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THE LAW COMMISSION

The President of the New Zealand Law Commission, Justice David Baragwanath said, in his December message:

> The only good reason for reforming the law is that we hope it will improve people's conditions in the future.

This is a thought provoking comment. The first thought is that there is only one thing that can improve everyone's conditions, and that is economic growth. That is not to say that economic growth will always improve everyone's conditions, but that it is the only process which can. Any other process can only improve the conditions of some at the expense of others. That requires policy choices which ought to be taken by an accountable government, and choices which ought not to be open to even to an accountable government since they involve oppression of minorities.

So how are we, and the Law Commission, to take seriously the provision in the International Covenant on Economic, Social and Cultural rights that everyone has a right to the continuous improvement of their living conditions? And what is the role of the law in that?

There are some fundamental difficulties at this point. The first is that what constitutes an improvement is subjective. Hence, the US Constitution recognises a right to the "pursuit of happiness" and sets obstacles in the way of the government deciding what happiness consists of and trying to deliver it. In the end the government cannot even promise economic growth. All it can do is create the conditions for it. The rest is up to the private sector.

Governmental attempts to improve peoples' conditions therefore run a number of risks. One is that they will not actually deliver the goods intended. As remarked before, there are two reasons for this, the problem of knowledge and the dynamic nature of the system.

The next risk is that the system will become captured by interest groups and end up delivering happiness only to a small number of people who benefit from the system, often by obtaining access to public money which they have the power to disburse. This is why programmatic reform of the private law is fraught with danger. The reform body simply becomes a target for lobbying and staff capture. The private law should be developed by an unconscious process of case by case decision, except where it has clearly got itself into a blind alley. Of course we do not need a standing Law Commission to point out when that has occurred. The final risk is that even if a policy delivers exactly what was intended to the people intended to receive it, it may not reflect their priorities or wants at all. It can only then be justified by a claim that "we know better".

There is a reasonable level of consensus on what conditions will assist economic growth (assuming people wish to pursue it). These include a structure of well-defined property rights, of law which applies equally to all with as much prospective certainty as possible and confidence that the law will actually be enforced. These also happen to be the conditions which maximise individual freedom.

It is therefore no surprise to find studies indicating that once taxation rises above about 15 per cent of GDP the return from taxation starts to diminish and once it reaches about 20 per cent of GDP it starts to put a brake on economic growth. At that point, the government passes from the maintaining the conditions above to what its supporters call redistribution, but which is actually largely a money-churning process.

There is obviously nothing the Law Commission can do one way or the other on the money-churning issue, so what do these considerations imply for its role?

First it should pursue the removal of privilege, in its correct sense of private law. The law should apply equally to all. Privileges are not only objectionable in principle but have the unfortunate dynamic effect of diverting effort into the lobbying of government to obtain them. This implies that the Law Commission should be explaining to the government and to the public the problems with provisions such as the so called anti-dumping legislation. This requires the Minister to impose countervailing duties when an import is being "dumped", the definition of which tends to be vague, and when the importation will harm, not the New Zealand economy as a whole, but the particular New Zealand industry. The law may therefore require the general welfare to be harmed in order to benefit a particular group.

Next, the Law Commission should pursue clarity and certainty and deprecate legislation which appears to have the effect of transferring decisions into the Courts. The clearer the rules, the more individuals can get on with their lives without having to lobby public servants or pursue cases in Court in order to have an issue decided. The vaguer the rules, the more effort is diverted into these activities.

Finally, the Law Commission should make clear what its guiding principles are. Helena Kennedy QC said at the Dunedin Law Conference that equality cannot be guaranteed by equal treatment. This is of course correct. A free society based on rules which apply generally and prospectively cannot be guaranteed to produce any particular outcome, it will produce the outcomes that the individuals within it choose to pursue. Another way of expressing this thought is that the pursuit of social goals is incompatible with the rule of law. This issue has been fudged by the law schools for the last generation, the results of which have started to become apparent in the legal system. One of the questions the Law Commission must surely consider is "what do lawyers have to say about society that is different from what anyone else has to say?". And if the answer is not that contained in this paragraph, what is it? ❑

SIR CLIFFORD RICHMOND

Lord Cooke of Thorndon

gave the address at the funeral service for Sir Clifford Richmond, St Mary's in Holy Trinity, Parnell, Auckland, 3 February 1997

Photo: courtesy Bell Gully Buddle Weir

Clifford Parris Richmond – Kip to us all, thanks to a small difficulty he had in pronouncing his name as a child – was born in 1914 and was to become probably the most illustrious member of an illustrious New Zealand family. The family's English roots may be traced back to the Richmonds of Highhead Castle in Cumberland. One Christopher Richmond lived from 1714-94. A grandchild of his, Kip's greatgrandfather, Christopher, practised at the Chancery Bar in the early years of the nineteenth century. The eldest of his four children was Christopher William Richmond, who emigrated to New Plymouth partly for reasons of health – he is described as asthmatic and frail. That did not prevent his rising to become a Minister of the Crown, Maori Affairs being his main responsibility, and later a revered Supreme Court Judge. His photograph occupied a commanding place in Kip's chambers in the Court of Appeal: there is an unmistakable family resemblance, especially in those keenly penetrating eyes.

The second of the four children was James Crowe Richmond, perhaps now best known as an artist and as father of the artist D K Richmond. The youngest son was Kip's grandfather, Henry Robert Richmond, through whose second marriage, to a daughter of the prominent New Zealand civil servant Robert Reid Parris, Kip's second name came into the family. Kip's father Howard Parris Richmond was a leader of the Auckland and New Zealand Bar. In *Portrait of a Profession* Sir David Smith wrote of Howard Richmond:

> ... Howard Richmond was properly aware of his ancestry. With his lithe body, large head, blue eyes, and incisive mode of speech, he gave the clear impression of being what he was, an intellectual dealing with practical affairs. He seemed to me to see life clearly and to know precisely what was right and what was wrong. There were no greys in his cosmos. There were even times when his apparent attitude of superiority could be felt. Nevertheless, in personal relationships, he was often witty and delightful.

Some of that is true of Kip also, but by no means all. Only a few days before Kip's death I had a visit from a university professor who is writing a history of the New Zealand Court of Appeal. He remarked that what struck him most in his interviews with Sir Clifford Richmond was his modesty and his kind references to his colleagues. Possibly the professor himself was being kind in not saying that these qualities distinguished Kip from the rest of us.

Kip was sent to boarding school, first to Hereworth in Hawkes Bay and then to the Wanganui Collegiate School, where he was in Selwyn House from 1928 to 1931. His legal education was at Victoria and then Auckland University College. He graduated LL.M with first class honours and did some part-time lecturing and examining, but there was never any likelihood of his becoming an academic lawyer. His father's firm Buddle Richmond, later Buddle Richmond Weir, now a part of Bell Gully Buddle Weir, lay in wait; but first he had two years as Associate to Sir John Reed in the Supreme Court, learning some law and, possibly more importantly, typing skill. Throughout his career in the law he remained an intellectual dealing with practical affairs, with the emphasis on the latter. He considered that the cobbler should stick to his last, that a Judge should devote his mental energies to the sufficiently exacting responsibility of judging. Such was the path that he followed with scrupulous integrity until the end of his judicial service.

Kip made many wise decisions, none more so that when he sought and won the hand of Valerie Jean Hamilton in 1938. Their long and happy marriage has been a true example of what lawyers have come to call the marriage partnership. The three children, eight grandchildren and (so far) two great-grandchildren, mean that these distinguished genes will go on and on.

Not long after the marriage came the Second World War. Kip served in the Fourth Field Regiment in North Africa and Italy. He was mentioned in despatches, attained the rank of major and became a personal staff officer to General Freyberg. Kip and Graham Speight (now Sir Graham) took over from John White (now Sir John) and Jack Griffiths. General Sir Leonard Thornton remembers the arrival of Kip as "a quiet, unassuming, whimsical sort of fellow". Kip returned to New Zealand on the same ship as his close friend Jock

Twigg. There is no truth at all in the story which Kip used mischievously to retail that as the vessel approached the Auckland wharf they saw their respective brides waiting and had some little hesitation in deciding which was which.

Kip practised as a partner in the Auckland firm for 15 years, establishing a reputation as a first-class adviser, particularly in matters of commercial law. Another partner in the firm was one who was to become our judicial colleague, Sir Maurice Casey as he is now. And it was no doubt through the professional connection, for the firm acted for Wilson & Horton, that Kip formed an enduring friendship with Budge Hintz, renowned editor of the *New Zealand Herald* and master fisherman.

In practice Kip was not primarily a Court man, although his services as a junior to A K North led to an appreciation of his value later reflected in his appointment to the Court of Appeal in 1972 when later Sir Alfred retired from the presidency. His appointment to the (then) Supreme Court occurred in 1960. It had been announced about the time of one of the New Zealand Law Society's triennial conferences in Wellington, and the first words I heard Kip speak, the first of very many, were as he walked away from the Heretaunga golf house after the closing ceremony. It was only a remark about the autumn weather, yet there was a serenity and authority about it which struck me as a portent of his judicial performance. He would judge people and problems as calmly and objectively as the weather.

Kip and Val served first in Christchurch. I use the plural deliberately, for their home and social activities were as significant in that city as his studiously fair and efficient work on the Bench. There was a vivacity to which Christchurch had not been altogether accustomed in its Judges; a kindly interest in the younger members of the profession, in and out of Court; and an outspoken and relaxed conviviality which Kip and Val both had the gift of creating. A congenial feature of the Christchurch period was Kip's renewed association with his comrade in arms Walter Dougall, then a resident Stipendiary Magistrate.

There followed a time as one of the Judges resident in Auckland. To this belong some notable judgments of his in the Supreme Court. Only last month, in preparing a judgment to be delivered in the House of Lords, I had occasion to consult his judgment in a case about town planning in the borough of Birkenhead, and to admire again the clarity which was his judicial trademark. He joined the Court of Appeal under the presidency of Sir Alexander Turner, the other member being Sir Thaddeus McCarthy who quite soon succeeded to the presidency. On McCarthy's retirement in 1976, Kip himself succeeded. It is the custom for Presidents in signing judgments to add after their name the letter P, and I recollect the quiet pride with which Kip asked me to witness the first occasion on which he did this. "The P', he said, "is put'. In the meantime Sir Owen Woodhouse had been appointed to the Court. A Court of three, Richmond, Woodhouse and Cooke, continued for a year or two and they were happy years of collaboration (with some legitimate differences) but the growing workload required the expansion of the Court. Sir Ivor Richardson became the fourth Judge, and by the time that Kip decided to retire, in 1981 at the age of 67, Sir Duncan McMullin and Sir Edward Somers had joined the Court.

In 1980 Kip had spent a term sitting in the Privy Council in London. He sat on at least one important case there, a constitutional appeal from the Bahamas, but I have sometimes wondered whether he was fully valued by his English and Scottish colleagues. Although he lacked nothing in acuity or speed of thought, he did not like to be hurried in his delivery, whether in debate during a hearing or in oral judgments (he could deliver these for more than an hour with uncanny precision) or in putting on a golf course. He was not quite the sort of Judge to whom they were used in Downing Street. On their way home Kip and Val were warmly received in Canada, and he retained particularly agreeable memories of some Canadian Judges as well as of some of his colleagues in the Privy Council, of whom he would often mention Lord Salmon.

As the leader of the Court, Kip's yoke was mild and considerate. Although there were a dozen years between us, we became fast friends and in recent years annual meetings with Kip and Val at Lake Taupo were always looked forward to and enjoyed to the full by Annette and me. He had the long term wellbeing of the Court at heart, nor did he shrink from difficult personal confrontations on issues where he saw it threatened; just as with courage he faced serious health problems in later life.

As a Judge, he was a superb analyst. Although instinctively cautious, he could become persuaded that a bold line was the right one. His judgment in the building negligence case, *Bowen v Paramount Builders*, survived criticism in the House of Lords to be vindicated by the Privy Council only last year. His courtesy to counsel was inveterate and his patience such that a scene in his Court was unthinkable.

An event during his presidency of special Auckland interest was a sitting of the Court of Appeal in this city, for logistical reasons, in the *JBL* case. The hearing occupied the best part of two months, still a record for the Court of Appeal in any one case. Kip presided; I was the other permanent member of the Court; and the third Judge was Mr Justice White, seconded from the Supreme Court for the occasion.

During our sittings Chief Justice Wild died in Wellington, and I remember, some time later, the then senior puisne Judge, Mr Justice Perry, bringing round to introduce to us in Auckland – though he needed no introduction – Ronald Davison QC, who had been appointed as Wild's successor and is able to be present today.

Kip's love of orderliness and clarity was reflected in his leisure pursuits also. Scrupulously neat and attractive watercolour paintings were executed with another talent in the genes. He was an accomplished carpenter – or cabinetmaker, as he described it in a *Who's Who* entry. In cabinets in the political sense he did not share C W Richmond's active interest; he eschewed any political connections. At one time he was virtually a scratch golfer. His physical achievements were remarkable for one with a slight unsteadiness of hand, a wartime legacy. And when fortification with a little gin was seen as appropriate, it was measured in intervals and quantities consistent with his judicious approach to living as a whole.

Kip enjoyed wide affection. He was genuinely loved by many, most deeply of course by the family in which he was husband, father, grandfather and greatgrandfather. I believe that no less than ten of them are here today, which would have given him pride. To Val, Gail, John and David and all the younger ones we express our heartfelt sympathy, tempered only by the consolation of knowing that, despite the afflictions towards the end, he lived a long and predominantly happy life, full of distinguished service to our country. In every sense he will be remembered as indeed Right Honourable. ❑

WHAT IS A "TREASURER"?

David Caygill, Buddle Findlay, Wellington

discusses the legal and practical aspects of this new office

One of the most striking features of the new coalition government is the appointment of Winston Peters to the position of Treasurer. Apart from the political ramifications of his resurrection six years after his brief Cabinet appearance as Minister of Maori Affairs, there is the novelty of the position itself. What does the job of Treasurer entail and how will it mesh with that of the Minister of Finance – the still redoubtable Bill Birch?

The nomenclature is Australian. Here as there, there is to be both a Treasurer and a Minister of Finance. Here, as in Australia, the Treasurer is to be the senior position. Paul Keating was the Treasurer, not the Minister of Finance, when he likened Australia's prospects to those of a "banana republic" and when he won a Euromoney award for the year's best performance in a finance portfolio.

But if the title has been imported from across the Tasman, other institutional arrangements have not. The departmental structure will be quite different. Australia has both a Treasury and a Department of Finance. Each Minister heads his or her own department and receives separate advice. The roles are correspondingly separate; in effect the Australian Minister of Finance is the Minister in charge of expenditure control.

