made against construing a trust, which Tompkins J held to be charitable on the basis that it advanced both religion and education and was for other purposes beneficial to the community, was that its real and substantial purpose was to benefit its members by providing them with food, clothing, shelter, and a $1 per week allowance. The Judge held that the provision of such benefits was not the principal purpose of the trust, but merely incidental to and in furtherance of the trust's main purposes. Those purposes required for their furtherance the accommodation and support of members residing at a particular location. Tompkins J did, however, suggest that his decision "might well be otherwise if trust members stood to gain financially from the trust's activities either in the form of significant periodic payments to them or in the form of ultimately sharing in the accumulated assets of the trust". (at 700) In the *Presbyterian Church* case, the Fund's objectives were the protection of Presbyterian ministers of religion "by ensuring that they are provided with sufficient income throughout their life in accordance with the mutual commitment of Church and minister to a lifelong undertaking". (at 370-371) Heron J conceded that the primary purpose of the Fund was the benefiting of retired ministers, but "that purpose is ... looked at in the overall context a charitable one". (at 371) His Honour continued (at 371-372):

> ... an integral part of the advancement of religion carried on by the Presbyterian Church involves the activities of its ministers, whose financial protection and welfare on retirement is primarily the concern of the Fund. But it is not correct to say that the benefit of the ministers is the ultimate object when one looks at the context overall. This is a case ... where the charitable altruistic purposes and the private benefits of the members ... coincide. They essentially are private benefits to members but for charitable purposes. ... [T]he retired ministers who financially benefit are an integral part of the structure and workings of the Church and without them the Church would cease to exist.

Thus, the Fund's purpose – the pecuniary benefit of members of the Fund – was in reality an incidental purpose to the main and overriding charitable purpose for which the Presbyterian Church existed.

The key point in both the *Centrepoint* and *Presbyterian Church* cases is that where the benefit to members is subsumed within or incidental to an overriding purpose which is clearly charitable, the fund or organisation will be charitable. See also *Educational Fees Protection Society Inc v CIR* [1992] 2 NZLR 115, esp 127. As a contrast to the decisions reached in these cases, in *NZ Society of Accountants v CIR* [1986] 1 NZLR 147, the Court of Appeal held that two (statutory) fidelity funds, run by the NZSA and the NZLS, were not charitable. As Richardson J said (at 153):

> the only persons who actually benefit from the fund are those whose moneys are misapplied by the solicitor or chartered accountant and who, having exhausted their remedies against that solicitor or accountant, claim reimbursement from the fund.

Benefit to the community as a whole, in the form of peace of mind, promotion of honesty or integrity of the profession, or moral improvement of the community, simply did not exist. In reality, the funds were not linked with or incidental to some other overriding charitable purpose. The schemes were more in the nature of a statutory "co-operative fidelity insurance scheme". (at 154) "All this is a far cry from the eleemosynary underpinning traditionally associated with the concept of charities" (at 154 per Richardson J; see also at 157 per Somers J).

IPENZ, when placed on Picarda's sliding scale, falls in the middle. Tipping J held that IPENZ was not established exclusively for charitable purposes. As already noted, to reach this conclusion he examined not only the rules of IPENZ, but also its activities. His Honour did this because he was not satisfied that the rules were crystal clear as to the purpose or purposes for which IPENZ was established. The rules included a Section headed "Object", which read: "The object of the Institution shall be advancement of the science and profession of engineering". Tipping J said this could be interpreted to mean that the purposes of IPENZ were two-fold – to advance science and to advance the interests of the profession of engineering. After examining the activities of IPENZ, His Honour concluded that IPENZ performed what he called "learned-society functions" (at 580), and that this purpose also appeared in the rules. Further, "the advancement of the science of engineering must be regarded as beneficial to the general public". (at 580) He also, however, concluded that IPENZ had and regarded itself as having a "guild or protective society function" (at 582) which could not be regarded as incidental, ancillary or subsidiary to the learned society's function. The members of the body clearly received private benefits, including enhancement of the profession's standing in the community, and advice and assistance on employment or professional activities. This purpose was not charitable. The consequence was crisply summarised by Heron J in the *Presbyterian Church* case (at 371):

> [In *IPENZ*] there were two distinct activities, one of which could be regarded as charitable and one not. Both were of equal importance in the eyes of the Judge.

Thus, Tipping J was forced to conclude that "IPENZ was not established exclusively for charitable purposes". (at 583)

The Medical Council, unlike IPENZ, is a statutory body. McGechan J held that it was established exclusively for charitable purposes. In the Court of Appeal, four judgments were given. All agreed with Keith J's judgment in respect of a matter which is not relevant to this paper. However, in respect of the charity point, there was a split. McKay and Thomas JJ delivered separate judgments agreeing with the decision of McGechan J. Keith J agreed with them, to form a majority in favour of charity. Richardson P and Gault J (in a single judgment given by Gault J) held that the Medical Council was not charitable.

The purposes for which the Medical Council of New Zealand was established were not expressly specified in the body's constitutive statute, and accordingly it was necessary to ascertain these from the statute as a whole. The approach taken in each of the judgments is instructive.

McKay J's approach to the statute was a liberal one, characterising those provisions which said anything about the Council as being concerned with the "functions" of the Council. There were, as was now agreed, five statutory functions. His Honour said that while the principal function of providing and maintaining a register of qualified medical practitioners was certainly beneficial to those whose names were included on it (because they could then practise under the titles doctor or medical practitioner, and could sue to recover fees), that benefit was not the purpose of the legis-

lation or of the Council thereby established. He concluded (at 7):

> My reading of the Act leaves me in no doubt that the purpose of the statute and the purpose of the registration system is the protection of the public. The Council is established to maintain the register, but that is not an end in itself. It is a necessary mechanism for achieving the purpose of registration. The purpose for which the Council is established is the purpose of the Act and of the registration system. In each case the purpose is to provide for the interests of the public through ensuring high standards in the practice of medicine and surgery. Any benefits to registered practitioners are incidental and consequential. They are inherent in a system of registration. They are intended, but as intended consequences and not as constituting a purpose of the legislation. The Medical Council was, therefore, exclusively established for the purpose of the protection and benefit of the public.

That purpose was clearly within the fourth head of *Pemsel* (and the spirit and intendment of the Statute of Elizabeth). McKay J then discussed the leading authorities – *General Medical Council v IRC* (1928) 13 TC 819 (the *GMC* case) and *General Nursing Council v St Marylebone Borough Council* [1959] AC 540 (the *Nursing Council* case) – cited by the Commissioner of Inland Revenue in support of his argument that the Council was not charitable. The trial Judge had held that the *GMC* case could not be distinguished, but that later authorities revealed an increasing liberality and shift in attitudes. He concluded that the *GMC* and *Nursing Council* cases had become fossils (at 255), and declined to follow them. McKay J, on the other hand, felt able to distinguish both cases. Underlying His Honour's approach to the authorities was a similar liberality to that which informed his attitude to the construction of the statute. He said (at 16):

> In applying the "spirit and intendment" of the preamble to the Statute of Elizabeth it is important to be guided by principle rather than by a detailed analysis of decisions on particular cases. As was said by Sachs LJ in the *Council of Law Reporting* case at 95: "The answer being eminently a matter of first impression derived from an overall view of the preamble coupled with the general trend of some centuries of decisions, no useful purpose can be served by citation of specific authorities.

Thomas J's judgment was in similar vein to McKay J's. His Honour's construction of the statutory position was quite broad brush and took only two pages (at p 4):

> ... [T]he Medical Council was established by Parliament for the purpose of protecting and promoting the health of the community. Parliament was seeking to in part discharge the established responsibility of the state for the maintenance of the health of its citizens. No other purpose can reasonably be ascribed to it in enacting the legislation. But this responsibility cannot be met, Parliament clearly determined, unless high standards are maintained in the practice of medicine and surgery. A system for the registration and disciplining of qualified medical practitioners was equally clearly seen to be necessary to achieve that objective. Hence, the Medical Council was established ... The functions [of registering and disciplining medical practitioners] became the administrative means by which Parliament furthered its objective of protecting and promoting the health of the community.

When it came to dealing with the *GMC* and *Nursing Council* cases, Thomas J suggested that the failure in those cases to focus on wider public purpose as opposed to immediate statutory functions of the bodies in question meant that they were of little use in the present case. The Judge went on to give a more sustained defence than had McKay J for the view that in determining the purpose of the Council, it was not sufficient to equate purpose with functions. The purpose of the Council was determined by articulating the purpose which explained the functions, ie the purpose which the legislature sought to advance in setting up the Council. The functions given the Council were merely the means by which the purpose was to be advanced. The purpose here was the furtherance of the health of the community. This wider or real purpose approach did not have the consequence of turning the functions into ancillary or secondary purposes. The wider purpose of Parliament was the exclusive purpose. There was no secondary or ancillary purpose, since the only candidate for that honour was "the objective of regulating the medical profession for its own benefit" (at 12), and that objective would not have led Parliament to enact the statute, at least in its present form. The wider purpose was charitable under *Pemsel's* fourth head. It served "a more charitable interest than what may be broadly called the public interest". (at 14)

Interestingly, the majority view, particularly as expressed by Thomas J, regards the public or charitable purpose as the sole one. Thus the case is on one extreme of Picarda's sliding scale. The steps to be taken are: first, construction of the constituting document (the majority favoured a liberal approach to construction, purporting to take into account the purpose of Parliament) to determine what the body's purpose or purposes are; secondly, the application of the first two fundamental requirements of the general law of charity to determine whether the purposes are charitable; and thirdly, the application of the third fundamental requirement of the general law of charity. Since the Medical Council had a single charitable purpose, it was exclusively charitable.

The dissenting judgment of Richardson P and Gault J reveals core differences with the approach taken by the majority. First, and pervading their judgment, their Honours took a narrower position on the legitimate approach to construction of the constituting statute. The list of functions, agreed after the trial, and to which both McKay and Thomas JJ referred, was characterised by Richardson P and Gault J as "the purposes of the Council". Their Honours stated (at 5):

> ... [T]hese functions of the Council may be described as regulating qualification for, and conduct in, the practice of medicine in New Zealand. To carry out these functions is to be regarded as the purpose for which the Council was established.

There was no suggestion of any other purpose. Having thus defined the purpose, the next step was to apply the general law of charity. Here their Honours went straight to the *GMC* and *Nursing Council* cases, concluding that they were indistinguishable from the present case both as to context and substance. (at 11) Their Honours were not prepared to see a different meaning of "charitable purpose" evolve in New Zealand where no local circumstances existed to warrant such an evolution. Keeping a register of qualified doctors was not therefore a charitable purpose.

As far as Richardson P and Gault J were concerned, therefore, this case would be placed at the other end of

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"CHARITY BEGINS AT HOME"

Pamela Andrews and Elaine Campbell of Kensington Swan, Wellington

looks at Court decisions on Family Protection Act claims and ask how one decides when "moral duty" arises

Surveys clearly indicate that unrestricted freedom of disposition is valued, (eg Thorns (1955) 5 *Social Policy Journal of New Zealand* 30, 38) but this principle is not protected by New Zealand law. The limit on this freedom imposed by the Family Protection Act 1955 is based upon the principle that the obligations that existed during a lifetime to provide for dependants, whether voluntarily assumed or imposed by law, for example by the Child Support Act 1991, are not extinguished on death. Regardless of the existence of a valid will the Courts may make provisions for applicants specified in s 3 FPA from the deceased's estate on the basis that the applicant has not been gifted enough under the will for "proper maintenance and support" (s 4). Family protection legislation was designed to save the State the cost of supporting the deceased's dependants (111 NZPD 501-509). A wider view of "testamentary claims prevails today" according to Law Commission PP 24: *Succession Law Testamentary Claims* p 5 yet the legislation has not been amended to reflect that view.