The nearest equivalent in New Zealand in the past has been the head of the Cabinet Expenditure Committee (now the Cabinet Expenditure Control and Revenue Committee). This Committee has usually been chaired by a Minister with other portfolio responsibilities than finance; it has not been a ministerial job in its own right. Doug Kidd did this task when he was Minister of SOEs. Derek Quigley did it many years before. Normally, the Minister of Finance retained overall control and responsibility for fiscal, monetary and economic policy as well as for the government's expenditure. Now many of these functions are to be exercised by the Treasurer.

Such has been the interest in how their respective tasks might be allocated that a formal protocol has been established and released by the Prime Minister. Mr Peters is to be the senior Minister. He will be responsible for preparing the Budget and presenting it to Parliament. He will be responsible for the Reserve Bank Act and for monetary policy (though in practice the Bank is independent both in a day-to-day sense and in the sense that it is separately accountable to Parliament). Mr Birch has also been appointed as Minister of Revenue and will be responsible for the Inland Revenue Department and for the administration of the taxation system.

One of the New Zealand First MPs, Mr Delamere, has been appointed Associate Treasurer. He, rather than Mr Birch, will chair the Cabinet Expenditure Control and Revenue Committee. All three "finance ministers" will serve on this Committee, as will the Prime Minister. All three will receive copies of Treasury reports to any one of them.

Two consequences flow from these arrangements. First, each will be able to keep an eye on the other two. Just as important, however, is that sitting around the Cabinet table will be three Ministers directly briefed by Treasury. Apart from Mr Peters, the winner in all this is clearly the Treasury. It has not been split as its detractors have occasionally sought. Rather, its capacity to influence government has arguably been enhanced – though, of course, final responsibility remains as it should with Ministers.

How the system works in practice will depend less on formal protocols or the precise division of responsibilities and more on the temperament and work habits of the three Ministers. First impressions suggest that the new Treasurer is imposing a discipline on himself rarely seen before. The presentational skills he honed so effectively in opposition will now be put to different use. Possibly Mr Peters will concentrate on the big picture issues, like compulsory superannuation. In contrast, Mr Birch has an experienced eye for detail and looks very much his old self: unflappable, determined and dedicated. Mr Delamere is less well known. Perhaps he too will end up doing the detailed work, while Mr Peters looks after the public presentation of economic policy as well as the many tasks involved in leading New Zealand First and being the Deputy Prime Minister.

Thus far the relationships between the three Ministers seem entirely professional. The three are ensconced on the seventh floor of the Beehive.

All that remains to perfect these arrangements is the passage of legislation formally to change the reporting responsibilities from the Minister of Finance to the Treasurer in Acts such as the Reserve Bank Act, the Overseas Investment Act and the Fiscal Responsibility Act. No doubt the necessary Bill is already drafted and has been awaiting the formation of the new select committees. It is necessary not because statutes like the ones cited refer to particular Ministers (any Minister can act for any other) but because the House requires Ministers to be absent before others can speak on their behalf.

All in all one suspects that the different party labels will not matter greatly to the success or failure of this trio, nor will the nominal responsibilities of each Minister. No doubt the individual characteristics of personality and ability will shine through from time to time. In the end however, they will succeed or fail on the strength of the government's overall performance – in which, of course, they will play a large part. ❑

SECRET LAW?

Scott Optican, The University of Auckland

experiences difficulties with suppression orders

In his great novel, *The Trial*, Franz Kafka relates the parable of a man seeking entry to the door of "the Law". Though the door is open, and the man can peer inside, the doorkeeper will not grant him passage. Believing that "the Law ... should be accessible to every man and at all times", the applicant tries throughout his entire life to gain admittance. Failing miserably, and near death, he is inspired to ask the doorkeeper a final question. "Everyone strives to attain the Law", he whispers, "how does it come about, then, that in all these years no one has come seeking admittance but me?" Perceiving that the man is near his end, the doorkeeper replies: "No one but you could gain admittance through this door, since this door was intended for you. I am now going to shut it."

Among other observations, Kafka's tale speaks to the reality – and the myth – of what modern legal thinkers refer to as "open justice". That principle, deeply enshrined in Anglo-American jurisprudence, encompasses the belief that law should be public, known and accessible to all. Affirmed throughout the decades by Judges, lawyers and legislators alike, open justice suggests that, at a minimum, information must be available as to what the law prohibits and what it allows. This is why statutes are published and judicial decisions are reported. Democratic societies have always rejected, and rightly so, any possibility of "secret law".

Yet, as I recently discovered, secret law, and the potential for secret law, exists in New Zealand today. Like the protagonist in Kafka's story, I too know what it feels like to peer through law's door without being permitted inside.

As a law lecturer, part of my job is to write and (hopefully) publish articles about current legal trends. In April, 1996, I completed a piece for the *New Zealand Law Review* (hereafter "the *Review*") on recent developments in s 21 of the Bill of Rights (regulating police search and seizure). The article, which has since appeared at [1996] NZ Law Rev 215, included a discussion of a (then) unreported interlocutory judgment issued by the Court of Appeal in *R v Barlow* (CA 144/95, 26 May 1995). As is well known, John Barlow was convicted in November, 1995, after three trials, of murdering Eugene and Gene Thomas, two Wellington businessmen. The Court's decision, issued before the first trial commenced, dealt with the admissibility of post-charge statements made by Barlow and tape recorded surreptitiously by the police. The 91 page appeal (comprising five separate judgments) contains highly significant discussions regarding the impact of the Bill of Rights on search and seizure, the right to counsel and the right to silence. It was, and remains in my view, the most important criminal procedure case of 1995. Hence my decision to feature it in the article noted above.

Though my piece was submitted to the *Review* well after the *Barlow* trial(s) had concluded, an issue soon arose regarding a suppression order outstanding in the case. On the cover of the unreported judgment I had written about was printed the warning: "[p]ublication prohibited until further order of the Court". The individual decision of Cooke P contained a similar ban. "By consent", noted the then President, "there will be an order prohibiting the publication of any part of this judgment until the further order of the High Court or this Court" (p 14). Though the Justices did not elaborate on it, the order seemed designed to prevent potential prejudice stemming from pre-trial disclosure of evidence recited in the judgment itself. A little checking confirmed that, although the trial was over, suppression was still in force and effect. This, of course, made publication of my article impossible. Further inquires revealed that, due to the Court of Appeal's blanket ban, other colleagues had also been prevented from writing about the case. It soon became clear that, until the order was lifted, no legal journal or updating service would allow published commentary on the decision. Though issued almost a year earlier, the judgment remained essentially hidden from public awareness or review. (It also appeared unknown to many in the profession, including criminal law practitioners for whom knowledge of the holdings in the case would have been quite valuable.)

Believing that continued suppression of *Barlow* was unwarranted – and anxious to get into print –I enlisted the help of Janet McLean, a colleague and the *Review's* editor, to overturn the Court's order. A letter was drafted to Justice Richardson, by then the Court's President, explaining the situation and expressing the *Review's* strong interest in publishing articles about the case. The letter appealed to the principle of open justice and argued that no good reason existed to continue the ban. It noted the over-inclusiveness of the suppression order, pointing out that, while forbidding publication, the Court had itself cited *Barlow* in a subsequent decision (*R v Wong-Tung* (1995) 13 CRNZ 422). Finally, the letter pointed to the significance of the judgment itself and the public and professional interests involved in ensuring "an accurate picture of current law".

The facsimile response from the Court was prompt though disappointing. We had hoped that the Justices, seeing the importance of the issue, would take action on the matter and vary the order of their own accord. Instead, Richardson P wrote that the Court could not modify the decree without "notice in the usual way and a fixture arranged for that purpose". Standing on procedure, he suggested that, alternatively, the parties themselves could apply for a consent order lifting the ban.

As a result of this communique, we decided to contact the Crown Law Office directly. In a letter similar to that sent

to the Court, we asked the Solicitor-General to petition for modification of the suppression order in the *Barlow* case. Again, our application rehearsed arguments about open justice and the public interest in knowing the law. Indeed, it suggested that, in any case where the Crown is a party, government lawyers have "an obligation to ensure the timely public reporting of legal proceedings". Our position, to which we invited the Solicitor-General's agreement, was that "to avoid the spectre of 'secret law', the Crown should not consent to delay publication of any significant judgment beyond what is absolutely necessary to maintain fair trial rights". With only the appeal pending, we suggested that any actual prejudice to such rights was, at this point in the *Barlow* proceedings, "speculative at best".

About a week after the letter was sent, the Crown Law Office wrote to say they would look into the matter. A little while after that, the Solicitor-General telephoned Ms McLean to inform her that an application to vary the suppression order would be lodged with the Court. On June 4, 1996, Crown Counsel informed us that the Court had granted the application – unopposed by the defence – to permit publication of the *Barlow* decision. Only the name of a Crown witness would continue to be suppressed. The Court of Appeal upheld Barlow's conviction in a judgment issued on August 21, 1996. My article appeared a few weeks later, many months after its originally planned release date. The interlocutory appeal in *Barlow* was finally reported in October, 1996 (*see* 14 CRNZ 9), almost a year and a half after it was decided and approximately eleven months after a verdict was reached in the case.

What, then, is the moral of this story? Unlike Kafka's parable, the modern doorkeepers of the law did, in this instance, permit access to its mysteries. Indeed, in the best tradition of open justice, both the Crown Law Office and Court of Appeal eventually took steps to ensure publication of the *Barlow* case. Questions remain, however, as to why such measures became necessary in the first place, and how academics having no involvement with the judgment came to be the catalyst for its circulation. Why, in other words, was such a sweeping ban imposed at all? Could it not have been tailored, as have other suppression orders, to protect the accused's fair trial rights *and* permit public discussion of the decision? (It could.) And should the order not have expired, of its own accord, after the *Barlow* trial had concluded? (It should.) Reflecting on the experience, I am convinced that the point of this tale has more to do with process than results. That is, like Kafka's fable, its moral draws from the struggle required to achieve an outcome rather than the outcome eventually reached.

Well, perhaps not such a struggle – only a few letters after all – but more than should ever have been necessary. *Barlow* is a good demonstration of how, in the rush to protect fair trial rights, Courts (and litigants) can overlook equally important concerns related to the timely and public reporting of law. It also shows how, despite laudable intentions, suppression of the facts of a case can block awareness of its issues and holdings as well. Take for example, the non-publication order made (and now lifted) in the Court of Appeal's judgment upholding David Bain's 1995 conviction for murdering five members of his family. At the start of the original reported version of the decision, *see* [1996] 1 NZLR 129, an editorial note informed readers that only part of the Court's judgment was being published. The reason, stated the note, was that "[t]he Court issued an order prohibiting publication of the name, identifying particulars of Mr A [the admission of whose hearsay testimony was the sole issue on appeal] and the substance of his evidence". The result, concluded this caveat, was that the remainder of the judgment could not "adequately and sensibly be reported without breaching this order". Though certainly warranted, such editorial caution resulted in a patchy and unsatisfying presentation of the Court's reasons for dismissing the appeal. It was only when the suppression order was lifted – thanks to the efforts of lawyers for Television New Zealand – that the public was able to hear all the facts and circumstances of the case. (Resulting, I might add, in a flurry of media debate questioning the Court's decision not to admit the controversial evidence and set a new trial. Regardless of one's feeling about the *Bain* decision, such debates are a healthy by-product of open justice and are threatened by the kind of sweeping suppression orders often made in a criminal case.)

The *Barlow* trial was, of course, an unusual proceeding. The length of time required to bring the case to a conclusion certainly magnified, in unforeseen fashion, the effect of the Court's order barring publication of the interlocutory appeal. However, had the ban been more focused in the first place, the effects of such a delay might have been minimised. Indeed, had suppression been tailored to cease after a verdict was reached – which is effectively what occurred – the judgment could have been published, and written about, long before those events actually took place. Because no such accommodations were made, the *Barlow* suppression order resulted in a significant and largely unwarranted chilling effect on public awareness of the decision. It also squelched, for a unreasonable amount of time, much academic comment about this important Bill of Rights case.

In her article, "The Principle of Open Justice in a Civil Context" [1996] NZ Law Rev 214, lecturer Morag McDowell decries the use of suppression orders "so wide ... as to have the effect of making [a] case completely invisible to the general public". Her suggestion, applicable to both civil and criminal proceedings, is that a suppression order be no broader than is necessary to achieve the due administration of justice. This will require orders that take into account both the position of individual litigants and the public's right to knowledge of ongoing legal proceedings. Noting that "a wide variety of interests must be balanced", McDowell comments that suppression orders could specify "the time when publication can occur, or the group of persons to which publication is allowed to be made". (p 232) To that I might add, "and the people allowed to write about the decision", namely, academics and others charged with the ongoing responsibility of discussing current developments in the law. To do that job effectively requires, above all, the ability to publish in a timely fashion without fear of breaching suppression orders made in a given proceeding. At a minimum, publication bans should be accompanied by clear judicial reasoning justifying the form of order in any particular set of circumstances. Sadly, no such exercise occurred in the *Barlow* case. ❑

Editor's Note: Mr Optican is far from the only person to suffer from such problems. Numerous other examples could be found. Readers are referred to, for example, *Rankine v Attorney-General* (1992) 6 PRNZ 484. This was subject to a series of rapidly changing restriction orders under R 72A, High Court Rules. These require the interpretation of phrases such as "recognised law reports and legal journals" "official Law Reports" and "regular series of law reports". At the time the report was printed the decision and the reasons for it could be reported but not discussed in a journal. Anyone wishing to discuss it will presumably have to check with the Court as to the current status of the R 72A order.

RECENT COMPLAINT EVIDENCE

Annabel Markham, Barrister and Solicitor, Auckland

reviews the discussion in* R v H, *especially the dissenting judgment of Thomas J

In November last year, the Criminal Appeal Division of the Court of Appeal delivered its judgment in *R v H* (CA289/95, 28 November 1996). The appellant had been convicted on trial in the High Court of multiple sexual offences against his 13-year-old niece. His appeal against conviction was advanced on five grounds, all of which the Court unanimously found to be without merit. The case would have been unremarkable had it not been for Thomas J's decision to write a separate judgment on the fourth ground of appeal, which challenged the admissibility of certain complaint evidence at trial. The complaint in question was a second complaint and had been made 16 months after the last of the offending.

The recent complaint rule permits complaints of sexual offences to be admitted by way of exception to the ordinary restrictions on hearsay and prior consistent statements. The complaint evidence has no probative value in terms of any fact at issue; it simply demonstrates consistency with the complainant's account and bolsters his or her credibility. To be admissible, the complaint must be made at the "first reasonable opportunity" (*R v Nazif* [1987] 1 NZLR 122).