No general moral obligation to support charities is recognised by New Zealand law. Courts are therefore not inhibited from reducing or even extinguishing testamentary provisions to charities

The balance the law has struck between the right of a willmaker to leave property to beneficiaries of choice and the moral right of spouses or children to provision from the estate has implications for one particular class of beneficiary. No general moral obligation to support charities is recognised by New Zealand law. Courts are therefore not inhibited from reducing or even extinguishing testamentary provisions to charities where a willmaker's parsimony to family is generosity to charity.

Gifts to charities are affected to a larger extent than most other dispositions by successful testamentary claims; cases indicate that Courts are inclined to the view that charity begins at home and that the wishes of the testator as to where charity should begin are largely irrelevant in the Court's consideration of testamentary claims. This article looks at the concept of "moral duty" and how this judicial gloss on family protection legislation results in dispositions to charities being reduced or extinguished contrary to the express wishes of the willmaker that a charity or charities should benefit under the will.

"MORAL DUTY"

The concept of a "breach of moral duty" is the basis for an award under family protection legislation. However, this concept is not found in the legislation. The legislation refers to a failure by a testator to make "adequate provision" for the "proper maintenance and support" (s 4) of those persons specifically referred to in the Act.

The gloss of "moral duty" can however be traced back to an early decision on the Family Protection Act; *Allardice v Allardice* (1910) 29 NZLR 959 at 973.

> It is the duty of the Court, as far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it.

The Courts have expressly stated that the concept of moral duty is "elementary in the administration of the Family Protection Act"; *Re Z* [1979] 2 NZLR 495 at 506. However as the New Zealand Law Commission points out "moral duties" vary according to the views of each individual Judge and are personal to each willmaker and difficult to generalise; Law Commission PP 24, p 3.

It is difficult to see why a "moral duty" is owed by a deceased to "support and maintain" a comfortably situated adult child, yet consistently the Courts will find a duty is owed in such circumstances, (eg *Little v Angus* [1981] 1 NZLR 126 CA). That such a duty is owed is obviously the personal view of the Judge and not that of the willmaker who frequently proffers reasonable explanations as to why no duty is owed, (eg *Re Ormsby* (1990) 7 FRNZ 580). Furthermore, the imposition of a moral duty in such circumstances does not sit easily with the wording of the statute which provides that claims may be made for "proper maintenance and support" of the claimant.

Claimants are seldom turned away from Court empty handed; 91.5 per cent of all claims brought by children under the Act succeed, (Peart "Awards for Children under the Family Protection Act 1955"(1995) 1 BFLJ 224).

In light of these figures one could be forgiven for taking a somewhat cynical view of repeated judicial comment that the Act does not allow the Courts to rewrite the will of the testator, eg *Re Wilson* CA 18/91, 13 May 1992.

THE POSITION OF CHARITIES

No moral duty is owed to charitable beneficiaries by willmakers yet bequests are often made to charities, how then are charities affected by testamentary claims?

It has been traditional for charities to abide by the Court's decision where a testamentary claim is made against the estate. The Court therefore infrequently has the benefit of hearing from those most frequently affected by the Court varying dispositions made under a valid will in successful testamentary claims. It is encouraging to note that in more recent times charities have sometimes, with the encouragement of the Court, taken a more active role in proceedings.

In the past, not only were charities frequently not heard in opposition to a claim, it would appear that in determining the claim the Courts frequently did not even feel obliged to consider the beneficiary charity's interests.

In the *Estate of Collecutt* HC Auckland A1139/83, 11 Dec 1985 at p 5 Casey J said

> The Court in considering competition between family members and charities adopts the view that there being no competing moral claim from the charity the Court can do full justice to family members before it considers the position of the charity.

It has even been suggested that making a bequest to charity is indicative of the willmaker's failure to recognise that a moral duty is owed to an applicant, *Ormsby* 576, and that the Court is entitled to take a more liberal view of what is required for "proper maintenance and support" of the applicants where provision was made to those with no "moral" claim on the bounty of the willmaker. An example is *Collins v PT* [1927] NZLR 746, 750 where the bulk of the estate was left to the Masonic Lodge.

Such judicial pronouncements suggest that the Courts may be intruding too far on the principle of testamentary freedom. Do they give sufficient recognition to the fact that the testator has desired to gift a greater or lesser proportion of the estate to charitable purposes for public good? Do they give sufficient recognition to the benefits such gifts confer on the community collectively? Do they sufficiently recognise the wishes of the testator?

When the concept of moral duty determines the success or otherwise of a family protection claim, charities will always be the losers. As noted earlier, New Zealand law does not recognise a general moral obligation to support charities. Invariably it is the gift to charity which the Court, in a successful claim, will reduce or extinguish because the charity has no "claim to the bounty of the testator".

However, is not the concept of moral duty itself seriously flawed? By its very nature the concept of moral duty is personal not only to the willmaker but also to the presiding Judge. As the New Zealand Law Commission suggests (PP 24, p 12/13), because the perception of moral duties varies according to the individual Judge, judicial practice ceases to be apparent. Who should get an award and how much the claimant should be awarded appears to be measured by the Emperor's foot not by clear, precise, predictable criteria. A willmaker is unsure whether he or she has discharged his or her supposed moral duty to the satisfaction of the Court.

The New Zealand Law Commission suggests that the concept of moral duty is too vague to ensure the purpose, meaning and effect of the law are clearly communicated. The Commission suggests that the concept might be acceptable if it were the basis for a code of coherent, precise and widely accepted criteria.

If moral duty were the basis for a code of such criteria, then whilst dispositions to charities may still be affected by a successful claim, at least to some degree the extent of that effect could be pre-determined. The interests of charities, and the benefits conferred on the whole community by such dispositions could also form part of the criteria. This would avoid the present position where the interests of charities and therefore the wishes of the willmaker are not considered until full justice is done to family members.

The current review of succession law testamentary claims needs to embrace the dilemma which testamentary claims currently pose for charities. At present charities are in the unenviable position that the willmaker's wishes to be benevolent are subject to the judiciary's prevailing view that charity begins at home. ❑

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Picarda's sliding scale. There was a single non-charitable purpose. The difference between the Judges is as to the basic rules of construction applicable to determining the charitable status of statutory bodies. A broad approach to construction led to a purpose beyond the expressed functions, which purpose was of public and charitable status. The GMC and *Nursing Council* cases were simply not relevant because they dealt with the non-charitable status of a different purpose. A narrower approach to construction led to a narrow purpose gleaned from the expressed functions, which purpose was not charitable because it had already been determined to be non-charitable in those cases, which were of highly persuasive authority.

Determining the charitable status of professional bodies is a matter of the application of the general law of charity to the body's purpose or purposes as construed from the relevant sources. In the case of a non-statutory body, recourse can be had to both the constitutive documents and the activities of the body in determining the purpose. In the case of a statutory body, the relevant legislation and, after the *Medical Council* case, the motives or intentions of the legislature are both legitimate sources. There are, of course, important jurisprudential questions – does a legislature have motives or intention beyond what is expressed? – and constitutional questions – are Judges entitled to determine the legislature's motives on the basis, for example, of the state's role (per Thomas J, at 4) or standards of credulity (per McKay J, at 7)? but these are beyond my immediate purpose. Once past the issue of defining the purpose or purposes of the body in question, the professional body cases give rise to issues which recur in the law of charity. In particular, how is the definitional law to be applied (using the narrow analogy or precedent approach, or the wider equity of the Statute of Elizabeth approach), and, if private benefit appears, how is that to be dealt with in applying the exclusive charitableness requirement? ❑

CHARITIES AND THE FAMILY PROTECTION ACT 1955

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finds out how much of a problem the Family Protection Act poses for charitable organisations

Nevill's *Will Drafting Handbook* (4th ed) lists some forty charitable and institutional organisations in New Zealand. A quarter of these charities were contacted recently to see if charitable testamentary gifts were being challenged by the families of testators making such gifts, and in particular whether such claims were considered vexatious by the charity concerned.

Some of the charities contacted viewed many of the claims by relatives as unjustified. More specifically, the religious charities all agreed that it was a "regular occurrence" for the family of the testator to contest gifts to religious organisations, by relying on the Family Protection Act 1955. Some religious charities acknowledged that a claim could be based on the subjective views of the family members concerning the religious beliefs of the testator. Whilst some claims were seen as fair many were not. Due to the increase in claims over the last decade some of the larger religious organisations had worked out a clear policy of settling claims as quickly as possible out of Court. A draft affidavit setting out the basis for the claim and which included a declaration by the claimant as to his or her circumstances would be requested. The nature of any moral obligation, the size of the estate, the existing claims on the estate, the financial position of the claimant and the testator's wishes would all be balanced in assessing the strength of the claim and negotiations were then made with the claimants accordingly. Whilst this often resulted in a considerable reduction in the amount the charity received it was perceived as unrealistic to litigate.

The medical charities contacted did not consider that there was a problem at all. It was suggested by these charities that organisations which provide a hands on, delivery service tended not to have a problem with claimants wishing to upset the charitable gift. Two medical charities could not remember any gift being challenged by a family member.

All the smaller charities pointed out that they did not have the resources to litigate if the negotiation process failed. Some said as a matter of policy that even with resources it would not be appropriate for a charity to go to Court.

Inevitably some cases do go to Court and the recent reserved judgment of Moran J involving a number of charities including The Canterbury Society for the Prevention of Cruelty to Animals Incorporated and IHC New Zealand (Incorporated) illustrates the difficulties that charities can face.

In the Estate of Pana, Pana v The Trustees Executors and Agency Company of New Zealand Ltd (M.185/95, HC Christchurch, 13 August 1996) Margaret Pana left her husband $20,000, plus sundry bequests of $15,000. A further $25,000 was to be used to set up a trust for her cat, Scotty. The balance of $136,586 went to various charities which were also the ultimate beneficiaries of Margaret Pana's half share in the former matrimonial home.

Moran J when considering the competing claims noted that none of the charities had any particular connection with Margaret and that none could claim to be deserving of her beneficent interest. That was not to say that they should be disqualified on that score. Margaret was entitled to leave her property to whomever she wished, subject only to fulfilling her moral obligation to her husband. "If there be a breach of Margaret's moral duty to George then the proper approach, in the absence of any competing moral claims, is to determine what further provision should be made for George. The charities may then have whatever is left over." [p 11]

All parties agreed that Margaret's breach of her moral duty to George was manifest and that as a minimum George should have the other half share in the matrimonial home. In this event the charities stood to receive some $141,586, (Moran J estimated $20,000 for costs).

If the charities received nothing then George would be left with a debt free house, a car and $238,586 (comprising the legacy of $20,000, the $141,586 and his own investments totalling $77,000).

The charities received nothing.

It was held that George should receive a debt free house and approximately $240,000 in investments. "Nothing less is required to discharge the moral obligation that Margaret owed to her husband given his age, his health, his position in life, and a relationship of some 50 years' duration characterised by hardship jointly endured and modest wealth jointly acquired." [p 13] George was 73 years old with no familial support and in poor health.

Moran J considered that *Re Watkinson* (M73/93, HC Hamilton, 7 October 1994) was not unhelpful. In that case Hammond J considered that a debt free house plus investments of $300,000 were required to meet the needs of a 77-year old woman with no familial support. The value of the estate exceeded $600,000.

Decisions such as these do illustrate the prevailing attitude that "Charity begins at home" (*Re Putt*, M19/87, HC New Plymouth, 2 March 1990, Barker J and *Re Ormsby* (1990) 7 FRNZ 573 at 576 per Thomas J), and that charities do not have an easy time when faced with claims by the testator's family pursuant to the Family Protection Act 1955. ❑

VARIATION OF CHARITABLE TRUSTS

Margaret Soper, Crown Counsel

clarifies a topic of practical importance but which seems regularly to lead to problems

Charitable trusts, once established, cannot in general be varied unless a power to do so has specifically been reserved in the trust deed. In certain circumstances they can however be varied by the High Court.

In the case of property held upon trust the High Court can, under Part III of the Charitable Trusts Act 1957, apply the funds to another charitable purpose. The property can be so applied if the original purpose has become impossible, impracticable or inexpedient to carry out or the amount available is inadequate, the purpose has been effected already or the purpose itself is illegal, useless or uncertain.

In deciding how the money shall be applied the Court will approve a purpose which accords as nearly as possible with the original one. The history of the legislation and a summary of the attitude taken by the Courts in such cases is set out in *re Twigger* [1989] 3 NZLR 329 at 340-1.

Also in the case of property held on trust there is a power to vary the administration of the trust. In this case the test is rather lower and the applicant simply has to show that the carrying out of the trust could be facilitated by extending or varying the powers of the trustees or by prescribing or varying the mode of administering the trust.

In both of the above cases the application may, pursuant to R 458D of the High Court Rules, be brought by originating application. The applications vary markedly in their background facts, the proposed variation and any legal issues that might arise so that it is difficult to suggest a common format. In general however the Court needs to know how the trust came to be established, how it has subsequently functioned, what it is that necessitates the variation of trust, what the proposed variation is and the reasons for selecting the variation that is proposed. All of this information can appear in one or more affidavits. The Court needs to see copies of the original trust deed. It is also helpful to annex the latest set of accounts so that the Court is aware of the value of the property involved.

The Court also needs to be satisfied that it has jurisdiction to make the variation that is proposed. To that end, the grounds appearing in the originating application can refer to ss 32 or 33 (or both) of the Charitable Trusts Act 1957, any relevant cases and the affidavits filed in support. The scheme itself can be prepared in the form of a draft order which makes the proposed amendments to the trust document.

Under s 35 of the Act every variation must be submitted to the Attorney-General. In practice the functions of the Attorney-General are carried out by the Solicitor-General at the Crown Law Office. He can remit the scheme to the trustees for consideration of any amendments the Solicitor-General may suggest or he can report on the scheme to the High Court. It is generally useful to submit the papers in draft form so that any suggestions the Solicitor-General might make can be readily incorporated if appropriate.

Once the Attorney-General's report has been received the applicant can file in the High Court and obtain a date for the fixture. Solicitors so doing need to make sure that the date for the fixture is sufficiently far ahead to comply with the advertising requirements in s 36 of the Act and also need to make sure that the matter is listed before a Judge in open Court.

Anybody at all can oppose the scheme by giving seven days' notice to the Registrar, the trustees and the Attorney-General. Under s 53 of the Act the Court can make an order approving the scheme with or without modification as it thinks fit. In practice however, the Court is generally reluctant to approve schemes with substantial modification in case the process for reporting by the Attorney-General, advertising and consideration of objections is by-passed. Nor is there any power in the High Court to approve alternative schemes.

For funds which have been raised by public subscription the process is rather different and is set out in Part IV of the Charitable Trusts Act. This simplified procedure applies only to money so that once the funds which have been raised have been spent on real or other property the application must proceed under Part III of the Act. In public subscription cases the trustee or the holder of the fund advertises the intention to vary the trust in a form approved by the Attorney-General. A public meeting of contributors is then held and a scheme committee selected to prepare the scheme. The scheme and the accompanying documents are then placed before the Attorney-General who may either approve the scheme or report on it for the High Court.

Both the Attorney-General and the High Court have the power to dispense with statutory procedural requirements for varying the purposes and mode of administering trust funds raised by voluntary contribution. Section 50 of the Act contains a power to dispense with the requirement to hold a meeting of contributors where the amount involved is less than $400.00 or five years has elapsed since the last of the funds were raised. Under s 55 of the Act there is also a general power in the Court or the Attorney-General when approving a scheme to waive any non-compliance with the procedural requirements of the Act. ❑

CHARITABLE ORGANISATIONS: MORE "TAXING" THAN THEY APPEAR

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consider the requirements for obtaining charitable status for tax purposes, and outline the various tax obligations and exemptions from tax that follow. This article is only an overview of a selection of the issues relating to the taxation of charities and should not be used as a substitute for professional advice.

INTRODUCTION

What would your response be to the following statements about charities and taxation?

(i) Charities are not subject to any tax obligations.

(ii) Doing business with a charitable trust will save you tax, provide benefits to the community, and give you a competitive advantage.

Many people would agree with both statements without giving the matter serious thought. However, the taxation of charities is not that simple. In this article, we expose the myth that charitable organisations can be used to circumvent the taxation system, and draw attention to a number of tax considerations that officers of charitable organisations need to be aware of.

In the following section we examine the criteria for obtaining charitable status for tax purposes. We then outline the tax obligations that officers of charitable organisations must satisfy, along with the various exemptions from income tax that apply to charities. After reviewing the requirements to become a donee organisation, we conclude by examining past attempts to reform the taxation of charities.

OBTAINING CHARITABLE STATUS

The exemptions from income tax specified in the Income Tax Act 1994, as amended ("the Act"), generally apply to income derived for "charitable purposes". The term "charitable purpose" is somewhat unhelpfully defined in s OB 1 of the Act as including:

> ... every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

The Charitable Trusts Act 1957 is even less helpful, with "charitable purpose" broadly defined as:

> ... every purpose which in accordance with the law of New Zealand is charitable; and for the purposes of Parts I and II of this Act, includes every purpose that is religious or educational, whether or not it is charitable according to the law of New Zealand.

In any event, while a trust registered under the Charitable Trusts Act 1957 receives the legal benefits of incorporation, it will not automatically receive an exemption from income tax. Separate approval must be obtained from the Inland Revenue Department ("IRD") before an organisation can become an approved charity for tax purposes (see *Tax Information Bulletin* Vol 4, No 7, March 1993, p 10).

In the absence of a satisfactory statutory definition of "charitable purposes", we examine the common law in the search for a comprehensive definition of the term. Generally, New Zealand Courts have adopted the meaning of "charitable purposes" applied in English cases. The classic exposition of what is charitable comes from Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531. In his judgment, Lord Macnaghten outlined the four categories of charitable activities:

(i) relief of poverty;

(ii) advancement of education;

(iii) advancement of religion; and

(iv) other purposes beneficial to the community (or a substantial body of the community) not falling under any of the preceding heads.

Even if an organisation's activities fall under one or more of these heads of charity, it will not be considered charitable unless there is an element of public benefit: *Molloy v CIR* (1981) 5 NZTC 61,070. This means that the activity must benefit the community as a whole or a significant section of it. Accordingly, a fund set aside to benefit employees of a particular company will not satisfy the public benefit test: *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; nor will a fidelity fund set up to meet the claims of victims of defalcation by a professional adviser: *New Zealand Society of Accountants v CIR; New Zealand Law Society v CIR* [1986] 1 NZLR 147. There is an exception to the public benefit rule for charitable activities falling within the first head, the relief of poverty. A fund set up for the relief of poverty of a limited class of persons (but not particular persons) will be regarded as charitable, even though a significant section of the public is ineligible to benefit directly: *Dingle v Turner* [1972] 1 All ER 878 (HL).

Even if an organisation is set up for charitable purposes and satisfies the public benefit test, it will not qualify for an exemption from income tax unless it is established *exclusively* for charitable purposes (ss CB 4(1)(c) and CB 4(1)(e) of the Act). The test for determining whether an organisation is carried on exclusively for charitable purposes is whether the purposes and objects of the organisation, when viewed as a whole, are charitable. An organisation will still be charitable even though some of its incidental objects and powers are non-charitable: *CIR v New Zealand Council of Law Reporting* (1981) 5 NZTC 61,053.

Even if an organisation is set up for charitable purposes and satisfies the public benefit test, it will not qualify for an exemption from income tax unless it is established exclusively for charitable purposes

An organisation must satisfy four requirements before the IRD will grant the organisation charitable status for income tax purposes: (see CCH, *New Zealand IRD Tax Rulings*, para 53.5.)

(i) *The organisation must be carried on exclusively for charitable purposes.* In the case of an organisation seeking approval for donee organisation status only, the organisation must be carried on for charitable, benevolent, philanthropic or cultural purposes see below.

(ii) *The organisation must not be carried* on for the private pecuniary profit of any individual. The exemption from income tax will be lost where a person related to the organisation has the capacity to arrange a private benefit. It is not necessary for the person to actually receive a benefit. However, this does not prevent the organisation from paying for services provided by a person related to the organisation, provided payments are reasonable and made on an arm's length basis.

(iii) *The organisation must have a provision in its rules requiring the assets of the organisation to be held for charitable purposes if the organisation ceases to exist.* A charitable trust registered under the Charitable Trusts Act 1957 does not need to include a winding up clause in its rules, as the distribution of assets upon dissolution of a charitable trust is governed by Parts III and IV of the Charitable Trust Act 1957.

(iv) *The organisation must not have the power to amend its rules in such a way to alter the exclusively charitable nature of the organisation.*

In order to determine whether the above requirements have been met, the IRD will require the following information to be included with an application for charitable status:

(i) a current copy of the organisation's rules, constitution, trust deed or other founding document;

(ii) a copy of the organisation's certificate of incorporation (if the organisation is incorporated);

(iii) details of the tax exemptions sought; and

(iv) details of how the organisation is (or will be) operating.

Often the IRD will require an organisation's rules to be amended before granting charitable status. In particular, the Department will often require amendments to be made to:

(i) the stated objects and purposes of the organisation;

(ii) benefits that members of the organisation are entitled to;

(iii) the use to which funds are applied; and

(iv) the disposal of assets in the event that the organisation ceases to exist.

TAX OBLIGATIONS

In addition to general obligations imposed on officers of charitable organisations by law (for example, in the case of trusts, the requirements contained in the Trustee Act 1956) there are a number of tax obligations that must be satisfied. As a minimum, officers of charitable organisations are required to fulfil the following tax obligations:

(i) apply for an IRD number (otherwise the organisation will not receive tax exempt status and will be required to file an annual income tax return);

(ii) maintain business records as required by sections 22 to 30 of the Taxation Administration Act 1994; and

(iii) keep sufficient records to enable the Commissioner of Inland Revenue to determine the source of donations made to the organisation and the application of funds within and outside New Zealand.

Charitable organisations that run business activities or employ staff must comply with a number of other tax obligations. These may include:

(i) Registering for GST and complying with the requirements of the Goods and Services Tax Act 1985, including filing regular GST returns.

(ii) Withholding PAYE and ACC levies from employees' wages.

(iii) Paying FBT where fringe benefits are provided to employees (note that there is a limited exemption from FBT for fringe benefits provided to employees of a charitable organisation in carrying out the charitable purposes of the organisation).

(iv) Declaring income that is not exempt from income tax (for example, business income not applied for charitable purposes within New Zealand see below).

Charitable organisations will also be subject to further tax obligations depending on the form of entity the organisation takes (for example, a company or trust), and depending on any associated entities in which the charitable organisation has a significant interest, such as a trading subsidiary or an investment entity.

TAX EXEMPTIONS

Current exemptions from income tax include:

(i) *Income derived by Charitable Organisations* (s CB 4(1)(c) of the Act). This exemption applies to income derived by trustees in trust for charitable purposes and income derived by any society or institution established exclusively for charitable purposes. This exemption is generally limited to investment income (interest, dividends and rents) as business income is subject to a separate limited exemption (see (iii) below).

(ii) *Income derived by Charitable Estates* (s CB 4(1)(d) of the Act). This exemption applies to income derived by an executor or administrator of an estate from funds held for charitable purposes.