The rule is sourced in medieval history. Thomas J embarks on a detailed historical review of the rule, tracing it to the requirement during the Middle Ages that victims of violent offences raise an immediate "hue and cry", alerting neighbours of the attack. Failure to do so constituted a defence. Over time this defence disappeared but – "reflecting an openly expressed fear of false accusations by women" – the absence of early complaint nevertheless continued to weigh heavily against rape complainants' testimony (for a similar account, see also Fletcher-Dawson, "The Abrogation of Recent Complaint: Where Do We Stand Now?" 27 Crim LQ 57, 59-62 (1984-85)). Although initially confined to rape complaints, the scope of the rule eventually expanded to include complaints made by males or females in all sexual cases (see *R v McNamara* [1917] NZLR 382).

Thomas J's central thesis is that the recent complaint rule, as presently formulated, is based on two outmoded myths or assumptions about women:

> The first is that the "natural" reaction of a "normal" woman is to complain promptly after being raped. The second is that women are prone to fabricate false allegations of rape.

The Judge acknowledges that these myths reflect discernibly male perceptions of the nature of rape and of female psychology (see also McDonald, "Sex, Lies and Relevance" (1994) 19 Alt LJ 215). His Honour demonstrates that while the more overtly sexist rhetoric of early cases and commentaries has disappeared, the basic assumptions persist. They find expression in the simple factual premise underlying the recent complaint rule, articulated by the Court of Appeal in *R v Neil* ((1994) 12 CRNZ 158, 160) as follows:

> the rationale of the complaints exception is that a prompt spontaneous complaint is likely to be true. The longer the delay the less the justification for the assumption.

Thomas J concludes that the "expectations of medieval England as to the reactions of an innocent victim of a sexual attack are no longer relevant". He cites empirical studies which demonstrate that there is no evidence for the assumption that a delayed complaint is less likely to be true. Nor is there any foundation for the traditional suspiciousness with which the law has regarded rape complainants' testimony. The Courts "cannot afford to disregard the considerable body of literature and empirical research on the subject or fail to analyse and learn from the day-to-day experience acquired in trials of offences of a sexual nature".

Having identified the falsity of the assumptions underpinning the recent complaint rule, the Judge accepts that it would be logical to abandon it altogether. This position is supported by other commentators, not only on the grounds that the rule derives from a sexist stereotype, but also because it treats victims of sexual offences differently from victims of other offences in evidentiary matters (see for example Barrington, "The Rape Law Reform Process in New Zealand" (1984) 8 CLJ 307, 322; for an analysis of the sorts of problems created by the abrogation of the rule in Canada, see Fletcher-Dawson, supra).

Taking a pragmatic approach however, Thomas J concludes that the interests of rape complainants would be better served by a judicial modification of the rule than by its abrogation. As Jennifer Temkin has observed:

> those that have argued for [the abrogation of the rule] appear to have done so on the ground that the recent complaint exception stems from a prejudiced attitude towards the testimony of complainants... Whilst this is certainly true, abolition of the exception does not do away with the prejudice. The complainant is now deprived of the opportunity to adduce evidence which might tend to support her credibility in a situation in which she continues to be viewed with disbelief and suspicion. The recent complaint doctrine did something to redress the balance. Its abolition leaves the complainant with the scales tipped further against her. (*Rape and the Legal Process* (1987 p 146.)

Accordingly, Thomas J advocates a more expansive interpretation of the "first reasonable opportunity" criterion, recognising that complaints "may not occur for months or even years after the rape". Similarly, he is critical of the restrictive approach of the Courts to the admission of second complaints, contending that it is indifferent to the dynamics of disclosure and treats the issue of "complaint" as a "homogenous concept rather than something which is defined by the circumstances and the personality and temperament of the victim". Because disclosure is often of a developing kind, in many cases the second complaint will be the more effective one, in terms of establishing consistency with the complainant's testimony at trial. As Thomas J observes:

> Why should the question of whether the complainant has acted consistently, and thus bolstered her credibility, turn on whether or not she made the most effective complaint first?

The Judge concedes that his approach entails a departure from established case law, but considers that there is ample justification for development of the common law in cases where rules have become "perceptibly anomalous, unfair and anachronistic".

The enactment of s 23AC of the Evidence Act lends further support for modification of the common law rule. This section enables a Judge to instruct the jury that there "may be good reasons" why a victim of a sexual offence may refrain from or delay in making a complaint, where the issue of delay or absence of complaint is raised during the trial. The section was clearly aimed at countering the damaging effects of defence counsel employing the "hue and cry" myth to undermine a complainant's evidence. Thomas J observes that there is a tension between this section and the operation of the recent complaint rule: if there are "good reasons" why a complainant might delay or refrain from complaining, it seems awkward and artificial to insist that a complaint be made at the first reasonable opportunity to be admitted under the rule. Thomas J exhorts the judiciary to follow Parliament's enlightened lead.

It is clear that the origins of the recent complaint rule owe more to medieval custom than reason and principle. It was not until the early 19th century, when the Courts began to examine and rationalise the laws of evidence, that the hue and cry doctrine was reformulated into the recent complaint rule. In this light, it is perhaps unsurprising that the two leading commentators in the area, Cross and Wigmore, offer slightly different rationales of the rule and its place in the general law of evidence (see 4 Wigmore, *Evidence* paras 1134-1140; *Cross and Tapper on Evidence* (8th ed, 1995) pp 296-302; Fletcher-Dawson, supra at pp 59-60).

The anomalous historical status of the rule has given rise to a number of conceptual problems, both in terms of the admissibility and the permitted use of complaint evidence during a rape trial. Cross notes that many of these problems stem from the fact that the rule:

> grates against the rule excluding previous consistent statements, the hearsay rule and the rule against self-corroboration. (Cross and Tapper, supra at p 296.)

Anxious academic debate has surrounded such conundra as whether the doctrine confers special probative value on a victim's silence (Fletcher-Dawson supra at p 60; Coombs, Reforming New Jersey Evidence Law on Fresh Complaint of Rape (1994) 25 Rutgers LJ 699, 711 et seq).

The value of Thomas J's judgment is that it locates the debate within a broader socio-cultural framework, rather than simply addressing the rule's illogicalities from within the discourse of evidence law. To this extent, his analysis coincides with many feminist critiques of rape laws (generally see Graycar and Morgan, *The Hidden Gender of Law* (1990, Federation Press) ch 12). The centrepiece of his critique is not the difficulty reconciling the rule with established laws of evidence, but its distorted view of women. The Judge takes as his starting point the true position of victims of rape, evidenced by empirical study, and remodels the rule to reflect it. As such, the judgment goes some way towards addressing what feminists have identified as a lacuna between the legal construction of rape, and the victims' actual experience of it (see for example Stephen, "The Legal Language of Rape" (1994) 19 Alt LJ 224; MacKinnon, *Toward a Feminist Theory of the State* (1989, Harvard University Press) ch 9).

However, Thomas J is careful to state that the Courts' continued adherence to the hue and cry myth reflects "neither malevolence or sexism" but is attributable to what is perceived as "ordinary human experience". It is true that the application of the recent complaint rule in recent times has more to do with flawed understandings of women and rape (and the doctrine of *stare decisis*) than any conscious ill-will towards female complainants. But "sexism" in the context of the law needs to be understood in a broader sense, as including the often unconscious, stereotypical assumptions about women that underlie legal doctrines and methods. It also includes the less direct practice of presenting subjective, male perspectives as if they were objective and sexually neutral. Both of these guises of sexism are present in the recent complaint rule – indeed, a substantial part of Thomas J's judgment is dedicated to exposing them.

Significantly, Thomas J's judgment recognises that the evidential rules brought to bear on a rape trial operate in a social context and should be formulated accordingly. Even with scrupulously impartial and even-handed rules, "prejudice in respect of female complainants will continue to maintain a subtle presence in the courtroom".

This observation answers the criticism that the recent complaint rule affords differential treatment to victims of sexual offences. While there may be understandable scepticism about the wisdom of treating rape as a "special" offence (after all, the discredited corroboration requirement was justified upon precisely that basis), the reality is that sexual offences *are* different. The difference lies in the gender specificity of the offending; the legal focus on issues of consent, creating a heightened contest of credibility; the effect of the offending on victims; and in the operation of a system of culturally constructed rape myths which function to undermine the credibility of complainants at every turn.

THE MAJORITY

The judgment of the majority was delivered by Eichelbaum CJ. The Chief Justice preferred to dispose of the fourth ground of appeal upon the basis that the defence had not objected to the admission of the complaint evidence at the time, rather than by determining whether it came within the recent complaint exception. His Honour nevertheless elected to address some of the issues raised in Thomas J's judgment, although the observations must technically be considered obiter dicta.

The traditional approach to recent complaint evidence was reasserted: the fact that a complaint may be delayed for good reason does not affect the legal question of its admissibility as a complaint. The enactment of s 23AC "did not

dilute or change the requirement that to be admissible as a complaint the complaint must have been made at the first reasonable opportunity".

That s 23AC does not expressly revoke or amend the recent complaint rule was accepted by Thomas J. His point was that the substance of the rule is inconsistent with the legislature's recognition that there may be good reasons for delay in making a complaint. The artificial distinction between the "legal" question of admissibility as a complaint, and the "factual" question of reasons for delay breaks down on analysis once it is conceded that the legal rule has at its heart a factual premise – albeit a specious one – that delayed complaints are less likely to be true. It is perhaps regrettable that the majority's judgment simply restates the traditional view and does not (or could not) make any real attempt to grapple with the criticisms of it.

In the majority's view, no evidentiary value attaches to a delayed complaint. There is no attempt to reconcile this blanket assertion with their earlier, arguably inconsistent statement acknowledging that complaints "may be long delayed for good and understandable reasons". Instead, employing a *reductio ad absurdum* technique, the Chief Justice states:

> if years after an offence the victim complains, and nine months later repeats the complaint in Court, the fact that she or he said the same on both occasions does not enhance the credibility of the complainant's evidence. In this situation "complaint" evidence should not be allowed, any more than evidence of previous consistent statements is normally allowed... the jury may undeservedly regard it as critical in a case where, as happens often enough, there is nothing else to throw into the scales on either side... If... complaints whenever made are to be admitted, accompanied by directions that this can enhance the complainant's credibility, the conflict between such a rule and the general law of evidence concerning prior consistent statements needs to be addressed.

This passage merits close examination and several observations may be made. First, according to the majority, complaints made at the first reasonable opportunity can enhance a complainant's credibility, but delayed complaints cannot. However, this can only be true if the "hue and cry" myth is accepted and it is assumed that delayed complaints are more likely to be fabricated.

Secondly, there is the obvious point that even if it is accepted that a complaint made "years" after an offence has no evidential value, that does not necessarily mean all delayed complaints are in the same category (the Chief Justice recognises that the example offered was "extreme"). As Thomas J would have it, a purposive approach to the admission of complaint evidence should be adopted. If the evidence accords with the objective of establishing that the complainant's conduct in complaining is consistent with her testimony at trial, it should be admitted for that purpose. Where the evidence does not meet this objective, or (at least in the case of second complaints) is "unduly duplicative or prejudicial to the accused" it should not.

Thirdly, the majority objects that a more flexible approach to recent complaint evidence will conflict with general rules about prior consistent statements. But the same objection can readily be made about the whole of the recent complaint doctrine, which is a recognised exception to the prior consistent statement rule.

In any event, it is submitted that this exception is well justified on policy grounds. One of the principal rationales for the rule against prior consistent statements is that it avoids superfluous and distracting testimony as "the assertions of a witness are to be regarded in general as true" (*Cross*, supra at p 295). By contrast, in rape cases issues of credibility are typically crucial. Given the climate of prejudice against female complainants in Court, the rule – rather than tilting the scales against the accused – does something to redress a pre-existing imbalance.

The majority accepts that the recent complaint rule is controversial and supports a Law Commission review, but cautions that possible reforms require careful consideration. While commending Thomas J for "ventilating the topic", the Chief Justice states that it will "benefit more from a balanced objective analysis than polemics".

CONCLUSION

The recent complaint rule has, at its heart, intuitive and subjective assumptions about innate female mendacity and the "normal" response of women to sexual violence. Yet it is clothed in the technical and objective language of a 19th century evidential rule and applied as such.

Thomas J challenges the rule's purported objectivity by demonstrating that the assumptions underlying it are both wrong in fact and sexist. There is certain irony in the fact that in doing so, his own objectivity is called into question. This will come as no surprise to feminists who are well used to their views being dismissed as lacking "objectivity" – as though the opposing views were impeccably neutral!

On a different level however, Thomas J's judgment also questions the whole process of abstraction that the recent complaint rule demands. Reflecting "linear logic", the rule insists on temporal proximity and restricts the admissibility of second complaints. This logic is profoundly at odds with the "complex and variable nature of the way in which women respond to rape" and confirms the "unreality" of the rule.

In this way, the judgment ties into the broader themes of the evidence law reform project. There is growing awareness that the heavily adversarial model of the 19th century – premised to an extent on offering accused persons a "sporting chance" – is no longer appropriate if the interests of victims are to be given due weight. Similarly, there are criticisms that the complex set of mechanical rules offends against common sense and "hinders rather than aids the search for truth through the creation of artificial and unnecessary constraints on the evidence which may be admitted" (New Zealand Law Commission, *Evidence Law: Principles for Reform* (Preliminary Paper no 13: 1991) para 56).

While one might share the Chief Justice's concern that a three-member Criminal Appeal Division Court is not the ideal forum for a thoroughgoing review of recent complaint evidence, that should not detract from the force of Thomas J's logic. His judgment represents the most considered and detailed treatment of the recent complaint doctrine in this jurisdiction to date. His position, far from being unbalanced or unduly radical, is supported by legislative direction, a number of law reform commission reports, a United States appellate Court, and numerous empirical and academic studies. It is also in keeping with the currents of change in evidence law generally. In this light, protest that the common law must wait for direct remedial intervention by the legislature may strike as a little hollow. Whatever the outcome when the rule is eventually considered by the full Bench, the issues raised in Thomas J's judgment cannot be easily dismissed. ❑

WHAT IS "GOOD FOR THE PLAYERS"?

Jayne Francis, Commercial Law Department, University of Auckland

examines the competitive aspects of the transfer rules for Rugby Union players and the effect of the Commerce Commission decision on them.

On 17 December 1996 the Commerce Commission authorised the New Zealand Rugby Football Union's (NZRFU) proposed player transfer arrangements. These arrangements were for the establishment of a transfer registration system for players and a requirement for provincial unions to negotiate a transfer fee. There were no limitations (as originally put forward) in terms of a quota system, transfer period restriction or cap on the transfer fee. The Commission concluded that public detriment resulting from the lessening of competition caused by the arrangements were limited, mainly the cost of administering the arrangements and the erosion of the skill of players whose transfer wishes were frustrated by the arrangements. The public benefits accruing however were larger. These arose from maintaining the value of overseas television rights, preserving the performance of representative teams, preserving sponsorship and maintaining inbound tourism associated with rugby.

if a particular club can afford its pick of good players, what effect will this have on the evenness of the competition and attempts by a player in a lesser club to be noticed?

This application to the Commerce Commission by the NZRFU came about because the NZRFU is now a professional sports organisation and, as such, is subject to the same competition laws as other businesses. However there is one major difference between this new "business" of sport (so potently highlighted by the SuperLeague wrangle) and other businesses, and that is that the commodity being argued over is people. The effect of such a decision by the NZRFU on individual players also needs to be given some thought. For example, what will be the situation if a provincial union cannot afford to buy the good player who has approached it? The player does not play for the club of his choice. Furthermore, if a particular club can afford its pick of good players, what effect will this have on the evenness of the competition and attempts by a player in a lesser club to be noticed?

These types of restrictions on players have come up in the sports context before. In *Adamson v New South Wales Rugby League* (1991) 100 ALR 479; (1992) 103 ALR 319 the full Court of the Federal Court of Australia reversed the Lower Court decision which, like the Commerce Commission's "balancing" exercise, had found that although similar rules formed by the New South Wales Rugby League (1991) 100 ALR 479; (1992) 103 ALR 319 were a restraint of trade, inasmuch as a player was prevented from playing with the club of his choice, the rules were justified in order to maintain competitive equality and financial viability. The Federal Court, however, held that these rules were contrary to the common law principle that people were entitled to practise their trade as and where they wished, to exercise and develop their skills as they saw best and to make their own decisions as to their employment and lifestyle.

The *Adamson* case and the new NZRFU player transfer arrangements raises the issue of the balance of interests between the sportsperson and the ruling body of the relevant sport, just as this issue exists in the employment law context. As it was said in the lower Court in *Adamson*, a player may have any one of many personal reasons for wishing to change clubs. These may be dissatisfaction with the performance of the club or coach, inability to secure selection in the first grade team, inability to play in a position of his choice, or because the training timetable is unsuitable. A player might have a lesser distance to travel to work if he moved, or the club for which he was playing might not be performing well and this could affect his chances for representative selection.

In *Kemp v New Zealand Ruby Football League* [1989] 3 NZLR 463 the High Court found it significant that similarly restraining League rules were not negotiated by the player, but had been imposed on him. In *Watson v Prager* [1991] 3 All ER 487 the Court said

> I do not doubt the necessity, in the interests of professional boxers, of the board exercising careful regulatory control over the contents of boxer-manager contracts. However, the board's opinion as to the scope of the restrictions to be imposed on a boxer in a boxer-management agreement is not necessarily right.

The question obviously needs to be answered in New Zealand: Will the Courts allow the controlling body of the relevant sport to be the sole Judge of what is good for the players? ❑

TAX PENALTIES

Tim Walton and Chris Reardon of Price Waterhouse, Australasia

consider the effects of the new tax penalty regime in a paper prepared for The 1996 Tax Conference of the New Zealand Society of Accountants

INTRODUCTION

This paper does not provide a comprehensive outline of the legislation. There will be numerous articles, technical papers and courses run which detail the technical position.

The paper looks at the likely behavioural changes for taxpayers and their advisers, and considers the steps taxpayers must take as they enter the modern taxpaying era. Guidance will be drawn from the Australian experience because Australia has already implemented a penalty regime similar to the New Zealand regime. Throughout the paper we include Australian commentary highlighting the evident modification in taxpayer behaviour following its implementation.

The Parliamentary Finance and Expenditure Committee ("FEC") have made it clear the focus of the new regime is on large corporates rather than unduly penalising small and ordinary taxpayers. They indicate that there needs to be a balance in the legislation between the Inland Revenue Department ("IRD") and taxpayers but with some bias towards the IRD. This paper concentrates on the impact upon large corporates and comments on the difficulties the IRD will face in applying the regime in a consistent and fair manner. Procedural changes will be required within the IRD to manage this new environment successfully.

PURPOSE OF NEW PENALTIES RULES

Section 139 Tax Administration Act 1994 ("the Act") sets out the purposes of the new rules. It states:

> The purposes of this Part are –
>
> (a) To encourage taxpayers to comply voluntarily with their tax obligations and to co-operate with the Department; and
>
> (b) To ensure that penalties for breaches of tax obligations are imposed impartially and consistently; and
>
> (c) To sanction non compliance with tax obligations effectively and at a level that is proportionate to the seriousness of the breach.

OUTCOME

The new penalties rules will completely change the New Zealand tax environment. Paragraph (a) of the purpose section will be achieved fairly quickly as taxpayers come to realise the extent of this changed environment. However, para (b) is unlikely to be achieved without a change in legislation or a great deal of judicial assistance.

While taxpayer behaviour is going to be modified, there is also going to be a requirement for the IRD to change its approach. Education will be essential for larger taxpayers in light of the unacceptable interpretation test. Education will also be essential for the IRD to ensure it understands the meaning of the various concepts, and how to apply them.

In the interim a great deal of uncertainty will arise as to the application of the new rules. This in itself will lead to a great deal of inconsistency.

Australian commentary:

The Australian taxation system has been moving inexorably to a full self-assessment regime across all taxpayer groups. In many ways, the regime preceded a supporting legislative framework. Elements of self-assessment have been in place since 1984 with the revision of the penalty system of all Federal taxation legislation. In 1986 the first major stage of self-assessment primarily restricted to companies, was introduced. Full self-assessment was extended to superannuation funds, approved deposit funds and pooled superannuation trusts as from the 1989/1990 income year.

The Taxation Laws Amendment (Self-Assessment) Act 1992 introduced a complex Australian legislative suite to support self-assessment. This included a complete revision of the public and private ruling system and a totally new penalty regime.

Australian corporate taxpayers have adjusted extremely quickly to the new regime and anecdotal evidence suggests that the level of documentation and supporting position statements for taxation interpretations has increased significantly. It is little wonder that the Australian Commissioner views the self-assessment system and the accompanying increase in tax strategy review and audit activity by the ATO as a spur to "voluntary compliance" by taxpayers.

ONUS

Section 149A of the Act provides that the onus of proof rests with the taxpayer in civil proceedings relating to any matter other than evasion or obstruction. This in itself will encourage greater care in documenting processes and retention of records.

There will be a non-legislated onus on the Commissioner also.

The onus on the Commissioner will be to ensure all IRD officers responsible for imposing penalties correctly understand the meaning of the terms "reasonable care", "gross carelessness" and the expression "about as likely as not to be correct".

These concepts are not easy to grasp. Say, for example, an officer has correctly understood the meaning of "reasonable care". The officer still has to assess the point at which it can be concluded on the evidence, and in the circumstances, that reasonable care was lacking. Satisfaction beyond a shadow of doubt is not required, merely that on the balance of probabilities, reasonable care was not taken. But

at what point can the officer say that the evidence supports a conclusion that it is more probable than not that the taxpayer did not take reasonable care? It is evident a large degree of subjectivity will be involved.

CONDUCT VERSUS INTERPRETATION

The civil penalties for tax shortfalls fall into three distinct groups. At Appendix 1, a flow chart indicates the offence and the penalty applicable on each track. The three tracks are:

- intentional behaviour (being tax evasion and an abusive tax position);
- unacceptable interpretation; and
- conduct penalties (being lack of reasonable care and gross carelessness).

The intentional behaviour penalties are not discussed in any great depth in this paper. Rather, the focus is on the unacceptable interpretation and standard of reasonable care issues.

There are many situations where both of these tests will be applied to the same shortfall in deciding whether a penalty applies. In such cases, it will be difficult to decide which penalty should apply.

Uncertainty as to the application of the legislation is demonstrated by the FEC statement issued with the reported back Taxpayer Compliance, Penalties, and Disputes Resolution Bill, 1995. This indicates that the draft policy statement to be released (at the time of writing) by the IRD on the concept of reasonable care represents the intentions of Parliament with regard to the meaning and administration of the Act. The FEC specifically states they are prepared to introduce the legislation without amendment on the basis that the concepts and interpretations outlined in the draft policy statement represent the IRD's application of the law. This is an unusual step and one which defies recent trends. It will be interesting to see how the IRD, and particularly the Courts, react to this statement.

Australian commentary:

The ATO reaction to the uncertainty surrounding the application and interpretation of the term "reasonable care" was to issue a series of Public Rulings aimed at providing guidelines for officers involved in the imposition of penalties under the new regime. TR 94/4 discusses the Commissioner's interpretation in regard to reasonable care, recklessness and intentional disregard, and TR 94/5 discusses the concept of what constitutes a reasonable arguable position (unacceptable interpretation). The series also considered the Commissioner's attitude towards the methodology used for calculating tax shortfall and appropriate penalties, voluntary disclosures and the Commissioner's legislative discretion to remit penalty payments.

The Australian Administrative Appeals Tribunal has generally approached the issue of "reasonable care" from a practical rather than technical perspective and on a case by case basis. In Re Carlaw v FCT, *95 ATC 2166, the Tribunal suggested that where the taxpayer seeks the advice of a professional tax adviser, the act must have some measure of support that the taxpayer has taken reasonable care. In* Case 34/95, *95 ATC 319, however, the Tribunal ruled that where the services of experienced tax agents are used, the level of "reasonable care" must be viewed from the tax agent's perspective and not from the taxpayer's. The Tribunal found that since the tax agent did not take the care a reasonable tax agent should have taken, the agent's client (ie the taxpayer) must be viewed as having failed to take reasonable care in preparing the return.*

The FEC has (impliedly) recognised the potential for the reasonable care test, at least, to be applied in a way other than intended by Parliament. This makes it necessary to refer to the draft policy statement to attempt to understand the likely application of the new rules. For this reason, this paper makes frequent references to the draft policy statement.

SHORTFALL

Tax shortfall is defined as being, for a return period –

> ... the difference between the tax effect of –
>
> (a) the taxpayer's tax position(s) for the return period; and
>
> (b) the correct tax position or tax positions for the return period –
>
> where the taxpayer's tax position results in too little tax paid ...

The shortfall penalties are based on a percentage of the tax shortfall resulting from the prescribed conduct or interpretation offences. If no shortfall arises, no penalty results, despite a possible breach of the required standard.

The definition of shortfall is defined in terms of the aggregate net shortfall. It is the difference between the tax effect of:

- the taxpayer's tax position; and
- the correct tax position

where the taxpayer's tax position results in too little tax.

However, that net global figure does not identify the amount of the shortfall resulting from a particular conduct or interpretation offence. Some apportionment is necessary to allocate the net global shortfall to the various incidences of culpable behaviour.

The Act is silent on this apportionment. We understand the definition is intended to refer to the shortfall attributable to a particular culpable tax position, not to a net global figure.

Commentary on the Bill states:

> A tax shortfall is the difference between the tax effect of the taxpayer's tax position as returned and the current tax position for the return period. One tax return may contain a number of tax positions and therefore a number of shortfalls.

A minor interpretation difficulty perhaps, but nevertheless it is discomforting.

Australian commentary:

The Australian definition of "tax shortfall" is similar in practical effect to the New Zealand legislation. We mentioned earlier that the Australian self-assessment legislative framework is complex. The definition of "tax shortfall" in s 222A provides a good example of where the Australian draftsman appears to have taken sadistic pleasure in turning a simple concept into a technical definitional maze.

CONDUCT ISSUES

The conduct penalty standards are "objective". For example, the reasonable care standard requires the taxpayer to exercise the care that a reasonable person would have exercised in the circumstances. The taxpayer's conduct is compared to that of the hypothetical reasonable person. However, deciding what the reasonable person would do in the first instance, is an extremely subjective decision. Fur-

thermore deciding on the facts known, that a lack of reasonable care was more probable than not, will also be a subjective exercise.

The draft policy statement on reasonable care indicates there should be achievement of a standard appropriate to each category of taxpayer. Consequently there will generally be a higher standard required of business taxpayers than of individuals. Amongst individuals, factors such as the age of the taxpayer, health and background will be taken into account. Many of these factors again are very subjective and will no doubt be exercised in a manner which creates an element of discretion on the part of the IRD.

An unacceptable interpretation is an application of tax law which fails to meet the standard of being about as likely as not to be correct

BUSINESS TAXPAYERS

Several factors will be taken into account such as size, internal controls, and systems failures etc, in determining whether there has been a reasonable standard of care.

The draft policy statement says:

> If a taxpayer's accounting systems are designed to correctly classify entries according to their attributes, and the system is monitored to ensure that the likelihood of error is reduced to an acceptable level, reasonable care is exercised.

Australian Commentary:

The New Zealand concept of "reasonable care" appears to have been borrowed directly from the Australian regime. An Australian taxpayer who fails to satisfy the Commissioner that reasonable care has been taken in relation to an item that has otherwise given rise to a tax shortfall will suffer 25 per cent additional tax (s 226G).

The term "reasonable care" is not defined in the Act. As in New Zealand, only vague comments accompanied the introduction of the legislation. The Explanatory Memorandum suggested that the reasonable care test requires a taxpayer to exercise the care that a reasonable ordinary person would be likely to have exercised in the circumstances. To the Commissioner's credit, an attempt was made in taxation ruling TR94/4 (but two years after the actual legislation) to introduce further guidelines which included the following rules:

- *(i) In determining the taxpayer's circumstances, regard will be had to the taxpayer's experience, education, skill and other circumstances.*
- *(ii) On matters of interpretation, if the taxpayer is uncertain about the correct tax treatment of an item, reasonable care requires the taxpayer to make reasonable inquiries to resolve the issue.*
- *(ii) The maintenance of adequate records of income and expenditure or adequate substantiation documents is an indication that the taxpayer has taken the effort to maintain reasonable care.*
- *(iii) On matters of interpretation, if the taxpayer is uncertain about the correct tax treatment of an item, reasonable care requires the taxpayer to make reasonable inquiries to resolve the issue.*
- *(iv) Where a public ruling is available, a taxpayer is expected to have known that the ruling exists and follow it. However, the taxpayer could take a position contrary to a ruling and still be considered to have taken reasonable care if the taxpayer is able to demonstrate that the ruling does not apply to his particular circumstances. Further, the reasonable care test would be taken to have been satisfied where the taxpayer did not know and could not reasonably be expected to have known that the public ruling existed.*
- *(v) The use of the services of a tax adviser does not exonerate the taxpayer from liability under the reasonable care test. In effect, where the services of an experienced tax adviser is used, the level of reasonable care that needs to be taken increases. This is due to the fact that the care level will be determined with the knowledge, education, experience and skill of the tax specialist in mind rather than the taxpayer of whom the return was prepared on behalf of (ref pp 9 & 21).*

In regards to point (v) above, the responsibility of tax agents were considered by the Administrative Appeals Tribunal in Case 34/95, 95 ATC 319. *In this case, the taxpayer employed the service of a tax agent to prepare his income tax return and certain deductions were claimed on the advice of the agent. The deductions were disallowed by the Commissioner and, as a result, a shortfall penalty was levied. The taxpayer objected to the penalty claiming that reasonable care was taken in the preparation of the return. In this regard, the Tribunal ruled that where the services of experienced tax agents were used, the agents objectively should have known, or at the very least had the resources to find out, the requirements in respect of whether a certain deduction is available.*

CARE ON INTERPRETATION ISSUES

Where the issue is a question of interpretation, taxpayers need to ensure they have made reasonable inquiries to satisfy the reasonable care test.