(iii) *Business Income* (s CB 4(1)(e) of the Act). This exemption applies to income derived from any business carried on by, or on behalf of, or for the benefit of, a charitable organisation for charitable purposes within New Zealand. If a charitable organisation uses business income for charitable purposes within and outside New Zealand, only that part of its business income that relates to charitable purposes within New Zealand is exempt from income tax. To enable the Commissioner to apportion the income between New Zealand charitable purposes and overseas charitable purposes, the charity must file an income tax return in a particular form. Based on this information, the Commissioner will determine whether or not a partial exemption will apply and how income will be apportioned (see *Tax Information Bulletin*, Vol 7, No 12, April 1996, p 25).

Current benefits to taxpayers who make monetary donations to a charity or donee organisation (see below) include:

(i) *Relief from Gift Duty* (s 73 of the Estate and Gift Duties Act 1968). Any gift made to a charitable trust or an organisation established exclusively for charitable purposes is not subject to gift duty.

(ii) *Rebate for Charitable Donations* (s KC 5 of the Act). Individual taxpayers who make a monetary donation of $5 or more to an approved donee organisation are entitled to a rebate of one third of the donation, up to a maximum of $500 per year.

(iii) *Deduction for Charitable Donations* (s DJ 4 of the Act). Corporate taxpayers (other than closely held companies) who make monetary donations to approved donee organisations are entitled to a tax deduction for the amount of the donations, up to a maximum of $1,000 or 5 per cent of the company's assessable income each year, whichever is greater. Section DJ 4 also limits the maximum deduction that can be claimed for monetary donations made to any one donee.

Even if a charitable organisation is not entitled to income tax exemptions under s CB 4(1) of the Act, certain classes of receipts will not be liable to income tax. The table (adapted from IR255, *Charitable Organisations – A Tax Guide*, May 1993, p 45) provides a summary of the income tax and GST treatment of receipts for a charitable organisation that is liable to income tax and registered for GST.

DONEE ORGANISATIONS

A New Zealand organisation which has charitable purposes, or which is set up for cultural, benevolent or philanthropic purposes may obtain approval from the IRD to become a donee organisation. In order to qualify as a donee organisation, most (or in some cases all) of its funds must be applied for cultural, benevolent or philanthropic purposes in New Zealand. In special circumstances, the Commissioner will grant donee organisation status to organisations that do not comply with this requirement where the organisation has wide enough public appeal to warrant an exception. Examples include Amnesty International, CORSO, UNICEF, and the Red Cross. A further requirement that must be satisfied before donee organisation status will be granted is that the organisation must not be carried on for the private benefit

Income tax and GST treatment of different classes of receipts

Type of Receipt	Liable for Income Tax	Not liable for Income Tax	Liable for GST	Not Liable for GST	Exempt from GST
Subscriptions	..	√	√	..	..
Donations	..	√	..	√	..
Koha	..	√	..	√	..
Bequests	..	√	..	√	..
Grants	..	√*	√	..	..
Subsidies	..	√*	√	..	..
Suspensory Loans	√	..	√	..	..
Trading Activities	√	..	√	..	..
Raffles/Housie proceeds	..	√*	√	..	..
Admission fess	√	..	√	..	..
Affiliation Fees	√	..	√	..	..
Sale of Donated Goods & Services	..	√	..	..	√
Sale of Purchased Goods	√	..	√	..	..
Sale of Assets/Equipment	..	√	√	..	..
Insurance proceeds	..	√	√	..	..
Hall/Equipment Hire	√	..	√	..	..
Rent Received (Residential)	√	..	..	..	√
Rent Received (Commercial)	√	..	√	..	..
Penalty Payments (Fines)	√	..	√	..	..
Advertising or Sponsorship	√	..	√	..	..
Interest/Dividends	√	..	..	..	√
Overseas Income	√	..	..	√	..
Gaming Machines	√	..	√	..	..

*Can be liable in certain situations

of anyone related to the organisation. The advantage of obtaining donee organisation status is that monetary donations of $5 or more made to a donee organisation qualify for a charitable rebate under s KC 5 of the Act, or a tax deduction under s DJ 4 of the Act (see above).

An organisation seeking donee organisation status must provide the IRD with a copy of a current copy of its rules, constitution, trust deed or other founding document, a copy of its certificate of incorporation (if the organisation is incorporated), details of the tax exemptions sought, and details of how the organisation is (or will be) operated. The objects of the organisation, benefits provided to its members, the application of its funds, and procedures for distribution of assets on winding up will all be scrutinised by the IRD before approval is granted.

Courtesy of Nisbet: originally published in *The Press*

REFORM ISSUES

The Labour Government's infamous Economic Statement of 17 December 1987 contained radical proposals to reform the taxation of charities. The Labour Government proposed that income of charitable organisations from investing and business activities should be taxable, with a corresponding deduction allowed for related expenses. The Government's intention was to place the business activities of charities on an equal footing with other organisations. The Economic Statement also contained an implicit proposal to repeal the rebate for charitable donations (at the time limited to a maximum of $200), although such donations would remain exempt from tax in the hands of the recipient organisation.

Due to the negative response generated by the reform package, the matter was referred to a Working Party (chaired by Sir Spencer Russell) for consideration. In its report to the Minister of Finance and the Minister of Social Welfare, the Working Party recommended that the current structure of tax exemptions be retained, but that the exemptions be tightened to counter abuse of the existing provisions. On 20 October 1989 the Prime Minister announced that the Government had accepted the Working Party's recommendations.

Another reform proposal that never made it to the statute books was a form of "excess retention tax". This tax would be imposed on charitable organisations that did not distribute a legislated percentage (proposed to be 33 per cent) of their "income" to charitable purposes. Again, this proposal to "force the hand" of charitable organisations met with stern resistance.

CONCLUSION

Returning to the two statements which we posed at the beginning of this article, our reaction is to "strongly disagree" with the first statement and to "tentatively agree" with the second, when the context is viewed pragmatically. We recommend that taxpayers seek legal advice *before* using charitable organisations, especially charitable trusts, for any purpose other than to collect and distribute funds for charitable purposes. Careful planning is needed to ensure that the organisation is structured in such a way to maximise the tax exemptions available ❑

Further details of the items referred to and additional references may be obtained from the authors.

LITIGATION

edited by
Andrew Beck

ESTATE LITIGATION

Claims against deceaseds' estates can result in a tangled web of litigation, particularly where there are several claimants and multiple causes of action. The most common claims are those brought under the Family Protection Act 1955 ("FPA"), the Law Reform (Testamentary Promises) Act 1949 ("TPA"), the Matrimonial Property Act 1963 ("MPA"), and constructive trust claims by de facto partners. Other possibilities include challenges to and construction of wills, and enforcement of contracts against estates.

The Law Commission has addressed some of the difficulties in its Preliminary Paper 24, *Succession Law: Testamentary Claims*, published in August 1996. The reform proposed by the Law Commission is essentially a single claim, encompassing the various claims currently available under the FPA, TPA, MPA and constructive trusts. Such reform is long overdue, but it is unlikely that any legislation will result for a considerable time. In the meantime, there remain several procedural obstacles to the smooth resolution of estate claims.

CHOICE OF COURT

Family protection, testamentary promise and matrimonial property claims may all be brought in either the High Court or the Family Court. The size of the claim or the estate is irrelevant; it is essentially the plaintiff's choice where to proceed. The Family Court has the power to refer a proceeding to the High Court either on application or of its own motion (s FPA; s 5 TPA; s 14 Family Courts Act 1980). There is no specific provision governing the transfer of these proceedings from the High Court to the Family Court, but the general provision in s 46 of the District Courts Act 1947 is applicable: *Re Burt* unreported, Greig J, 31 July 1996, HC Napier CP 14/96 (see discussion under *Recent Cases* below).

Where there has already been some distribution of an estate, it may be necessary to apply for a tracing order under s 49 of the Administration Act 1969 to recover funds from beneficiaries. Tracing orders may be granted in the High Court or the District Court (pursuant to s 34(2A) of the District Courts Act 1947) but the Family Court has no jurisdiction to make such orders.

Constructive trust claims, and claims for specific performance of contracts against estates cannot be brought in the Family Court; they may proceed either in the High Court under Part IV of the rules, or in the District Court under Part V of the District Courts Rules 1992. Claims involving testamentary incapacity can only be brought in the High Court, and require an application for probate in solemn form. Claims involving the construction of wills can only be brought in the High Court. There is some uncertainty as to whether this requires an application for probate in solemn form (*Re Payne* (1989) 2 PRNZ 432), or whether an application may be made under the Declaratory Judgments Act 1908 (*Re Moore* (1991) 4 PRNZ 217).

OFFICE OF THE COURT

In FPA and TPA claims, only the personal representative of the deceased is named as defendant (HCR 450(2); DCR 443(2)). Following the ordinary rules, the proceeding should be commenced in that person's place of residence unless it can be established that a material part of the cause of action arose nearer to the plaintiff's resident (HCR 107, DCR 113). In TPA claims, the place where services were rendered or where a promise was made could constitute material parts of the cause of action; in FPA claims it is difficult to apply this concept in any meaningful way.

In most other claims, the personal representative would be the obvious defendant, although there may be additional defendants who could be cited first in order to choose a particular Court. Applications for probate in solemn form are, however, required to be commenced in the office nearest the deceased's last place of residence (HCR 643). There is always the power to apply for a change of venue if this would be convenient for the parties (HCR 107(4); DCR 113(4)).

FORM OF PROCEEDING

All of the proceedings mentioned above are commenced by statement of claim and notice of proceeding. Affidavits must be filed together with the statement of claim in claims under the FPA and MPA (High Court R 456, District Court R 449); in other claims falling under Part IV (apart from TPA and specific performance claims) affidavits are only filed subsequently. In claims under the TPA, claims for specific performance, and probate in solemn form, affidavit is by oral evidence unless otherwise ordered.

DIRECTIONS FOR SERVICE

The majority of estate claims fall under Part IV of the High Court Rules (Part V of the District Courts Rules 1992), which means that an application for directions as to service must be considered. The MPA appears to require an application for directions (s 7), but the other statutes do not. Strangely enough, the rules do not make this mandatory, but provide for details of the estate and beneficiaries which are to be supplied in applications where

claims are made under the FPA, TPA and MPA (HCR R 451(3); DCR R 444(3)). The intention appears to be that such an application should be made in all claims of this nature. As it is important for all potential beneficiaries to be aware of claims against the estate, an application for directions as to service would be prudent in most estate litigation. It is not essential for the application to be supported by an affidavit, but the applicant's counsel or solicitor is required to provide a memorandum with reasons for the directions sought.

LEAVE TO PROCEED OUT OF TIME

Proceedings under the FPA, TPA and MPA all have a comparatively short limitation period of 12 months after the grant of administration unless the Court grants leave to bring the claim. Applications for leave to proceed out of time are therefore not uncommon. The application is by way of interlocutory application in an intended proceeding (*Colonial Mutual Life Assurance Soc Ltd v Wilson Neill Ltd* [1993] 2 NZLR 617; *Parris v TVNZ Ltd* (1996) 9 PRNZ 444) and should be supported with an affidavit setting out the reasons justifying a late application. Once an estate has been finally distributed there will of course be nothing to gain from a proceeding against the estate, and a tracing order under the Administration Act is not available: *Re Bimler* [1994] 3 NZLR 13 (CA).

A related issue concerns proceedings which have not been served within 12 months of filing. An application to Court is required (HCR 128, DCR 134), supported by an affidavit setting out the reasons for the delay. It is also necessary to show that reasonable efforts have been made to serve the documents: *Watson v Watson* (1990) 4 PRNZ 397. Where a strong case is shown in respect of the substantive application, the Court may be more willing to grant leave under R 128 in order to obviate a separate application for leave: *Re Coleman* (1994) 7 PRNZ 584.

COMBINING CLAIMS

By its very nature estate litigation frequently involves several different types of claims. Examples of the diversity of proceedings can be seen in *Re Avery* unreported, Barker J, 2 April 1987, HC Auckland A276/85: claim for breach of contract together with claims under the FPA and TPA; and *McGregor v Verbiest* unreported, Hansen J, 31 May 1993, HC Dunedin M9/93: claim to exercise option granted under will, combined with claims under FPA and MPA. It is generally desirable to resolve all such matters in a single proceeding, particularly where the same parties are involved.