The draft policy statement indicates that for questions of interpretation, reasonable care will depend on:

- what efforts the taxpayer had taken to resolve the issue;
- the types of advice received;
- the certainty of the law.

INTERPRETATION ISSUES

The unacceptable interpretation test (referred to as a requirement to have a "reasonably arguable position" in the original discussion document) is intended to be an objective test. Along with the reasonable care standard, an unacceptable interpretation of tax law is considered in relation to each tax position taken by the taxpayer.

A tax position means a position or approach with regard to tax payable under one or more tax laws, including a liability to tax, an obligation to withhold tax, the right to a refund or, the right to a credit. An unacceptable interpretation is an interpretation taken in relation to a tax position, or application of tax law which fails to meet the standard of being about as likely as not to be correct, when viewed objectively.

The test of "about as likely as not to be correct" has been much debated, starting before the legislation was even introduced. This specific test is in place in Australia, but to date it has not been the subject of litigation.

In the policy statement included at the beginning of the Bill, the FEC state that significant emphasis should be given to the word "about". Many concerns have been expressed in submissions made, that the true meaning of the word "about" will not be applied in practice. One submission suggested the penalty should focus on taxpayers taking positions which are so clearly extreme as to be frivolous, vexatious or manifestly unsound. Unfortunately, this was rejected.

The draft policy statement continues by saying that the position taken by a taxpayer must be a position to which a Court would give serious consideration, but not necessarily agree with. This means the prospect of the taxpayer's interpretation being upheld by the Court must be substantial although not necessarily 50 per cent. Applying this will be a matter of very fine judgment.

Australian commentary:

Where the potential Australian tax shortfall is greater than the higher of A$10,000 or 1 per cent of tax which would have been payable on the basis of the taxpayer's return, the taxpayer must demonstrate, in addition to reasonable care, that the position adopted in relation to the item is reasonably arguable. Failing this test attracts a 25 per cent penalty.

What is "reasonably arguable" is defined in the legislation to be:

> *Having regard to the relevant authorities and the matter in relation to which the law is applied or the other matters it would be concluded that what is argued for is about as likely as not correct (s 222C(1)).*

The "relevant authorities" to which regard can be had are rather restrictive. Sub-s 222C(4) lists the authorities to include:

- *(a) An income tax law.*
- *(b) Materials for the purposes of s 15AB(1) Acts Interpretation Act 1901 (eg Explanatory memorandum, speech made to the Parliament, headnotes forming part of Acts).*
- *(c) A decision by a Court (whether or not an Australian Court) or Tribunal or Board of Review.*
- *(d) A public ruling pursuant to the official tax public ruling regime.*

Importantly, it appears that regard cannot be had to counsel opinion or formal advice received from lawyers or accountants. The Explanatory Memorandum introducing s 222C(4), specifically states that opinions expressed by an accountant, lawyer or other adviser will not be considered as an authority (ref p 21).

It is common practice among tax professionals to prepare a supporting statement, which has come to be known as a Reasonably Arguable Position Paper ("RAPP") at the time when the taxpayer adopts a potentially arguable tax position. The preparation of a RAPP is intended to be evidence that the taxpayer has taken reasonable care at the time the statement was made and that the taxpayer has also adopted a reasonably arguable position.

ABUSIVE TAX AVOIDANCE

Just two short comments on the concept of an abusive tax position in relation to interpretational matters.

First, as already indicated, this concept involves the intentional behaviour group. The penalty provisions apply to those taxpayers who have applied an unacceptable interpretation to tax law and have entered into, or acted in respect of arrangements, with a dominant purpose of taking tax positions that reduce or remove tax liabilities or give tax benefits.

It is the taxpayer's state of mind which is important in determining whether there has been abusive tax avoidance. This is a different test to that imposed under s BB9 Income Tax Act 1994 ("ITA") which applies to the *purpose* of the arrangement. The difficulty perceived here is that this will be an objective test applied to the state of mind of a taxpayer based upon information available at the time the taxpayer entered into the arrangement.

Secondly, the section is intended to apply to incorrect tax positions (unacceptable interpretation) where there has been a breach of an ordinary provision or a specific or general anti-avoidance provision of the ITA with the dominant purpose of avoiding tax. Over the years, the general anti-avoidance provisions have proved notoriously difficult to interpret. Indeed, our recent experience has shown that the IRD have had some rather unusual views of when s BB9 can apply. In other words, there is likely to be great uncertainty, and a high degree of subjectivity in the application of the abusive tax position rules.

Australian commentary:

Where a tax shortfall arises as a result of a "tax avoidance scheme", the penalty for not having a Reasonably Arguable Position increases from 25 per cent to 50 per cent. This is still significantly short of the New Zealand sanction of 100 per cent.

RELIANCE ON ADVISERS

Taxpayers are unlikely to be considered to have breached the standard of reasonable care if the IRD has failed to provide adequate information in its guides, or if they have relied on misleading information from reputable sources, or if the relevant information is extremely complex or specialised. However, reliance on advisers is not a defence in its own right.

With regard to interpretational issues, the draft policy statement quotes from the commentary to the Bill. This states:

> In the absence of relevant case law, information which supports a reasonable argument may include such items as ... the contents of tax opinions, legal articles and related material. However, the mere existence of an opinion from an adviser would not on its own indicate that an acceptable interpretation exists. It is the contents of the opinion not the fact of seeking advice which will be relevant.

The draft policy statement goes on to state:

> Accordingly, the existence of an opinion expressed by a tax professional does not of itself indicate an acceptable interpretation but the contents of that opinion may support an acceptable interpretation.

Most advisers struggle with where the line is to be drawn in relation to the concept of "about as likely as not". Advisers (and the IRD officers responsible for imposing penalties) are to become Judge and jury in deciding if a Court will give serious consideration to a tax position taken. The first consideration will be to gauge how the IRD will react. To use the IRD's own words, will the "prospects of the taxpayer's interpretation being upheld by the Court ... be substantial, although not necessarily 50 per cent"?

But all this is merely using more words to define words. Is the issue advanced by it or further confused? At the end

of the day "about as likely as not" will be difficult to foresee and an issue involving a high risk factor.

Australian commentary:

The Australian position is similar to that proposed by New Zealand. Although the opinions of accountants, lawyers and other advisers have not been specifically listed as "authorities" (refer comment at p 18 above), the Explanatory Memorandum stated, at p 84:

> *An opinion expressed by an accountant, lawyer or other adviser is not an authority. However, the authorities used to support or reach the view expressed by the adviser, including a well-reasoned construction of the relevant statutory provisions, may well support the position taken by the taxpayer.*

OPINION SHOPPING

Opinion shopping is not going to be the answer when a taxpayer is looking to enter into an arrangement which carries some risk.

The onus of proof is going to be on the taxpayer to demonstrate that the position taken is, as likely as not, going to be correct. It only requires the IRD officer responsible for the decision to contend otherwise for battle to commence.

Under the new dispute resolution procedures, the arguments of both sides will have to be "put on the table" and discussed, before an assessment including penalties can be issued. This will at least allow for some consistency. But the point is, a favourable opinion from an adviser is not going to be conclusive in preventing these disputes arising. The merits of the case are going to be the crucial issue!

What is likely to develop is a process whereby taxpayers will ask advisers the question on whether or not the tax position to be taken is, viewed objectively, about as likely as not to be correct. Advisers and corporate tax managers will take over the role of the Courts in the taxpayer's eyes in ruling on whether or not a taxpayer can proceed with the tax position without fear of a penalty. If the adviser's view is held negligently, the cost of the penalty will potentially fall to the adviser under a civil law action! How advisers will react to this pressure remains to be seen.

Australian commentary:

Opinion shopping has not become a practical issue in Australia. Instead, where there are questions of interpretation to resolve, taxpayers and their advisers have generally sought to protect their positions by preparing RAPP's as a means of mitigating any potential penalties if the issue should be reviewed by the ATO under audit conditions. These papers have, to a large extent, superseded the s 169A(2) requests for interpretation at the time of lodging a taxation return and formal private rulings under s 14ZAG Taxation Administration Act.

DOCUMENTATION

The discussion above may have left many concerned about the application of the new penalties regime. The flow chart on appendix 1 appears relatively straightforward in terms of when, and at what level, a penalty should be levied. The discussion of the various examples below will, however, indicate it is not simply a case of being able to say a particular penalty applies in particular circumstances. Each situation will need to be analysed very carefully, before the offence can be categorised into one of the conduct or interpretational penalties groups.

Clearly, a penalty is now going to arise in situations where, previously, no penalty existed.

The steps taxpayers take in arriving at the amount of income and expenditure in their returns of income are going to have a very large bearing on whether or not an offence exists and the categorisation of that offence.

Consequently, every step a taxpayer can take which demonstrates that they have taken a reasonable standard of care, is going to be of great assistance in arguing that proper conduct was exercised. For larger taxpayers, conduct generally relates to systems. The lack of systems, or the lack of double checking where systems are likely to be inadequate, is likely to lead to penalties. Furthermore, reasonable care is not the only onus on such taxpayers. Education on complex tax issues is also their responsibility. Large taxpayers will need to be able to identify interpretational issues.

TIMING OF TAKING TAX POSITION

The test of *when* a breach of the relevant standard has occurred may be important in deciding whether or not a breach has occurred.

For example, s 141B(6) (dealing with unacceptable interpretation) states:

> For tax positions involving an interpretation of a tax law or laws that have been taken into account in a tax return, the time the taxpayer takes the tax position is when the taxpayer provides the return containing the taxpayer's tax position ...

However, when it comes to a reasonable standard of care, at what point do you judge whether or not such a standard has been met?

"Tax Position" means:

> ... a position or approach with regard to tax, or possible under one or more tax laws, including without limitation –
>
> (a) a liability for an amount of tax or the payment of an amount of tax ...

Taxpayer's tax position means –

> (a) the tax position or tax positions a taxpayer takes in, or in respect of –
>
> (i) A tax return; or ...

The concept of tax positions taken in a return is clear enough. Positions in respect of a return is a more problematic concept. All tax positions which impact on the return will be reflected in the return.

An effective system operating throughout the year will be of no benefit if a taxpayer is careless in completing the return. On the other hand, carelessness during the course of a year will not lead to a penalty if the errors are picked up and corrected at the time of completion of the return.

Nevertheless, while return completion is the crucial event for judging whether or not reasonable care has been exercised, all events during a year which build onto that return will come under scrutiny in establishing whether or not reasonable care was exercised in taking a particular tax position. The draft policy statement endorses this approach. However, in reality the words "tax position ... in respect of ... a tax return" are wide enough to allow an argument to be put that on the filing of the return, reasonable care has to be exercised in respect of steps taken to record information for that return. ❑

Next month the authors examine some examples taken from the TIB draft.

IN THE DISTRICT COURTS

Judge R L Kerr

highlights some recent cases

TRAFFIC REGULATIONS 1976, REGN 55(2)

Does one have to succumb to the blandishments of roadside windscreen washers? The answer is probably not.

Judge L H Moore in *Police v Heremaia* [1996] DCR 744 dealt with a breach of Regn 55. The defendant was a pedestrian on the side of an intersection washing windscreens of stationary vehicles at the traffic lights on Great South Road, Auckland.

The Regulation provides that:

(1) A pedestrian shall not remain on a pedestrian crossing longer than is necessary for the purpose of crossing the roadway with reasonable dispatch.

(2) Subject to the preceding provisions of this part of these Regulations, a pedestrian shall at all times when practicable remain on the footpath if one is provided, or as near as practicable to the edge of the road if there is no footpath.

Police regarded car window washers as problems for traffic safety and public order. Accordingly they charged Heremaia with what was in effect loitering.

"Pedestrian" is defined by Regn 2 as:

> any person on foot upon a road; and includes any person in or on any contrivance equipped with wheels or revolving runners which is not a vehicle.

The Judge considered that Regn 55 (2) was exceedingly wide in its impact:

> It emphasises the concept of the carriage way portion of a road as a place for traffic to pass over rather than for pedestrians to loiter upon, let alone to do business upon.

His Honour therefore concluded that a pedestrian ought at all times "when practicable" remain on the footpath, the words quoted permitting exceptions such as attending to a vehicle which had broken down. However, they did not permit the use of the carriage-way for washing car windscreens even if a motorist requested it.

Heremaia was therefore convicted and fined $4 with Court costs of $5, the maximum fine being only $10. His Honour considered that even the maximum fine would simply be a licence fee for window washers.

BUILDING ACT 1991, s 91

Judge G V Hubble, considered the above section in *Frith v Auckland City Council* [1996] DCR 549. In short, the section applies the Limitation Act 1950 to civil proceedings against any person arising from "the construction, alteration, demolition, or removal of any building".

Subs 91(2) provides that:

> Civil proceedings may not be brought against any person ten years or more after the date of the Act or omission on which the proceedings are based.

Frith concerned an application to strike out the plaintiffs' statement of claim because it was based on events which occurred as long ago as June 1977.

The plaintiffs had purchased land on Waiheke Island in February 1993. They subsequently discovered there was an error in the location of the house, the septic tank and water tank. The problem could only be remedied by purchasing additional land at $15,000.

It seems that the defendant's predecessor, the Waiheke County Council, had issued drainage and building permits between 21 December 1975 and 23 June 1977 to the then owner of the land. The issue for determination was whether the ten year period under s 91(2) ran from any date other than the date of the issue of the permits and certificates or ran from the date of "reasonable discoverability".

The Judge referred to *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, 518 (CA), where Cooke P opined that the general importance of the decision was reduced because of the limitation defence under the Building Act.

Judge Hubble decided that the Building Act made no distinction between dormant causes of action and those which had crystallised by discoverability. He concluded that unless proceedings were issued prior to 1 July 1993 (when the Building Act came into force) they were subject to a ten year limitation period.

THE DOG CONTROL AND HYDATIDS ACT 1982 ss 2, 6

In *Police v Clark* [1996] DCR 738, Judge LH Moore dealt with an attack by a German Shepherd and a bull mastiff on a passer-by's dog. The police prosecuted the owner of the two dogs contending that in terms of the Act a dog was "stock". The decision is now superseded by the Dog Control Act 1996 but is interesting because the Judge concluded that as a dog was not specifically referred to in the definition of "stock", it could only become stock if it was included in "other animal", those words following "deer, goat, rabbit or opossum". To find a dog was stock was to ignore the careful way that word was defined in the Act, particularly as dogs were not usually encountered in the wild in New Zealand. The Judge also considered that to include "dog" within the words "other animal", would offend against the ejusden generis rule.

Accordingly no offence had been made out. The decision was followed by Judge RL Kerr in *Waitakere City Council v Lehay* (to be reported). ❑

TRANSACTIONS

edited by
Brian Keene

RECENT CASES

TRUSTEE'S BREACH OF DUTY: ADVISERS' CONFLICTS OF INTEREST

The decision of *Kilsby v Kilsby* (Neazor J, HC Palmerston North 20 December 1996, CP 102/92) shows the need for trustees to exercise meticulous care in dealing with trust property and the dangers of advisers acting for more than one party in trust situations.

Trustees: the prudent person

Briefly, the plaintiff beneficiaries sued the trustees under a will who had sold a 2.67 ha block from a larger 35 ha farm to one of the trustee's sisters in 1985 ("the 1985 sale"). The purchase price was $62,000. The sale lapsed because of failure to comply with the Land Settlement Act. Time passed and the error was realised. The sale was redocumented in 1988 at the same figure and the requisite consent then obtained ("the 1988 sale").

As is not uncommon in these cases, this error was compounded by the muddled way in which the trustees proceeded to fix the consideration for the sale of the block. They took advice from a registered valuer but instead of asking for a formal valuation of the property which was to be sold, they received more general advice from which they deduced such a value. It was quite the wrong approach and, in particular, meant that the protections provided by s 14(6) of the Trustee Act 1956 to a trustee who sells on the basis of a valuation from a registered valuer were not available.

At the time of the 1988 sale, the trustees had two options in dealing with the problems with the 1985 sale. The first was to apply for relief under the Illegal Contracts Act. The second was to redocument the sale. The latter alternative was chosen but again there was a failure to either establish an updated valuation of the land or to identify and cure the earlier irregularities surrounding the 1985 valuation. Neazor J had no difficulty in holding that the trustees did not act in accordance withe prudent person standard in their dealings. Had they done so, a valuation would have been produced and it inevitably would have shown the value of the block at a significantly higher figure than the 1985 agreed sale price. The Court accepted that, in adopting the 1985 sale price, the trustees had "acted honourably" towards the purchasers but did not act as prudent businessmen. Under the Trustee Act they had failed to honour their responsibilities owed to the beneficiaries.

The trustees pleaded s 73 Trustee Act claiming that they had acted honestly and reasonably and ought fairly to be excused. The Court held that the trustees, in giving effect to the 1985 sale price in the face of indications that by 1988 quite a different position pertained, had failed to act reasonably and therefore were not entitled to the relief given in s 73.

Solicitor's responsibility

The solicitor for the trustees was sued for acting negligently and in breach of his contract of retainer to the trustees. Regrettably, the same person acted for vendor (the trustees) and purchaser (the trustee's sister). In the circumstances the Court had no difficulty in holding him to have had a clear conflict of interest which led to his depriving the trustees of the benefit of the advice as to their contractual position in relation to the purchaser. In particular, its effect was to deprive the trustees of the ability, in accordance with their duty to the beneficiaries, to renegotiate the price at the time of the 1988 contract to the then current market value.

Neazor J held that the solicitor's minimum duty before he could continue to act for the trustees was to inform them of the potential conflict between vendor and purchaser so that if they wished to have him continue to act they did so on the basis of informed consent. This he failed to do. More importantly, he then failed to advise the trustees to approach the 1988 sale on the footing that the 1985 sale was null and void. In doing so, quite independently of the conflict of interest, he failed in his duty to discharge his contracted retainer with the trustees.

Causation and quantum

Both the trustees and their solicitors alleged that if either of them were in breach of any relevant duty no loss was caused out of the 1988 transaction. They argued that had the sale not been documented at the same figure the purchaser could have applied for relief under the Illegal Contracts Act and obtained the Court's validation of the 1985 contract. Neazor J dismissed this with little difficulty. The Court would not apply the Illegal Contracts Act because the consideration for the 1985 agreement was not itself in order and under s 7(3) of the Act the Court:

> shall not grant relief if it considers that to do so would not be in the public interest

Neazor J then considered the case authorities dealing with concurrent causes for breach of trust. He weighed up what advice the solicitor ought to have given against evidence that the principal trustee, because of his personality, background and attitude, may not have accepted that advice. He held

that the solicitor should not bear the whole of the loss and ruled his contribution would be 60 per cent. The balance of 40 per cent remained the responsibility of the trustees.

After review of the valuation evidence the capital loss to the estate was fixed at $61,750 of which one-half related to the beneficiaries on whose behalf the claim was brought. Interest was then awarded based upon evidence of the probable return to the estate had the proper price been obtained. Interest was at market rate based upon three monthly rests as, from the evidence, that was the pattern of estate investment over the relevant period. Although there was delay in issuing the writ, interest still accrued over that period as the beneficiaries were minors and were effectively deprived of the return on the capital over that time. The amount of judgment in favour of the beneficiary plaintiffs was $57,600 including interest which was then ordered to bear interest at 8 per cent from 30 November 1995 – a date which approximated the end of the hearing.

The decision is noteworthy as continuing a line of authorities under which the Court has strongly policed the "prudent man" test under the Trustee Act. Trustees may not allow themselves to get diverted by "family" considerations or "honourable conduct" to third parties. They must singlemindedly address and protect the best interests of their beneficiaries. Once this test has been failed, the Courts were prepared to award equitable damages on a robust commercial basis ensuring that the beneficiaries were fully compensated for any breaches.

The ancillary issue of the solicitor's obligation to the estate is also consistent with the line of authorities which indicate that once solicitors act in a conflict of interest situation they will bear responsibility for any resulting losses, albeit there is a possibility that those losses may have occurred anyway. By so acting the solicitor has taken away the chance that upon receiving advice the client would have acted differently and not been in breach of his obligations to the beneficiary. That chain of causation establishes responsibility at law sufficient for the Court to apportion some liability to the solicitor for the trustee's breach.

THE FAIR TRADING ACT: A WHIFF OF COMPETITION

In *Yves St Laurent Parfums v Louden Cosmetics* (Anderson J, High Court Auckland, 11 February 1997) claims for infringement of registered trademarks, passing off and Fair Trading Act came before the High Court. The decision is of interest, not only for the flexibility of approach which the Judge showed in approaching the concepts which underpin these economic torts, but also as an illustration of the pervasive influence of the Fair Trading Act.

The nub of the case was elegantly stated:

> The great designer house Yves St Laurent formularises and markets many fine fragrances including *Paris*, *Kouros*, *Jazz* and *Opium*. The defendant is also involved in the perfume industry. It deals in perfumes and perfumed toiletries ... [and] has in mind the less expensive end of the market. Its range includes the products *Paradise*, *Kosmos*, *Java* and *Optimism* which in New Zealand tend to be offered at retail at about one third to one quarter of the price for similar volumes of Yves St Laurent products. ... In this proceeding the plaintiffs, which represent the house of Yves St Laurent, sue the defendant in connection with the products mentioned above, on various grounds, at the core of each of which is plagiarism.

His Honour established that the reality of market positioning of products was not limited to the product itself but was critically associated with its presentation and get-up. Thus, in passing off a perfume, similarity of scent may be less important than the packaging and merchandising display of the product.

His Honour then reviewed the evidence which included an independent research house market survey supporting a perception of association between the two product ranges. He dismissed this as having any real probative value. Much more significant was the display at certain pharmacies which marketed both the plaintiff's and defendant's products. There the retailers, without proof of concurrence by the defendant, had placed signs or tabs near the defendant's products indicating that they are copies of named fine fragrances marketed by the plaintiff and other haute couture parfumiers. The Court ruled this as significant evidence showing a conjunction in the minds of the retailers between the plaintiff's and the defendant's similarly marketed and "got up" products.

His Honour then examined the packaging and presentation of each of the perfumes which were the subject of the claim. *Opium/Optimism* was found to be vaguely but not confusingly similar. The plaintiff failed in that claim. In respect of the three product *Paradise*, *Kosmos* and *Java*, both passing off and Fair Trading Act breaches were found. Injunctions restraining continuing breaches were immediately issued with an inquiry as to damages to follow.

On the quantum of damages, Justice Anderson observed:

> The foreseeable or apprehended damage may take many forms. In addition to those which I have mentioned earlier is the damage to that aspect of the plaintiff's goods which is best described in a New Zealand context as mana. There is a dignity in a fine fragrance, as there is in a fine wine such as Champagne, which is degraded by mimicry.

The plaintiff made further claims in equity and tort on the basis that the defendant's conduct amounted to actionably unfair competition, misappropriation of property and unjust enrichment. The Court eschewed the temptation to make new law and reminded itself:

> Competition is not per se unfair and enrichment is not per se unjust. I am not willing to make an obiter declamation that trade activity which does not misappropriate another's property, does not infringe trade marks or breach copyright, does not mislead or deceive, is not likely to mislead or deceive, does not involve any misrepresentations, may nevertheless be actionable at the suit of a trade competitor which has a vague impression of unfairness or injustice.

SECURITIES ACT COMPLIANCE COSTS

It is all very well for law makers to legislate protections for various groups in society. These protections obviously come at a cost and sometimes that is so high that it restricts or cuts out entirely business opportunities otherwise available.

Legislators generally have downplayed the problems of compliance cost claiming they are exaggerated and that their critics are putting up straw men to justify their philosophical opposition to controls or legislative intervention.

Recent events suggest otherwise. Britain's Halifax Building Society had decided not to issue free shares to an estimated several thousand New Zealand account holders because it considered compliance with the New Zealand regulatory regime (principally the Securities Act and Regulations) to be too onerous and costly in respect of the New Zealand residents who had accounts with Halifax. In the result those account holders will miss out on a free share issue arising from Halifax changing from its existing mutual structure to becoming a listed company. To make matters worse, there is no provision permitting the account holders to take cash instead of shares and therefore they may well miss out on the whole benefit of demutualisation.

The current Securities Act and Regulations are being amended so that from October 1, overseas companies considering a share offer have to provide investors with a form of investment statement. Although simplified in form, the requirements as to disclosure are rigorous. That, in turn, means the investigatory and preparation work before the issue of the investment statement will remain significant.

The Securities Commission, which administers the Securities Act, holds itself out as attempting to facilitate offshore offerings in New Zealand. It has expressed itself willing to assist, within the current legal regime, in reducing costs of compliance by granting exemptions to the law in certain cases. It cites fees payable for an exemption application as only $1000 and that exemptions have been given in the past. What is unknown, however, is the potentially considerable professional costs involved in preparation of the necessary information to obtain the exemption.

The Halifax Building Society case is an example where the opportunity of a commercial benefit to a New Zealand resident has been lost because of the compliance costs and difficulties of our investment regime. Yet investors in Australia and thirty other countries in the world will enjoy those opportunities. It may be instructive for securities regulators and their advisers to consider Halifax as a case study so as to either better streamline the procedures or review the thresholds at which they apply so that New Zealand investors are not disadvantaged compared to others in the international community. ❑

The robustness and width of application of the Fair Trading Act is reinforced by the judgment. No new principle was enunciated but it is clear that the tenets of the Act provide a simple right and remedy in such cases. There is no need to extend the law to the more arcane concepts underpinning the economic torts or, worse still, vaguer issues such as unjust enrichment and "actionably unfair competition".

The ability for advisers to go to the provisions of the Act and apply its wording to unfair competition cases must be seen as a breath of fresh air even for those in the "parfum" industry.

CERTAINTY OF CONTRACT: SHARE SALES AGREEMENT

In *Trottman et Anor v Gillon* (HC Auckland, CP 87/95, 22 January 1997) Williams J had to consider whether a binding contract had been formed for the sale of the plaintiff's shares in a computer software company.

The defendant, Gillon, wished to buy 2000 shares for $200,000 and gain a seat on the board of the company. The company was considering issuing shares at the time so Gillon had the opportunity of either taking the new shares issued by the company or acquiring some or all of the plaintiff's interests.

Intermediate negotiations directly between the plaintiff and the defendant had established both a general desire by the plaintiff to sell to the defendant and a price. The critical term affecting contractual certainty was whether there was agreement upon the time allowed for payment.

Originally the plaintiff was looking to be paid immediately. However, he attended a special general meeting of the company at which he agreed to sell his 2000 shares, one half to existing members and the other half to the defendant. He was aware that the company was allowing a 12 month interest free period to the defendant for the shares that the company was issuing. He agreed at the meeting that the defendant's parcel of 2000 shares was to be made up 1000 from the company and 1000 from him.

Once the source of the shares was agreed, one of the existing shareholders was deputed to invite the defendant, who was waiting outside, to join the meeting. He advised the defendant that the 12 month interest free period applied to both the company's block of shares as well as the plaintiff's. The defendant then told the meeting of shareholders, which included the plaintiff, that:

> provided the terms of the deal were the same as he had been offered, he was unconcerned as to the source of the shares.

The plaintiff, Trottman, then either indicated his assent or at least did not indicate dissent and they later shook hands on the deal.

The plaintiff's claim against the defendant was framed on the footing that the defendant was required to pay within a reasonable time, ie not over a 12 month basis. The company's affairs did not prosper and its shares fell considerably in value. Hence, enforcement

of the contract became a serious economic issue between the plaintiff and the defendant.

The Court decided that there was no consensus as idem on the pivotal question of time for payment. It accordingly dismissed the plaintiff's claim and entered judgment for the defendant.

One must wonder about this decision in view of the long line of case authorities which exhort a Court to give legal effect to the dealings of parties where possible. In this case the question of what objectively had been decided between the parties could have been reviewed based upon:

- the issue of whether the shareholder deputed to talk to the defendant following the meeting had the plaintiff's ostensible authority to agree to a one year period for payment; and
- whether the conduct of the plaintiff in confirming when the defendant entered the meeting that the deal in relation to his shares was the same as he knew it to be relating to the company's shares made such an arrangement binding upon him.

Were one to follow through these arguments and ask objectively what was offered and what was accepted, there seems a strong case for upholding a contract. No doubt, each case turns upon its facts but it behoves the Courts to approach commercial contracting situations such as these with a view to giving legal effect to the commercial dealings of the parties whenever possible.