In the High Court, there is no jurisdictional barrier to litigating all claims together, although there may be issues as to the appropriate form of procedure, method of giving evidence, and admissibility of evidence: evidence which is admissible in a TPA claim may not be admissible in the construction of a will: *Tutill v Public Trustee* (1990) 4 PRNZ 407. There may also be questions as to the appropriate parties to the proceeding: only the personal representative of the deceased is the defendant in FPA and TPA claims, whereas other claims may require the naming of additional defendants. Any procedural problems should, however, be able to be dealt with by suitable directions.

Once an estate has been finally distributed there will of course be nothing to gain from a proceeding against the estate, and a tracing order under the Administration Act is not available

In the District Court, the problem is much greater. There are divisions between the District Court and the Family Court which make it impossible to bring all claims together unless they fall solely under the FPA, TPA and MPA. This is an issue which requires some legislative attention if the aim is to allow estate litigation to take place in the Family Court. In particular, it seems undesirable that a separate application should have to be made for a tracing order under the Administration Act; in the High Court it has been accepted that such orders should be sought in the same proceeding as the substantive application: *Hogan v Seales* unreported, Holland J, 22 March 1993, HC Christchurch M678/89.

HEARING

Estate litigation, like other Court matters, requires to be set down for trial with the payment of a setting down fee. The matter is heard in open Court and cannot be dealt with in Chambers: *Re Davie* (1991) 4 PRNZ 504. One consequence of this is that, in the High Court, proceedings cannot be brought before a Master. Evidence in FPA and MPA claims is generally by way of affidavit, and cross-examination is rare. In all other claims the presumption is in favour of oral evidence; this will also be the case where several different causes of action are combined. In such cases, an application for directions may well be required in order to determine how evidence should be presented.

APPEALS

Special provisions are made for appeals in FPA and TPA claims from the Family Court: they are required to be brought within 28 days after the making of the order (s 5A TPA, s 15 FPA). Other appeals from decisions made in the District Court have to be brought within 21 days after the date of sealing of the order (s 73(1) District Courts Act 1947). Although the FPA and TPA time limits are similar to those imposed by the Matrimonial Property Act 1976 and the Family Proceedings Act 1980, they are all now out of line with the scheme of the District Courts Act. It is not clear why these claims should be treated differently from other decisions of the District Court, but this discrepancy in time periods needs to be borne in mind where there are consolidated claims. It should also be noted that there are no special provisions relating to appeals against MPA claims. In FPA and TPA claims, the Family Court has the power to dispense with security for the costs of the appeal, a power which does not exist in respect of other District Court proceedings.

Appeals from the High Court are treated in the same way as any final decision of that Court: an appeal must be brought within three months after the order has been sealed (RR 27, 28 Court of Appeal Rules 1955).

CONCLUSION

The technical procedural requirements surrounding estate litigation make claims far more complicated than they need to be. Most irregularities will be able to be cured by the Court using R 5, but the need for simplification is evident. Hopefully something will emerge from the proposals put forward by the Law Commission.

RECENT CASES

Consolidation of estate litigation

The decision in *Re Burt* unreported, Greig J, 31 July 1996, HC Napier CP 14/96 dealt with a number of relevant issues in estate litigation. The plaintiff, a daughter of the deceased, had instituted a family protection claim in the Family Court in Hastings. This was followed by a matrimonial property claim in the same Court. The proceedings reached a stage where the Judge ordered that no further applications would be entertained after 24 May 1996.

The plaintiff subsequently applied for leave to bring a testamentary promises claim out of time, but the Court refused to consider it. In order to get around this difficulty, the plaintiff commenced a testamentary promises proceeding in the High Court, and applied for the family protection matter to be transferred there.

The Court observed that it is customary to deal with the merits of a claim at the same time as the application for leave. In the circumstances, however, Greig J considered it appropriate to decide the leave application. Although the possibility of further delay was recognised, it was held that this could not cause any real prejudice. This may be thought somewhat lenient, given the order which had already been made in the Family Court, but the Court was no doubt reluctant to shut out the new cause of action which had been brought as the result of further legal advice.

Regarding the transfer, the Court considered that it was proper for all the matters to be heard in the same Court. There was, however, no application to transfer the matrimonial property proceeding to the High Court, and the plaintiff in that proceeding was not before the Court. The obvious course of action was to transfer the testamentary promises claim to the Family Court.

The Court noted that there is no provision specifically allowing for this, but held that s 46 of the District Courts Act 1947 could be applied. Greig J held that there is no conflict between that section and the provisions of the Family Courts Act 1980, and that the power to transfer should not be limited because of the positive provisions allowing transfer from the Family Court to the High Court. As there was no important question of law or fact likely to arise, a transfer under the section was appropriate.

The conclusion reached by the Court appears to be correct, and in accordance with the general trend to devolve litigation to the District Courts. It is somewhat strange, however, that the amendments to the FPA and TPA provide for transfer only from the Family Court to the High Court, a matter already dealt with in the Family Courts Act.

the English Courts have viewed breaches of the advertising rule as very serious matters, even when committed innocently

Advertising liquidation proceedings

An interesting point concerning liquidation proceedings arose in *North Island Freight Link Ltd v Performance Plus Fertilisers International Corp Ltd* unreported, Master Thomson, 5 November 1996, HC Napier M92/96. Rule 700J of the High Court Rules prohibits any person from advertising or publishing any information relating to the statement of claim for the liquidation of a company until seven days after service on the company. The purpose of the rule is clearly to give the company an opportunity to pay the debt or to apply to Court under R 700K for an order preventing advertising of the proceeding.

The company complained that R 700J had been breached in that the plaintiff had discussed the financial difficulties of the company with another creditor, had advised the solicitor acting for another creditor that liquidation proceedings were in the process of being issued, and provided copies of the documentation before the seven days had elapsed.

The Court held that discussion of a company's solvency was merely an incident of commercial life and could not be a breach of the rule. Master Thomson considered that the advice given to the creditor might be a breach, following *Re Signland Ltd* [1982] 2 All ER 609, but that the handing over of copies of the statement of claim was clearly a breach.

The Court noted that the English Courts have viewed breaches of the advertising rule as very serious matters, even when committed innocently. The question therefore arose as to what action should be taken against North Island Freight Link. In the circumstances, Master Thomson considered the breach to be more technical than real. The other creditor already knew of the company's financial difficulties, and the issue of proceedings by the plaintiff was already public knowledge by the time the documents were provided. Had that been the end of the matter, no sanction would have attached to the breach.

However, the plaintiff had apparently agreed to settle the proceeding with the defendant, and subsequently erroneously advertised the proceeding in a newspaper, following that with a published apology stating that it did not intend to pursue the liquidation application. Master Thomson held that the whole proceeding was therefore tainted and should be dismissed.

The facts of the case are obviously somewhat unusual, but the ultimate conclusion is rather surprising. The breach of R 700J appears to have been entirely technical, and therefore not a justification for the dismissal of the proceeding. For the plaintiff to continue might have been in breach of the settlement agreement reached by the parties, but that is a different issue. It is difficult to see why the proceeding should simply be regarded as "tainted", or why that should cause it to be dismissed if the settlement had not in fact been honoured.

A further point raised in argument was the relationship between R 700J and R 700O, which requires the plaintiff to supply a creditor with a copy of the statement of claim on request. The Court did not resolve this apparent conflict, but it may well be that providing a copy is not "publishing" information relating to the statement of claim. The purpose of the rule is to prevent public dissemination of the fact of the application; any creditor who knew of it would be able to search the Court file.

SETTING ASIDE SUMMARY JUDGMENTS

Rule 143 of the High Court Rules, and its equivalent in the District Courts Rules 1992, R 165, give the Court the power to set aside a summary judgment which has been given against a party "who does not appear at the hearing of an application for judgment" if it appears to the Court that there may have been a miscarriage of justice. While the emphasis of the rule should be on the miscarriage of justice, considerable debate has arisen as to whether or not a party has "appeared", and is accordingly within the ambit of the rule.

Two lines of cases have developed on this issue. One adopts a purposive construction to the rule, and holds that where a defendant has not had an opportunity to be heard on the merits of the case, there has been no appearance. If the facts justify it, the judgment will then be set aside. On this basis, the Court in *Lewis v Pratt* [1994] DCR 662 considered that there had been no appearance where a defendant represented himself and did not present any documents or defence on the merits. In *Mangarata Construction Ltd v Cavendish Executive Homes Ltd* (1995) 8 PRNZ 645, counsel appeared to apply for an adjournment without any documents having been filed in opposition. Blanchard J said (at 650):

> Obviously Mr Milliken was present as its counsel for the purpose of seeking an adjournment but I think that, as Mr Ivory has submitted, it cannot be said in the circumstances that Mr Milliken appeared for the purpose of representing his client Cavendish at the hearing of the substantive application which followed immediately upon the refusal of the application for adjournment. I say this because under R 159 Cavendish had no right to be heard in opposition to the application without leave of the Court.

The other line of cases adopts a very technical meaning of "appear", considering that where the defendant or its counsel has been physically present, there has been an appearance preventing the operation of the rule. In *Skyline Finance Ltd v Kerr* unreported, Hardie Boys J, 8 December 1987, HC Christchurch CP 472/87, counsel appeared on three occasions to request an adjournment. In an application to set aside, counsel conceded that R 143 was not applicable. Hardie Boys J accepted that if there was an announcement by counsel of his appearance when the matter was called, that would constitute an appearance. Likewise in *Strathfield Jones Management Ltd v Christie* unreported, Anderson J, 18 August 1989, HC Tauranga CP 209/88, counsel appeared without an affidavit in opposition having been filed and R 143 was held inapplicable.

it is better for the merits of a summary judgment application to be canvassed on an application to set aside rather than on appeal

These cases were relied on in the most recent decision, *Martin v Grenada Developments Ltd* unreported, Goddard J, 16 August 1996, HC Palmerston North AP 26/95, where leave to file and serve documents out of time was refused. Goddard J declined to follow a "meaningful right of audience" approach, and said:

> With respect, this cannot be correct on either the plain meaning of the wording in the section or on a purposive approach. Adopting a purposive approach, RR 165 and 143 must be interpreted in the context of the summary judgment procedure, which is a regime providing for the expeditious disposal of civil claims. The rules provide a complete and strict code of procedure. A defendant, who wishes to oppose the entry of judgment, but has not complied with the prescribed time requirements in filing a notice of opposition and affidavit in support, can make application for leave to file and be heard out of time. The granting of leave to do so is a matter for the discretion of the presiding Judge. If the Judge refuses leave and will not hear a defendant on the merits and judgment is entered, the appropriate remedy is an appeal from the entry of judgment.

The practicalities of the situation suggest that it is better for the merits of a summary judgment application to be canvassed on an application to set aside rather than on appeal. Not only is it quicker and cheaper, but the appeal Court will not have the benefit of a decision reached after proper argument. In any event, there are a number of flaws in the technical approach.

Most importantly, there must be an appearance on the *application for summary judgment*. An appearance on an application for leave to file documents or for an adjournment is not, *and could not be* an appearance on the summary judgment application. The point raised by Blanchard J in *Mangarata Construction* that leave is required for an appearance does not seem to have been considered in the cases going the other way.

Secondly, the summary judgment rules do not constitute a "complete and strict code" (*NZI Bank Ltd v Philpott* (1988) 1 PRNZ 560); they are part of a body of rules which must be seen in context. Their purpose is to provide a speedy judgment on the merits of a case. If the merits have not been canvassed there is a risk of a miscarriage of justice. Rules 143 and 165 provide for the possibility of setting aside, not because there has been no physical appearance, but because the defendant has not had an opportunity to present the merits of its case. An appeal is not the best remedy in such circumstances, because the case is incomplete.

It is suggested accordingly that the *Mangarata Construction* approach is the correct one and that the other line of cases should not be followed. Setting aside a judgment is never lightly undertaken, and the onus on the defendant to establish a miscarriage of justice is a substantial one. It is therefore unlikely that the consistent adoption of this approach would lead to any increase in applications to set aside summary judgments. ❑

THE NOTARY PUBLIC

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traces this institution from medieval monastery to the internet

The office of Notary Public is one of the oldest legally related professions. Like much else to do with the law, its origins are church connected and lay notaries did not appear until as late as the fourteenth century.

Notaries first developed in response to the need for reliable authentication of documents executed in one jurisdiction for use in another. This remains one of a notary's major functions to this day. However, at a quite early stage the practice of a notary in civil law countries began to depart markedly from that in England. The continental notary assumed more the position of a public official before whom wills were proved and probate granted and by whom official records were maintained. None of these functions applied under the common law where a notary was and remains a private practitioner attending to individual clients' business.

Two different classes of notary developed in England. The first was the City notary, also known as a scrivener, whose function was intimately connected with the thriving mercantile interests of the City of London and whose duties included translation of documents as well as their authentication. The comparatively few scriveners are legally qualified but most practise solely as notaries rather than solicitors. In contrast, the provincial notaries' jurisdiction is limited to the area in respect of which they are admitted and they practise as an adjunct to their profession as a solicitor.

Not surprisingly, when the first notaries came to be appointed in New Zealand (and similarly in other common law Commonwealth countries) they were based on the provincial rather than the city notary so far as their functions were concerned, but they were appointed with jurisdiction throughout the country rather than for a particular town or city. There is therefore no impediment to a New Zealand notary continuing the calling after moving from one place to another.

The ecclesiastical origin of the notarial office is still seen in the process of appointment. This is by a deputy of the Archbishop of Canterbury resident in Lanbeth, the Master of the Faculties. There have been suggestions that notarial appointments should be patriated to New Zealand. The impediment is that such a change requires an approach to every independent country to ensure that notarial acts receive due recognition. There were something like 120 countries when the move was first mooted; today the figure approaches 200 and the task is even more daunting. For this reason it seems unlikely that any early change is likely though some Australian states have grasped the nettle.

The relationship with the Church is more apparent than real. Although an applicant for admission requires a certificate by two practising notaries, the standard form of which states that he is "conformable to the doctrine and discipline of the Church of England", there is no difficulty in altering this part of the document to reflect the applicant's beliefs, whether Christian or otherwise or lack of them. Perhaps a greater obstacle is sometimes the previous phrase which certifies that the applicant is "of sober life and conversation".

The practice of most notaries in New Zealand consists of witnessing of documents for use overseas, administration of oaths and declarations and certifying that copies have been compared with originals and are true and correct. There is also the noting and protesting of dishonoured bills of exchange and, for those practising in port cities, the noting of protest by a ship's master when the vessel has suffered some nautical misadventure or has experienced heavy weather resulting in damage to cargo.

The function of the notary is simply to authenticate the execution of a document, not to advise as to its content, enforceability or desirability. Each notary maintains a register of notarial acts in which are entered particulars of documents witnessed, identity of persons appearing before him or her and the country for which the document is to be used. Most notaries have lodged specimens of their signatures and seals with the Ministry of Foreign Affairs and with the principal foreign Missions so that if further consular verification of any document is required the details are already on record. The affairs of notaries in this country are administered through three independent societies of notaries, one in Auckland with members in the upper half of the North Island, one in Wellington for the remainder of the North Island and one in Christchurch for the South Island. Applications for admission as a notary are referred in the first instance to the appropriate society which passes its recommendation to the Master of the Faculties.

Lest it be thought that a notary is a Dickensian type character surrounded by dusty files and archaic practices, it should be noted that the advent of the Internet has resulted in civil law countries of a refinement in the office known as a "cybernotary". A cybernotary authenticates documents by electronic means through the Internet which can reproduce such documents across the world in a few seconds. So far the practice has not spread to common law jurisdictions but it is at present under consideration by a committee of the American Bar Association. Clearly the notary of the future will need to be computer literate amongst other qualifications, though one suspects that Asian countries with their insistence on seals and elaborate authentication may be hesitant in accepting an electronic document. But that was said about every development in the electronic media field and notaries and their clients have shown a readiness and ability to adapt to change over the centuries. There is no reason to think that they will not prove equally adaptable to meet the challenges of the 21st century. ❑

Further reading: "The Australasian Notary" by W H Blyth (Auckland, 1973).

REREGISTRATION OF CLOSELY HELD COMPANIES

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reminds us of jobs to be done under the Companies Acts

INTRODUCTION

Companies incorporated under the Companies Act 1955 ("1955 Act") have until 30 June 1997 to reregister under the Companies Act 1993 ("1993 Act"). The principals and advisers of closely held companies must decide on a reregistration procedure, whether to adopt a company constitution and the content of the constitution. Selected facets of these issues are explored in this article, a shortened version of a chapter in the author's forthcoming book on the governance of closely held companies under the 1993 Act. Readers may inspect a draft manuscript of the book at http://www.law.vuw.ac.nz

REREGISTRATION PROCEDURES

The Companies Reregistration Act 1993 ("reregistration statute") provides five procedures for reregistration. Four are voluntary in that they are initiated by the board making an application for reregistration. This document must set forth the information specified in s 3(3): the name of the company, details of the directors, the number of shares and their features if different from those specified in s 36 Companies Act 1993, the registered office and the address for service. The fifth procedure, automatic reregistration under s 13, is for companies that omit, whether through design or inadvertence, to initiate one of the voluntary procedures.

The four procedures for voluntary reregistration vary in the approvals required. Reregistration under s 4 requires special resolution approval. If that approval is not forthcoming, the board can reregister the company under s 5 without again consulting the members. The board can reregister the company under s 6 without first seeking approval from the members. Finally, with the unanimous written consent of the members, the board can reregister the company under s 7. Where the application anticipates certain alterations of shareholder rights, discussed below, reregistration must proceed under either s 4 with special resolution approval or s 7 with unanimous written consent.

The reregistration statute makes no reference to the company constitution. However, the prescribed form for the application for reregistration (Form 1) anticipates lodgement of a constitution. Also, s 29(b) of the 1993 Act provides that a constitution may be filed upon reregistration. On the other hand, the application for reregistration is not mentioned in ss 27 and 28 of the 1993 Act which identify the sources of shareholder rights. Accordingly, it seems that the application for reregistration serves a strictly declaratory function. If a company wishes to carry forward or implement a particular capital structure or governance mechanism that falls outside of the statutory regime of the 1993 Act, the company must lodge a constitution.

For instance, some closely held companies registered under the 1955 Act have outstanding both ordinary and preference shares; in others, member approval is required for specified business decisions. To maintain these capital and management structures, which are at variance with the off the rack rules of the 1993 Act, an appropriately formulated constitution must be lodged on reregistration. Such structures cannot be maintained solely by describing the rights of members in the application for reregistration.

The approvals required for constitutions adopted at reregistration is not addressed as such by the reregistration statute, the 1955 Act or the 1993 Act. However, Form 1 requires that any constitution be attached to the application. Whenever shareholder approval is required in relation to the application, the members will give the approval only if they accept the proposed constitution attached to the form. Appropriately, the application and thus also the constitution requires shareholder approval only where registration will result in an alteration of shareholder rights.

REREGISTRATION OF INCORPORATED PROPRIETORSHIPS

Many closely held companies under the 1955 Act are incorporated proprietorships. The company will have on issue one class of shares, all but one of which is held by the proprietor. To satisfy the statutory requirement for at least two members, the other share is generally held by the proprietor's spouse, accountant or solicitor. As the most significant deviations from the Table A regulations, the company's articles will name the proprietor as the sole director and allow the director to vote on self-interest transactions. The articles will also include many provisions, some taken from Table A and others from standard forms, which are relevant for multi-person companies but are of little significance for incorporated proprietorships. These include provisions for calls, lien, forfeiture, pre-emptive rights, capital changes, dividends and meetings.

The threshold issue for the incorporated proprietorship is whether it should be reregistered as a one person company. This will be appropriate where the existence of the second shareholder served no purpose other than to satisfy the 1955 Act's requirement for at least two members. The presence of an additional shareholder complicates those procedures under the 1993 Act which, in such companies, require unani-

mous consent. These include the s 107 assent, negation of the audit requirement under s 201, the resolution in lieu under s 122, reduction of the annual report under s 211(3), and the written consents for reacquistions, redemptions and financial assistance under ss 60(1)(b)(i), 69(1)(b)(i) and 76(1)(a).

In most cases, conversion to a one person company is easily accomplished. The notional member, who often has no interest in being a shareholder of the company, voluntarily relinquishes the share. The only issues then relate to the form and timing of the transfer. The outstanding share can be acquired by the primary member or, once the company is reregistered, by the company itself. Member purchase is more straightforward. As a transaction between two shareholders, it is subject only to rules on the transfer of shares. In contrast, the entity purchase must comply with the rules in the 1993 Act relating to share reacquisitions.

As to the timing of the transaction, the transfer cannot occur prior to reregistration due to the requirement under the 1955 Act for at least two members. In most cases the transfer can be easily arranged to occur after registration. However, the company will come under the 1993 Act with two shareholders. This may complicate operations until the transfer is effected. Accordingly, the transfer should be concurrent with reregistration of the company. The transfer document should be drafted so as take effect at the time of reregistration. As between the parties involved – the company, the notional member and the primary member – the transfer will be effective as of that date even though it will be entered into the share register at some earlier or later date. Whilst notional members lose their shares at the time of reregistration, this change in rights is effected by the sale and purchase agreement and not by the reregistration. Accordingly, the elimination of the notional member does not amount to an alteration of shareholder rights so as to preclude reregistration by the board under s 5 or 6.

There will be situations where it is not possible to eliminate the notional member by means of a voluntary transaction. This will occur where the notional member cannot be located; there will also be a small number of cases where, eg due to a domestic dispute, the notional member will not cooperate with the primary member. In these cases, it is possible to force the notional member out of the company. For instance, the member's notional holding can be eliminated through a share consolidation which provides cash payment for any resulting fractional share.

The consolidation can be authorised under the 1955 Act but culminated under the 1993 Act by means of the other member's purchase of the fractional share. By authorising the consolidation prior to reregistration, the scheme takes advantage of the express statutory basis for consolidations under the 1955 Act and avoids the obstacles associated with the interest group rules under the 1993 Act. By structuring the cash payment as consideration for the primary member's purchase of the fractional share and delaying the payment until after reregistration, the scheme avoids the technicalities associated with the requirements for two shareholders and for capital reductions under the 1955 Act and with the rules respecting distributions under the 1993 Act.

Prior to reregistration, the proprietor in the capacity of primary shareholder and director can arrange for two resolutions as anticipated by s 70(1)(b) of the 1955 Act and regn 46 of the Table A articles. The one amends the memorandum to alter the division of share capital. This resolution will be stated to take effect on reregistration. The other amends the articles to allow the board to sell any fractional shares and remit or hold the proceeds on trust. This resolution will take effect immediately. The primary shareholder and the company will also enter an agreement for the sale and purchase of the fractional share which will result at reregistration.

Reregistration of the company can proceed under s 4 with special resolution approval, under s 6 by action of the board alone or automatically under s 13 on 1 July 1997. Automatic reregistration has the advantage of fixing a predetermined date for the consolidation. After reregistration, the primary member will pay to the notional member, or to board in trust for the notional member, the amount owing under the agreement for the sale and purchase of the fractional share. At some future time, the proprietor as sole member of the now 1993 Act company can arrange, by means of a s 107 assent, for reacquisition and cancellation of the outstanding fractional share. So long as the price paid for the fractional share is a fair one, the scheme should be immune from challenge as oppressive or prejudicial under either the 1955 Act or 1993 Act.