SECURITIES ACT: *CULVERDEN* REVISITED

The clumsiness of the Securities Act in addressing the retirement village industry was underscored in the last step of the Culverden saga. In earlier editions of this *Journal* the decisions of the High Court and Court of Appeal have been reviewed. The Privy Council has now delivered its advice in *Culverden Retirement Village Ltd v Registrar of Companies* [1997] 2 WLR 291.

The issue was whether an obligation by a retirement village to repurchase its units when the residents ceased to occupy them was a "debt security" within the Securities Act 1978. The owners argued that the buy-back provision was ancillary to the initial purchase of an interest in land and was therefore exempt under s 5(1)(b) of the Act. The New Zealand Court of Appeal held against the retirement village proprietors who appealed to the Judicial Committee of the Privy Council.

The appellant's broad submission, that the Securities Act was concerned to protect investors, not borrowers, and that the buy-back provision was merely ancillary to the buyer's purchase of land at the outset.

Their Lordships' advice was:

> In practical terms the substance of this transaction is that in return for a lump sum payment, a buyer acquires two rights; the right to occupy a unit and the right, when his occupation ends, to be repaid the price he paid, adjusted downwards or upwards according to the length of his occupation, the state of the property, the factors built in to the inflation adjustment in this particular case, and the movement of the market. The repayment right, far from being ancillary, is a cardinal feature of the transaction. This being so, the repayment right cannot be sheltered behind s 5(1)(b) exemption as an unexceptional term ancillary to the purchase of an interest in land. (at 295)

Their Lordships further ruled on the appellant's submission that the buy-back right was not a security because it was not a right in the property of another nor was it within the definition of debt security under the Act. That argument was rejected because of the width of the definitions sections in the Act.

Securities lawyers are currently considering the ramifications of the decision. For those retirement villages where there is an obligation to buy-back the unit, the prospectus to be approved by the trustee must now include not only the offering of the security represented by the occupancy right to the unit (unless exempt under s 5(1)(b) of the Act) but also the debt security on the buy-back. To date few if any retirement villages have covered the latter obligation.

There is also debate on whether the wide definition of "debt security" extends to include an option by the retirement village to repurchase the unit when the buyer ceases to occupy it. Many retirement villages employ such option techniques in lieu of firm obligations to purchase. A "debt security" is defined as an interest in or right to be paid money, that is or is to be ... owing by any person, on its face it seems to presuppose a contractual debt. The option to purchase being merely a right to call for a transfer will not involve contractual debt until the option is exercised. Hence the whole arrangement may well fall outside of the "debt security" regime.

Some may argue there is a certain irony in the width of the definitions of the Securities Act resulting in lesser protections to the public – an option as opposed to a contractual debt. However, it must be remembered that the purpose of the Act is to ensure adequate disclosure in relation to activities and instruments within purview of the Act. It does not seek to impose any particular form of the contractual rights upon the parties. That is for them to freely agree for themselves.

The fact that the Act applies to the retirement village industry may fairly be seen to be something of an anomaly. The protections in the Act are most apposite to commercial investments. That industry is not concerned with "investment" in any commercial sense, but rather occupation rights and access to services of a much more domestic character. Hence the application of the Act in this area can cause – and indeed has caused – curious results.

The last and wider issue raised by the decision is how far it may affect other industries which up to now have thought themselves exempt from the application of the Act. For example, s 5(1)(c) provides an exemption in relation to any proprietary right to chattels in the same way that s 5(1)(b) does for interest in land. A number of dealers in motor vehicles and other industrial equipment have been known to offer guaranteed buy-back rights on those vehicles or equipment. Up until now nobody has questioned whether the debt security created by the buy-back obligation fell within the Act. Quite simply, the transaction has been viewed as a totality, ie the debt security was seen to be ancillary to the exempt activity. Clearly this is no longer so. Other industry groups will need to consider the ramifications of the Privy Council's reasoning with some care. ❑

STRICT LIABILITY AND PARTIES TO MURDER AND MANSLAUGHTER

Professor Gerald Orchard, The University of Canterbury

investigates the surprising proposition that there can be elements of strict liability in charges of murder and manslaughter

INTRODUCTION

A principal offender accused of murder under the further definition of murder in s 168 Crimes Act 1961 may be guilty of murder although the essential ingredient of death was neither intended nor foreseen as likely to ensue. Further, a person who has unlawfully caused another's death may be guilty of manslaughter although neither death nor bodily injury was intended or foreseen. To this extent strict liability is imposed in respect of culpable homicide.

In the case of secondary parties, when s 66(1) applies the mens rea required is limited in the same way. As to manslaughter, if an accused intentionally assists or encourages an unlawful and dangerous act, from which death results, both principal and accessory may be convicted of manslaughter even though neither of them foresaw the possibility of death (which may have been an unlikely result): *R v Renata* [1992] 2 NZLR 346 (CA). Similarly, if the principal is guilty of murder under s 168 and the accessory intentionally assisted or encouraged the principal in intentionally inflicting grievous bodily injury for one of the specified purposes, then as is the case with the principal the accessory will be guilty of murder whether or not the resulting death was foreseen: *R v Hardiman* [1995] 2 NZLR 650; (1995) 13 CRNZ 68 (CA); cp *R v Ratu* 31 August 1995, CA 62/95. In *Hardiman* the Court also favoured the view that on a charge of murder the same rule applies when a party's liability is founded on s 66(2), the "common purpose" provision under which there may be liability for the contemplated, albeit unwanted, consequences of a joint criminal enterprise even though the party has not intentionally assisted or encouraged the conduct constituting the offence charged: *R v Hamilton* [1985] 2 NZLR 245, 250 (CA). This is a controversial proposition, but before considering the question it is convenient to outline the position at common law.

THE COMMON LAW

At common law an intention to inflict serious bodily harm is sufficient mens rea for murder, and the actus reus (death) need not be foreseen by a principal offender, and for manslaughter the killer need not be aware of the risk of killing or injuring. It appears that, at least for the most part, no greater degree of foresight of consequences is required for liability on the basis of participation in a joint enterprise which led to the killing. A participant in a joint enterprise may be convicted of murder if the killing was within the scope of the joint enterprise and the participant realised that there was a real risk that serious bodily harm would be intentionally inflicted: eg *Chan Wing-Siu v R* [1985] AC 168 177-178; *R v Stewart* [1995] 3 All ER 159; *R v Powell* [1996] 1 Cr App R 14. As to manslaughter, again provided the act causing death is regarded as within the scope of the joint enterprise, a participant may be guilty of manslaughter who had realised that there was a real risk of some bodily harm being inflicted in its execution, or foresaw a dangerous act of the kind which caused death (such as the use of a knife or loaded gun); and it may be enough if the type of injury inflicted was an obvious risk, in view of the scope of the joint enterprise: eg *Chan Wing-Siu*; *Stewart*; *R v Perman* [1996] 1 Cr App R 24; *R v Reid* (1975) 62 Cr App R 109, 112.

THE TERMS OF s 66(2)

In this country, as the Court of Appeal has recognised, these questions have to be considered in the light of the terms of s 66 Crimes Act 1961 (*R v Tomkins* [1985] 2 NZLR 253, 255), and we have been recently reminded that the terms of the Act "should not be read down by reference back to the previous common law if they are otherwise clear in their meaning": *R v Machirus* [1996] 3 NZLR 404, 410 (CA).

Section 66(2) provides that a party to a common unlawful purpose is a party to every offence committed in its prosecution "if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose". It is an essential ingredient of any offence of culpable homicide that there be "the killing of a human being" (ss 158, 160). In some instances such a killing may be murder or manslaughter even though the killer did not foresee any real risk of causing death, but as such an event is an ingredient of any such offence the apparently clear terms of s 66(2) seem to require such foresight before anyone can be a party to murder or manslaughter under this subsection.

The correctness of this conclusion was accepted by Tipping J in *R v Greening and Mason* (1990) 6 CRNZ 191, 194-195. Similarly, in *Brennan v R* (1936) 55 CLR 253, 263-264, Dixon and Evatt JJ reasoned that as manslaughter requires the death of the victim that result must be among the probable consequences of the unlawful purpose before an accused can be a party to manslaughter pursuant to the

equivalent of s 66(2), although this was not essential if there had been aiding, counselling or procuring under the equivalent of s 66(1). More recently, in *Stuart v R* (1974) 134 CLR 426, 440-441 Gibbs J rejected a submission that in this context assistance could be had from the "so-called definition" of "offence" which in New Zealand is found in s 2 Crimes Act, and which refers only to a punishable "act or omission": in s 66(2) "offence" cannot refer only to the principal's conduct viewed in isolation but includes any accompanying intention, circumstances or consequences included in the definition of the offence for which the actor is punishable (cp *R v Trinneer* (1970) 10 DLR (3d) 568, 573). On the other hand, to accommodate the possibility of different verdicts of murder and manslaughter against the different parties the relevant "act" may be broadly construed as "culpable homicide" (*Tomkins* at 256), and it will not be necessary that the accused foresaw the precise way in which such offence was committed: cp *R v Emery* [1996] DCR 374.

INTERPRETATION IN THE COURT OF APPEAL

In *Hardiman* the Court of Appeal preferred the view that if an actual killer is guilty of murder under s 168 another could be held a party to murder under s 66(2) if he or she had known that the infliction of grievous bodily injury for one of the specified purposes was a probable consequence of carrying out the common purpose, and did not accept that a real risk of a killing must be foreseen. For this conclusion the Court relied on *R v Morrison* [1968] NZLR 156 (CA) (Noted (1968) 3 NZULR 196), and *Trinneer*.

It is submitted that this is unsatisfactory for a number of reasons.

First, in *Morrison* the Court did describe as "entirely adequate" directions which did not require more in the way of foresight than foresight of grievous bodily injury, but there does not seem to have been any argument that that was not a sufficient description of the knowledge referred to in s 66(2). The appellant's contention had been that the trial Judge had not adequately explained that he was responsible only for injuries inflicted in the prosecution of the common purpose, which is an issue distinct from the knowledge required (although the Court hardly recognised this).

Secondly, in *Trinneer* the Supreme Court of Canada held that when murder is alleged the equivalent of s 66(2) did not require knowledge that death was a likely consequence when such knowledge was not required of the principal offender, upon the basis that although the "offence" referred to was murder this meant murder "as defined in" the equivalent of s 168. In *Hardiman* the Court thought that this provided "an entirely logical basis" for the decision, but this may be doubted, indeed, one commentator has dismissed *Trinneer* as "an absurd decision": Colvin, *Principles of Criminal Law* (1986), 324. The only aspect of murder "defined in" s 168 is the mens rea which will suffice in certain cases. As to that element it will be enough under s 66(2) that a party foresees that the principal may well act with that state of mind (cp *Greening* 194-195), but, as its terms recognise, s 168 can apply only when there has been a culpable homicide: even murder "as defined in" s 168 requires the unlawful killing of a human being. For that reason the judgment in *Trinneer* does not answer the objection that the offence of murder cannot be foreseen unless a killing is foreseen. This is implicitly recognised in *R v Ancio* (1984) 6 DLR (4th) 577 (SCC) where it was held that as murder always requires a killing there cannot be the intention to commit the offence required by the statutory definition of attempts (in New Zealand, s 72) unless the offender intends to kill, even though an intent to cause grievous bodily injury would suffice for the full offence under the equivalent of s 168. The Supreme Court overruled *Lajoie v R* (1973) 33 DLR (3d) 618 where it had held that the intent specified in s 168 also sufficed on a charge of attempt, *Trinneer* being cited as "somewhat analogous" (although in the context of manslaughter the correctness of *Trinneer* was assumed in *R v Davy* (1993) 86 CCC (3d) 385 (SCC)).

Thirdly, in *Hardiman* the Court did not question the "suggested direction" in *Tomkins* at 256 that an accused may be a party to manslaughter under s 66(2) if he or she knew there was "an ever-present real risk of a killing", although it confirmed that such knowledge is not required under s 66(1). That such knowledge is needed under s 66(2) was also assumed in *Doctor v R* 20-7-93, CA 366/92, but if a killing must be foreseen for manslaughter under s 66(2) it does not make sense that it need not be foreseen before an accused can be a party to murder under that provision.

Finally, the discussion of s 66(2) in *Hardiman* was obiter, for the Court proceeded to find that only s 66(1) was applicable on the evidence, and there was "no room for the application of s 66(2)". This, however, was not the case in *R v October and Kirner* 31-7-96, CA 477/95. In that case three accused had been convicted of the rape and murder of a woman who had died after a ferocious and prolonged assault. There was a lack of evidence of direct involvement by the two appellants in the violence which caused death, but there was evidence from which it could be inferred that each of the three accused had raped the victim, and that each rape followed violence sufficient to cause bleeding. The Court of Appeal held that the murder convictions could be sustained pursuant to ss 168 and 66(2), there being sufficient evidence that the accused had formed a common intention to rape the victim and to assist each other therein, and that each knew that one of the others, for the purpose of committing rape or avoiding detection, could well cause some grievous bodily injury. *Morrison* and *Hardiman* were cited for the proposition that that was enough and it seems doubtful whether the evidence would have supported an inference that a killing was known to be a real risk, so that the wider view seems to have been essential for the decision. The judgment does not, however, indicate that there had been any argument on this question.

CONCLUSION

The dicta in *Hardiman* and the decision in *October* allow convictions for murder although the accused did not advert to an essential ingredient of the actus reus of the crime. The imposition of such strict liability in this context may be thought to be wrong in principle (cp *R v Tihi* [1989] 2 NZLR 29, 32 (CA)), but in the case of principal offenders it is expressly provided for in s 168, and in the case of secondary parties under s 66(1). This result is at least not clearly inconsistent with the terms of the Act. But it is submitted that this is not true of s 66(2) and that when that is relied upon the rule is insupportable. Section 66(2) codifies a "wider principle" governing secondary liability (*Chan Wing-Siu* at 175) and it would not be anomalous if it were held that its seemingly clear terms demand more knowledge of likely consequences than is required of a principal, or an aider, abettor, counsellor or procurer. ❑

AMENDING THE COMPANIES ACT 1993

Julie Crengle, Rudd Watts and Stone, Wellington

asks how the Companies Act is shaping up and identifies aspects needing further consideration. This paper was written for the AIC conference on corporate governance.

Commentators on company law, particularly those overseas who have watched with interest the process of change, ask whether the Companies Act 1993 is delivering what was promised. The most that can be said at this stage is that it seems the new legislation is living up to expectations. Certainly there have not been any claims of it being seriously deficient in any respect.