The second governance issue is whether a single-shareholder company should adopt a constitution. Unless one wishes to explore the fringes of the 1993 Act, incorporation without a constitution is a satisfactory course for a one person company. There are few, if any, improvements which a constitution can make on the statutory regime as it applies to such companies. The 1993 Act provides the one person company with features which, under the 1955 Act, could be obtained only by means of appropriately formulated articles. For example, s 144 entitles directors to vote on a transaction in which they have an interest, s 161 authorises the board to make contributions to a superannuation scheme, and s 52 authorises capital reductions subject to the solvency test. In a one person company, there is little call for those powers, eg to purchase own shares, the exercise of which requires authorisation in a constitution.

This is not to say that the 1993 Act is a particularly appropriate governance regime for the one person company. It is replete with formality requirements which serve no useful purpose as applied to closely held companies in general and to one person companies in particular. The impact of these requirements can be reduced but not eliminated by means of a general s 107 assent and a s 212 waiver of the notices required under s 107(7).

Several procedures are available to bring the one person company under the 1993 Act without a constitution. The easiest option is to wait for automatic reregistration at the end of the transition period. Upon automatic reregistration, the memorandum and the articles of the company will cease to have effect. The company is from then governed solely by the 1993 Act. The same result could be achieved under any of the four modes for voluntary reregistration. However, automatic reregistration avoids the paperwork and fees associated with voluntary reregistration.

REGISTRATION OF MULTIPLE MEMBER COMPANIES

Companies with two to four non-notional members are, next to incorporated proprietorships, undoubtedly the most common entity registered under the 1955 Act. The articles of these companies typically adopt the Table A regulations respecting distributions, lien, forfeiture and calls. Articles at variance with those regulations are commonly provided for self-interest transactions, management, transfer of shares and election of directors.

The principals of these companies will generally not be dissatisfied with their present operating structure. They may enquire whether they can simply carry on under the 1993 Act and use the articles as the company's constitution. This course of action appears to fit within the scope of s 6 which authorises the board, without involvement of the members, to effect a reregistration where it will not alter their rights and obligations. Whilst the option as a certain intuitive appeal, it is not advisable for three reasons.

First, the standard articles contain provisions which are arguably not enforceable under the 1993 Act. The most obvious examples are the provisions for dividends and for self-interest transactions. The articles will stipulate that dividends are payable out of profits and that, once disclosed, a self-interest transaction is not subject to avoidance. These articles are inconsistent with, respectively, ss 52 and 141 of the 1993 Act, neither of which is stated as being subject to the constitution. Transactions conducted under the 1993 Act in accordance with these articles could expose the directors to liability.

standard articles contain provisions which are arguably not enforceable under the 1993 Act. The most obvious examples are the provisions for dividends and for self-interest transactions

Secondly, used as a company's constitution, the 1955 Act articles will not provide the company the requisite authority to indemnify and insure directors, to issue redeemable shares, to purchase own shares and to make special offers for own shares without the unanimous consent of the members. Under the 1993 Act, a company can engage in these transactions only if so authorised by the company constitution. It will be in the interest of multi-person companies and their principals under the 1993 Act, in contrast to one person companies, to have the authority to exercise some or all of these powers. The articles used by closely held companies under the 1955 Act do not provide the requisite authorisation as the transactions involved were generally not possible under the 1955 Act.

Thirdly, used as a company constitution, the articles will not provide an optimum variance and augmentation of the off the rack rules in the 1993 Act. The 1993 Act sets forth about 20 significant rules which are expressly stated as being subject to the company constitution. The articles will provide an appropriate variation of some but not all of these rules. For example, the standard articles generally require shareholder approval for a new issue, a power otherwise allocated to the directors under s 42 of the 1993 Act. The articles will also provide appropriate variations on the 1993 Act rules respecting election and removal of directors under ss 153 and 156, the board's management authority under s 128 and the board's power to fix its own remuneration under s 161. On the other hand, the usual pre-emptive cross purchase provisions in the articles may be inferior to an entity purchase scheme as the most appropriate restriction on the transferability of shares under s 39.

REGISTRATION PROCEDURE FOR MULTI-MEMBER COMPANIES

The choice of reregistration procedure depends on the adoption and the content of a constitution. If the company is to operate without a constitution, then automatic reregistration under s 13 is the most practicable procedure. However, automatic reregistration will not generally be a desirable option as it places the company under the statutory regime which is not optimal for multi-member closely held companies. If the company constitution does not alter the rights of the members, then the directors can effect the reregistration under s 6 without shareholder approval. If the constitution alters the rights of the members, then reregistration must proceed under either s 4 or 7.

In most cases, the members will, after discussing the matter with their adviser, be able to agree on the provisions of the company constitution. In this event, it may be expedient to reregister the company under s 7 with the unanimous written consent of all members. This avoids the necessity for convening a shareholders meeting. Where one or more members are absent or where the members cannot agree, then resort must be had to one of the other registration procedures.

If the absent or truculent minority holds less than 25 per cent of the shares, then it will be possible to reregister under s 4 with special resolution approval. The constitution can include all the provisions desired by the majority, including ones which alter the rights of the members. Section 4(1) requires the board to certify that the application will not unfairly prejudice or unfairly discriminate against any member. Under ss 8(1) and 9(1), the application can be challenged in Court on ground of prejudice or oppression by a dissentient member or one who did not receive notice of the meeting. It cannot be challenged by a member who receives notice but does not attend or vote on the application.

Where a special majority cannot be assembled or cannot agree on the content of the constitution, then the board can register the company under s 5 or 6 or await automatic reregistration under s 13. In most such cases, the parties will, although otherwise in disagreement, prefer to proceed under s 5 or 6 as this will, more or less, maintain the status quo. Automatic reregistration will place the company under the statutory governance regime which differs in significant respects from the position of the company under the 1955 Act.

Registration under s 5 or 6 is subject to an alignment requirement. Section 5(2) forbids alteration of specified shareholder rights, eg in respect of voting and distributions; s 6(1)(b) forbids alteration of members' rights and obligations generally. Both proscriptions apply *except to the extent that* [the members'] *rights and obligations would be affected by the Companies Act 1993 by reason of the reregistration of the company*. The alignment requirements thus distinguish two kinds of alteration. On the one hand, there are alterations in members' rights which occur by reason of reregistration under the 1993 Act and differences between the 1955 Act and the 1993 Act. As examples, under s 110 of the 1993 Act shareholders are entitled to a minority buyout right and under s 129 to vote on major transactions. These rights did not exist under the 1955 Act. On the other hand, there are alterations which do not occur by reason of reregistration and differences in the two statutes. Such exogenous changes would include the replacement of voting shares with non-voting shares or the exchange of ordinary shares for a mix of ordinary and redeemable shares.

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PLANNING FOR SERFDOM: RESOURCE MANAGEMENT AND THE RULE OF LAW

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ponders the implications of the divergent interpretations of the Resource Management Act 1991. Parts of this article are based on a paper given at the Commonwealth Law Conference in Vancouver in August 1996.

INTRODUCTION

In the Commonwealth, the traditional legal model of conflict resolution is a disinterested Judge applying general rules to new facts in order to resolve an adversarial dispute between two sets of rights. The rules are to be applied to the parties equally regardless of size, wealth, status or popularity. The rules are created by a legislative authority (preserving a separation of powers) or created by precedent (following the principle that like cases shall be decided alike).

Conventional urban planning processes do not follow this form. Instead, they combine rule-making and decision-making functions; create particular rules for particular facts; grant the participants procedural rather substantive rights; and allow cases to be decided by authorities interested in fashioning particular outcomes for particular urban landscapes. This was the nature of planning law in New Zealand under the Town and Country Planning Act 1977 ("TCPA"), which was replaced by the Resource Management Act 1991 ("RMA" or "the Act") five years ago this October. It retains these characteristics in many other countries.

SERFDOM

In the United States, Professor Robin Malloy has argued that the predominant characteristics of urban planning are contrary to the rule of law; that the growing exercise of discretionary political power in planning processes has produced an age of serfdom in which legal outcomes are dependent upon personal status in the political sphere:

> In today's environment, city planners and politicians are no longer content to map out general restrictions governing land use. Rather, they seek to actively participate in real estate development – to participate in the entrepreneurial fulfilment of specific city planned projects that they themselves see as essential to the successful development and marketing of their urban identity... Public officials constantly provide ample rhetoric in support of the free marketplace, competition, private enterprise, and rugged individualism. However, in complete contradiction to this rhetoric is an urban development program based on *centralized* urban planning, *public* management, and *government* ownership of almost every major new commercial project in the urban centre... ("Planning for Serfdom – An Introduction to a New Theory of Law and Economics" (1992) 25 *Indiana L R* 621 at 628-629 and 630 (emphasis in original)).

Malloy contends that this trend threatens freedom and liberty because it concentrates power in the state and blurs the distinctions between public and private spheres:

> The requirement to act by general rules is merely one that seeks to eliminate discretionary outcome specific results that can lead to political abuse and the destruction of liberty... the state (should) not become the pervasive and undisputed source of power in the urban marketplace. (at 631)

THE RESOURCE MANAGEMENT ACT 1991

On its face, the RMA describes a radically different kind of regulation process than that of conventional planning statutes such as the TCPA. Conventional urban planning is focused upon the regulation of activities. The RMA provides for the regulation of effects. The distinction is important. The regulation of activities calls upon authorities to regulate how citizens behave, particularly in regard to land use. The regulation of effects, on the other hand, allows citizens to behave in any way they wish as long as that behaviour does not cause a prohibited effect. The Honourable Simon Upton, Minister for the Environment and one of the architects of the RMA, has maintained on numerous occasions that the Act was intended to replace the old planning process of regulating the use of resources with one that regulated the effects of that use:

> ... [Before the RMA], planners were expected to make choices for people. That's been turned on its head by the RMA. People are assumed to be able to make their own choices about the use of resources. Councils are there to see that the effects of those choices are consistent with sustainable management (Honourable Simon Upton, Address to the New Zealand Planning Institute Conference, 26 May 1995, at 2).

However, the RMA has been interpreted and applied in a different way than that described by Mr Upton. A recent report prepared for the Reserve Bank by Owen McShane (*The impact of the Resource Management Act on the "hous-*

ing and construction" components of the Consumer Price Index, August 1996) argues that the RMA has been applied by councils and planners as a traditional planning statute, rather than as an alternative approach to resource protection:

> The promoters of the RMA were hoping that alternatives to the old zones and codes, which depended on enforcement by rules controlling use, were to be replaced with a more permissive regime which would permit any activity or use, provided its environmental effects were acceptable in terms of the Act... The most common complaint from applicants is that Councils and their planning staffs have not been able to make this dramatic change in world view and continue to maintain the traditional controls of the Town and Country Planning Acts, while imposing *on top of this layer of existing controls* the additional layers of controls and procedures associated with environmental effects. (at 49)

This conclusion is supported by the allocative nature of controls included in many local plans, and by much of the commentary on the RMA, particularly within the planning fraternity. For example, Kerry Grundy, a geographer at the University of Otago, wrote in this *Journal* in February 1995:

> ... Section 5(c) [of the RMA] requires that adverse effects on people and communities and the social, economic, aesthetic and cultural conditions of people and communities must be considered when deciding whether a resource use is serving the purpose of the Act. And this is how it should be. The consideration of such issues is a necessary precondition to ensure a socially sustainable outcome. It provides a means of ensuring that a resource use is not detrimental to the community in which it takes place ("In search of a logic: s 5 of the Resource Management Act" [1995] NZLJ 40 at 41).

Mr McShane observes that the Act was enacted during a period of reform in New Zealand that strongly favoured light-handed and less interventionist legislation, but the manner of its application has created regulation which is more onerous, more discretionary, less predictable and less consistent with traditional legal principles. The report argues:

> Many of those who strongly believe that resources should be allocated by a governing elite have welcomed the "environmental movement" as a means of legitimising their aims. They welcomed the RMA as a tool to further extend their existing right to control and direct resources and have not taken kindly to the notion that the RMA was intended to "give" control of environmental effects on the one hand, while "taking away" control of the use and allocation of resources on the other. (at 44)

Had the RMA been interpreted in the manner advocated by Mr Upton, it could have reformed planning practices and taken New Zealand away from the serfdom described by Professor Malloy. As drafted, the RMA does not require councils to design outcome specific rules. It does not require the development of a centrally planned vision for land use in local areas. The legality of particular activities need not be dependent upon the discretion of planners and local officials. Instead, it could allow for reasonable certainty, for freedom of activity as long as environmental standards were observed, and for like cases to be decided alike.

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SECTION 5

The competing approaches to the application of the Act rely upon different interpretations of s 5, the purpose section of the Act. As has been pointed out on several occasions since the Act was passed, the interpretation of the Act's overall intent is dependent upon the reading given to s 5. Section 5 states:

> 5. Purpose –
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while–
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> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
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> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

At least three competing interpretations of s 5(2) have been articulated. The first, championed by Mr Upton and others, limits sustainable management entirely to ecological matters and does not require consideration of social, economic or cultural factors or health and safety. This interpretation is consistent with a less interventionist statute designed not to regulate activities but to ensure that activities do not cause prohibited effects.

The second interpretation requires a balancing between or integration of ecological considerations with social, economic and cultural wellbeing and health and safety. This interpretation, which seems to have found favour within the planning community, allows highly discretionary decision making and for resource allocation in planning. Under this interpretation, it is possible to restrict activities for social, economic, cultural reasons even if their effects are environmentally appropriate; and allow activities for social, economic, cultural reasons even if their effects are environmentally adverse.

The third interpretation gives priority to the ecological factors enumerated in subparas (a), (b) and (c) but allows social, economic and cultural wellbeing to be evaluated if the ecological requirements are met. This version of s 5 appears to be a middle ground between the first two interpretations described above, although it could also be seen as the most restrictive of the three interpretations: under it, the

Act would require the prohibition of any activity with unacceptable effects, but could also prohibit environmentally appropriate activities on the basis of social, economic or cultural considerations.

RESOURCE ALLOCATION IS NOT ENVIRONMENTAL PROTECTION

The argument in favour of a conventional planning approach to the RMA can be misconceived as an argument in favour of stronger environmental protection. Similarly, the argument that the RMA was designed as a less interventionist statute can be erroneously taken as an argument against strict environmental rules. In fact, the reverse is the case. The interpretation of s 5 upon which the conventional planning approach is based may allow activities to occur even if their effects are environmentally adverse if they are socially, economically, or culturally advantageous. In contrast, the less interventionist approach based upon the control of environmental effects does not allow for the consideration of social, economic or cultural factors. Therefore, if an activity causes adverse environmental effects, it would be prohibited regardless of its social, economic or cultural attributes. Thus, the question here considered is not *whether* government should control the use and development of land, but *how* it should decide what controls there are to be.

The determination of what citizens are permitted to do thus becomes dependent upon the opinions of other members of the public about the proposed activity

THE NEED FOR RATIONALES

Variation from accepted legal norms calls for rationalisation. For the breach of a fundamental legal principle to be justified, either the original principle itself must be flawed, or there must be something about the particular situation that makes the principle unnecessary or inappropriate. In the absence of an argument against the broad principle that there should be disinterested equal application of generally applicable objective rules, are there particular considerations in the environmental and planning context that justify abandoning this model? Considered below are three popular justifications for a particularised, discretionary approach to planning and environmental protection: scientific uncertainty, non-equilibrium in ecosystems, and the consultation of "stakeholders" in the search for the best interests of the community.

(a) Scientific uncertainty

There is significant scientific uncertainty about numerous aspects of environmental impact, including the nature of ecosystem function and change, toxicity of hazardous substances, causal mechanisms of environmental disease and many others. In the face of uncertainty, it is appropriate to exercise caution, particularly in the environmental context. However, the conclusion that scientific uncertainty requires that proposed activities be considered on a case-by-case basis reflects a misconception of the legal process. It confuses rules with evidence. Scientific uncertainty does not mandate legal uncertainty. Courts frequently decide cases fraught with conflicting expert evidence. The existence of scientific uncertainty does not prevent the articulation of the basic legal propositions which will govern particular cases, nor does it require deviation from general principles of adjudication. The use of generally applicable rules does not foreclose the application of the precautionary principle to cases in which the facts are not clear.

(b) Non-equilibrium in ecosystems

One of the most significant areas of scientific uncertainty in the environmental field is ecosystem function. In the past, ecosystems were thought to evolve to a state of equilibrium, or steady state, in which the relationship between system elements was settled and predictable. There is now evidence to suggest that ecosystems are in a continuous process of evolution and change. If this is so, it is far more difficult to measure and predict the effect of human activity on ecosystem elements because there is no fixed or "neutral" state.

It has been argued that the existence of non-equilibrium in ecosystems requires an interventionist approach to environmental protection, one which designs particular planned outcomes for particular landscapes. Consider two statements, the first from biologist Daniel Botkin of the University of California: "The task before us is to understand the biological world to the point that we can learn how to live within the discordant harmonies of our biological surroundings, so that they function not only to promote the continuation of life but also to benefit ourselves: our aesthetics, morality, philosophies, and material needs ... Nature in the twenty-first century will be a nature that we make" (*Discordant Harmonies: A New Ecology for the Twenty-First Century* (New York: Oxford University Press, 1990) 191-193). This approach is consistent with the views of Michael Crozier of the Department of Geography at Victoria University of Wellington, who has suggested that from "a social and legal point of view, the questions must be: 'What is the tolerable rate of change, are the changes adverse or beneficial, and what can we reasonably do about them, bearing in mind the life style expectations of the community" (Letter to the Editor, *News Vuw*, 15 April 1996, 14).

There are at least two problems with the approach reflected in these statements. The first is that its fulfilment requires a central authority to decide what aesthetics, morality, philosophies and material needs should be promoted at the expense of other versions of those values. The "we" referred to in both quotes is the same governing elite described in the McShane Report which would control and direct resources to fashion results according to its professional judgment.

The second problem is that the approach confuses two distinct kinds of ecosystem change, that which is consistent with natural evolution, and that which is caused by disproportionate human interference. Its object is to manage ecosystems; not to prevent or limit change caused by human activity, but to actively manipulate environments to suit "the life style expectations of the community". In this respect, it protects natural systems less than the bottom line approach described by Mr Upton. Non-equilibrium theory is a variation, not an opposite, of equilibrium theory; systems that change over the long term often have elements that are in equilibrium over the short term. The existence of non-equilibria in ecosystems does not foreclose either the objective of environmental preservation nor the use of general rules.

(c) "Stakeholders" and public consultation

In planning parlance, "stakeholders" are citizens who have particular interests that may be affected by particular planning and resource allocation decisions. Under the RMA, stakeholders are given the opportunity to express their views on particular proposals (such as on proposed rules in plans or particular resource consent applications). The decision maker is then able to weigh competing views and determine the overall public interest.

This approach broadens standing rights. However, it provides all parties with only the procedural right to be heard. In the absence of substantive rights, all parties are subject to the discretionary nature of the decision to be made. There is a real risk that the public interest will be confused with public opinion. The determination of what citizens are permitted to do thus becomes dependent upon the opinions of other members of the public about the proposed activity. It is true that many activities can have far reaching environmental impacts and affect many members of the community. Such activities should be restricted. The issue, once again, is not *whether* there ought to be prohibitions against environmentally harmful activities, but *how* those prohibitions are to be determined. That members of the community would be detrimentally affected means that there should be general rules prohibiting such activity, not that those members need to be asked for their opinion of the outcome in a particular case. Asking a planner to search for the "public interest" is little different from asking a Judge "to do justice" in the absence of rules or precedents, something the legal community would abhor.

THE NEED FOR GENERAL RULES

In New Zealand and throughout the Commonwealth, environmental rules lack precision and thus call for wide discretion in the formulation of regulations and in the resolution of particular cases. Predominant environmental ideas like sustainable management, sustainable development and inter-generational equity are vague, lack content, and are capable of producing vastly different outcomes on the same set of facts depending upon the inclination of the decision maker. They therefore encourage adjudication that is arbitrary and fact-dependent.

Ideal rules are sufficiently abstract to be generally applicable and sufficiently precise to direct outcomes. They are capable of answering the question "What are citizens allowed to do?" In New Zealand and elsewhere, environmental law lacks such rules. Their formulation is difficult, but necessary and possible (for an example, see B Pardy, "Sustainability: An Ecological Definition for the Resource Management Act 1991" (1993) 15 NZULR 351).

CONCLUSION

Discretionary outcome-specific rules, central planning and public hearings are inadequate as the main tools for land use and environmental decisions. Their characteristics are contrary to accepted legal norms and allow, indeed require, ad hoc decision making. A free marketplace requires knowable objective rules applied by disinterested decision makers. Present planning processes do not provide these things. Lawyers who act in the present resource management rubric may be the only ones in a position to direct the development of a better technique.

FURTHER READING

Malloy *Planning for Serfdom: Legal Economic Discourse and Downtown Development* (1991)

Day "Resisting serfdom: Making the market work in a Great Republic" (1992) 25 Indiana L R 799

Ryan "Freedom of Property – An urban planning perspective (1988) 11 UNSWLJ 48

Makuch "Zoning: Avenues of Reform" (1973) 1 Dalhousie LJ 294

Williams "Development Controls and Planning Control" (1964) 19 Rutgers LR 86.

Bruce Pardy's book "Environmental Law: A Guide to Concepts" *published by Butterworths, is now available in New Zealand* ❑

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Whilst it is easy to construct examples which illustrate the distinction, the operation of the alignment requirement is quite problematic in some quite common cases. Suppose the articles require shareholder approval for a new issue and the constitution proposed by the board under s 5 or 6 is silent on the matter. The application would appear to contravene the spirit of the alignment requirement inasmuch as it leaves the board free to issue shares without shareholder approval under s 42 of the 1993 Act. However, it is at least arguable that the application does not restrict any of the rights specified in s 5(2) and falls within the exception for endogenous alterations under ss 5 and 6. Similarly, it is not clear whether the exception extends to constitutional provisions which authorise the company to indemnify and insure directors, to issue redeemable shares, to purchase own shares and to make special offers for shares. The company did not have these powers under the 1955 Act.

CONCLUSION

Like any commercial legislation, the reregistration statute is bound to occasion its share of surprises, misadventures and disputes. Surprises are in store for the shareholders of the many companies that are likely, by default, to be automatically reregistered. In incorporated proprietorships, primary shareholders will find their business subject to a statutory regime which is made unduly onerous by the presence of the notional shareholder. The members of multi-person companies will lose all the control powers which were conferred by the company's articles but which under the statutory regime are vested in the board.

The most likely misadventure will arise in the reregistration of incorporated proprietorships. The optimum procedure for such companies is to eliminate the notional shareholder in connection with reregistration and then proceed without a constitution. Instead, many such companies will be reregistered as two person companies, which necessitates the use of a constitution. Such companies will have lost the availability of the 1955 Act as a basis for eliminating the truculent or absent notional shareholder.

The most likely source of dispute will involve boards which are tempted to have their cake and eat it too. On the one hand, the board will wish to include in the constitution provisions which authorise the company to buy back its shares and to indemnify and insure the directors. On the other, to preclude renegotiation of the company's governance, the board will prefer to reregister under s 6 without having to consult the members. The outcome depends on the interpretation given to alignment requirement under s 6(1)(b). ❑