However, it must also be said that it is still early days. A significant number of companies in New Zealand have yet to reregister – in fact, as at 30 November 1996, 24.76 per cent of the companies on the register were new 1993 Act companies, 5.28 per cent were companies which had reregistered, and the remaining 69.96 per cent were 1955 Act companies who had yet to reregister (the total number of companies then registered was 182,694: – Commercial Affairs Division, Ministry of Commerce, 17 December 1996).

In general, the new Act has not really been tested. For example, it is too soon to tell if the provisions aimed at protecting minority shareholders work.

Some aspects of it, though, certainly are delivering what was promised. The amalgamation provisions in particular are proving popular, as a greatly simplified way of restructuring groups of companies.

It would also seem that the Act is achieving its key aim – to give companies and managers greater flexibility while also increasing the obligations of directors and the penalties which can be incurred if directors fail to meet their obligations under the new Act.

The Act does seem to have been accepted by the commercial community. People apparently, have not been discouraged from using the company structure. In the year to 30 June 1996, 19,863 new companies were registered – up from 16,249 the previous year.

That does not mean, of course, that there are not some glitches in the new Act. Obviously, whether something works in practice the way the theory would have it work can only be gauged with time. Practical difficulties have arisen. For example, exempt companies had under the Financial Reporting Act, up to nine months after balance date to prepare financial statements. But until the Companies Act 1993 Amendment Act 1996, enacted on 2 September 1996, the same companies had to have sent those financial statements to shareholders within five months of balance date. That time period has now been changed to ten months.

NECESSARY CHANGES

It was accepted some time ago that there would be hiccups in the operation of the new Act. The Company Law Monitoring Group was therefore established in late 1994 by the Minister of Justice to monitor the operation of the reforms made by the company law package.

The work of the Group has been divided into two phases. Phase I saw the Group consider submissions on practical and technical difficulties which had arisen with the company law package. In Phase II, which is not yet underway, the Group will consider submissions on policy issues arising from the reforms.

As a result of its Phase I work, the Group recommended amendments to a number of sections. The key technical amendments are embodied in the Statutes Amendment Bill 1996.

The Bill was introduced on 22 August 1996, and was referred to the Government Administration Select Committee. Nothing is yet known about the membership of that Committee, when it will be determined, when submissions are likely to be invited or when the Bill is likely to be enacted.

The Bill proposes to:

- clarify whether execution by common seal still has legal effect. The answer is no. The proposed amendment makes it clear that the company must comply with one of the methods of execution set down in s 180, but may in addition affix its common seal (if it has one). Companies can choose to retain a common seal, but should be aware that those dealing with the company will disregard the seal when checking for valid execution (cl 43).
- amend the interested director provisions by removing the requirement for directors to disclose transactions between themselves and the company if the transaction is in the ordinary course of the company's business and is on usual terms and conditions (cl 41).
- require the board resolution on a short form amalgamation to state the names of the directors of the amalgamated company (otherwise the directors of the company which survives the amalgamation will always be the first directors of the amalgamated company) (cl 45).
- amend s 36 regarding the rights attached to shares to provide that such rights may be negated, altered, or

added to by the terms of issue of shares on an amalgamation (in addition to by the constitution or the terms of issue on incorporation) (cl 31).

- remedy the present uncertainty regarding the liability of a subscriber for the initial shares in the company. Currently there is nothing which sets out what the liability of the initial shareholder is, because there is no requirement that the consideration for the shares be stated. The amendment provides that the subscriber is not required to pay any consideration for the issue of shares on incorporation unless:
  (a) the company's constitution specifies the consideration payable; or
  (b) the shareholder is liable to pay consideration for the issue of shares under a pre-incorporation contract or a contract entered into after incorporation (cl 33).

The Bill makes a number of other technical amendments.

Other technical amendments are likely to be proposed next year – only those considered essential were hurried through in 1996. One proposed amendment is to amend the First Schedule to make it clear that the chairperson of a meeting can also demand a poll.

In addition to those technical reforms, it is possible some reforms will be proposed which reflect a change in policy. Among those being considered by the Company Law Monitoring Group are:

- amalgamations – whether the Act should make it clear that an amalgamation is not an assignment – or, on the other hand, that it is an assignment.
- overseas companies – whether there is a sound policy reason for a company with, for example, Australian shareholders to have to file audited financial statements in New Zealand when its competitors are often not required to do so. Formerly, a name protection company with offshore shareholders was exempt from such requirements. Now, however, if a company that would otherwise be an exempt company has offshore shareholders, audited financial statements must be registered – at a cost of $250 – Financial Reporting Act 1993 s 19).
- solvency test – general issues regarding the valuation of assets and liabilities when applying the solvency test are to be considered.
- disclosure to shareholders – whether the company ought to be obliged to send annual reports and financial statements to shareholders who do not want them.
- director's remuneration – whether in the annual report what ought to be required is disclosure of director's remuneration received solely in his or her capacity as a director, or remuneration from all sources (ie salary received as an executive).
- exempt companies – whether to extend the concept of an exempt company to groups where the assets and turnover criteria are met.

WHAT THE ACT DOESN'T SAY

As more companies come to operate under the new Act, it will become apparent that some matters are not addressed by the Act. For example, the Act is currently silent on the question of liability for shares issued on incorporation. The Statutes Amendment Bill will address that question.

Some other matters not explicitly dealt with include:

- what happens at an Annual General Meeting – clients often ask what they must do at an AGM. The practice is to have the annual report and financial statements tabled and accepted by shareholders, to resolve to appoint or not to appoint an auditor, and to allow shareholders the opportunity to question management. However, only the appointment of an auditor is actually required by the Act to be dealt with at the AGM – and even that can be avoided (by most companies) by passing a written resolution (s 196(2)). The Act provides that the need for a physical meeting to be held can be avoided if "everything required to be done" at the meeting is instead done by written resolution (s 122). As we have seen though, the list of things *required* to be done is fairly short.
- compulsory acquisition provisions. The 1955 Act allowed a shareholder owning 90 per cent of the shares in a company compulsorily to acquire the minority's shares. These provisions are not carried over into the new Act. Compulsory acquisition of someone's property which does not have a basis in statute arguably constitutes an unlawful expropriation of another's property. An interesting issue therefore arises – the Stock Exchange Listing Rules contain compulsory acquisition provisions, and there are some who consequently would challenge the validity of the Listing Rules provisions.
- whether the ability to act in the best interests of one's parent company can "override" other duties owed to the subsidiary. The Company Law Monitoring Group will be looking at this in its Phase II work. The issue arises because I, as a director of a subsidiary, might be entitled to act in the best interests of the parent company. If I am asked to agree to the subsidiary entering into a cross-guarantee required as part of a group financing arrangement, can I say "it's in the best interest of the parent company, so I agree"? Consider that I also have a duty not to allow the subsidiary company to enter into obligations if it would not be able to perform them when called upon to do so. Can I point to the fact that it is unlikely the subsidiary would ever be called upon to do so, because the parent is in a sound financial position – particularly where the subsidiary is virtually a shell but the financiers are requiring guarantees from all the companies in the group?

Can the ability to act in the best interests of one's parent company override other duties owed to the subsidiary? The Company Law Monitoring Group will be looking at this

CONCLUSION

Early signs are that the new Act is achieving the broad objectives set for it. Companies and their management have greater flexibility, and can do more things, but the seriousness of their responsibilities is brought home to them through certification requirements, duties provisions, and penalties.

Amendments have been made and will be made over the next year or so to fix the glitches that are identified when people apply the Act in practice. And some policy decisions might see further amendments being made. ❑

WHITHER THE COMPANIES ACT 1993?

Jack Hodder, Chapman Tripp Sheffield Young, Wellington

examines progress in an address to the 12th annual Company Secretaries' Conference

INTRODUCTION

It is nearly three years since the 1993 company law reforms came into force, and nearly eight years since the Law Commission's seminal report was published.

The dropping of the title of company secretary exemplified the Law Commission's view that directors have the ultimate responsibility for company administration, although they may delegate the tasks. In fact, the survival of the office of company secretary is not only predictable but sensible, especially where it reflects a conscious decision following a review of a company's administrative arrangements.

This paper reflects the interests of the author, commencing with a role in developing the Law Commission's reform proposals, more recently as a litigation partner in a large commercial law firm, and throughout as a legal commentator with *The Capital Letter*.

The limits of my own activities mean that I am not qualified to speak on the impact of the new legislation on the approach to, and completion of, substantial corporate transactions. Nor is there anything of value that I can say on re-registration. However, I have taken soundings from a number of my commercial partners on the impact of the reforms on the advice and transactions that they have been involved in. As you might expect, there has been a variety of reactions, including comment on

- a conspicuous boom in risk management advice, and the creation of paper trails
- the continuing use of 1955 Act companies, and the slow rate of re-registration under the 1993 Act, perhaps reflecting a lack of enthusiasm within corporates for the reforms
- the relaxation of capital maintenance rules, enabling completion of a wider range of transactions (perhaps with a lesser margin for risk)
- the fact that, generally, life goes on although each new transaction throws up some legislative imperfection (eg in contracts for issue of shares, or the position of directors where there is a company as a bare trustee).

My focus is more on corporate governance issues. On these issues, because of the way they developed, the success of the 1993 reforms depends on our Judges making those reforms work. At the heart of what follows, therefore, is what our Courts have said and done in the years of 1994, 1995 and 1996. I also mention the current state of affairs in the official Company Law Monitoring Group.

HISTORY AND CONTEXT

As most will recall, the Companies Act 1955 and its predecessors had followed English models. That involved a roughly 20 year cycle of legislative revision, and an ongoing theme that limited liability was a privilege. Nevertheless those interested in company law reform in New Zealand were aware that major legislative changes in both Australia and Canada had moved significantly away from the English model. Here, the Macarthur reports of the late 1960s and early 1970s had indicated that we might usefully look at Australian rather than English models for reform.

THE LAW COMMISSION

For what seemed a relatively long time (but not long enough for some), nothing much happened. Then in 1986 an activist Minister of Justice directed the Law Commission to report on the form and content of a new Companies Act. In so doing, the Commission was to "have regard to" the ongoing role of the Securities Commission in relation to take-overs, insider trading and company accounts; and also to the work of the Department of Justice on corporate and individual insolvency. In fact the reform field became even more crowded with the Russell Committee's inquiry into the sharemarket, the Australian Law Reform Commission's work on insolvency, and (later) the establishment of the Takeovers Advisory Committee.

The Law Commission treated its brief as one to focus on "core" company law: the creation, operation and termination of companies. It also saw the need to deal with the issue of company charges in the wider context of security interests relating to personal property. On that basis, the Commission prepared discussion papers and reports (the latter including draft legislation) directed towards a new legislative package containing a new Companies Act, a new Personal Properties Securities Act and some related legislation.

In relation to company law, the Commission concluded that there was a need for new legislation to provide more accessible and intelligible law, and to rewrite some significant rules of company law which represented outdated policies and/or were inconsistent with commercial reality.

The Commission sought to articulate a policy basis for reform. In its 1989 report, *Reform and Restatement*, it said that a good system of company law should:

- provide a simple and cheap method of incorporation and company organisation which is flexible enough to meet the needs of diverse organisations
- clearly identify the duties and powers within the corporate structure in an Act designed for use by directors and shareholders and not just lawyers and accountants

- provide for better accessibility to company law by setting up the Act as the statement of first recourse in identifying rights and duties within the company
- ensure that regulation to prevent abuse is appropriate (that is to say, directed at the abuse of corporate structure or limited liability) and is commensurate with the risk of abuse so as not to frustrate the economic and social benefits of the company form
- maintain and build upon a distinction between the aims of company law and securities law: company law being concerned with the incidents, benefits and abuses of the corporate form; securities law having a wider concern with the integrity and efficiency of capital markets.

The Commission itself identified the most significant reforms proposed in its 1989 report as:

- enactment of a new Act to replace the 1955 Act
- abolition of the concepts of par value and nominal capital as part of a reform of the rules about share capital and the maintenance of capital
- enabling companies to buy their own shares and finance the acquisition of their shares (reversing the current law), subject to protections for shareholders and creditors
- redefinition of the distribution of power within the company by direct operation of statute rather than by a deemed contract
- expression in the statute of a standard form of company constitution which will apply unless expressly varied by the company constitutional documents
- a fuller restatement in the statute of the duties and powers of directors
- recognition of the circumstances in which the interests of existing shareholders need special protection
- a comprehensive system for protection of minority shareholders including
  - dissentient rights to buy-out where class rights are affected
  - improved standing to enforce through the Courts obligations owed to the company and directly to shareholders
- greatly simplified liquidation rules
- requirements for experience and independence in those conducting liquidations and receiverships
- restatement of the law relating to receiverships in the Property Law Act 1952
- removal of the law relating to company charges from the Companies Act and its incorporation in a comprehensive Personal Property Securities Act, as recommended in the Law Commission's Report 8.

In its 1990 report, *Transition and Revision*, the Commission dealt with some "fine-tuning" of its draft Companies Act, and with: receiverships, re-registration, transitional provisions, flat and office owning companies and insurance companies. The question of co-operative companies was left by the Commission on the basis that a separate statute was not required if the recommendations for flexibility on such matters as share repurchase were to be enacted.

Had all gone well, we ought to have had a coherent package of company law reform. I am unrepentant enough to suggest that the questions – "How far have we come, and how much further do we have to go?" – can use the Law Commission's work as the benchmark.

THE LEGISLATIVE PROCESS GOES AWRY

Unexpectedly (at least to the Commission), unnecessarily and undesirably, the Law Reform Division of the unrestructured Department of Justice set about rewriting the Commission's draft legislation. Refraining from refighting old battles, I see no reason to revise my contemporary view that Justice's rewriting of the Law Commission's draft Bill was absurd and retrograde; and that the Department's stonewalling on a new Personal Properties Securities Act was unforgivable.

In the extended legislative process that followed the introduction into the House of the Department's Bill just before the 1990 election, neither ministers nor members of Parliament distinguished themselves with any focus on overall coherence. Significantly, the departure from the Commission's draft meant that the Commission's reports lost much of their value as guiding texts for interpretation. In the result, the state of the 1993 reform package was such that its success depended (and still does) upon Judges making practical sense of a variety of inconsistent legislative signals.

THE FRACTURED DECADE

It is worthwhile recalling that the 1993 legislative package is very much a child of the 1980s. That was, in commercial terms, a fractured decade: the heavy regulation of R D Muldoon; the deregulation of R O Douglas; the boom of the mid-80s; and the stockmarket (and property) slump of 1987 and thereafter.

It is also worthwhile bearing in mind that the 1980s and 1990s have seen a continuing policy debate featuring

- on the "dry" side, those who favour economic analysis and a high degree of certainty to achieve efficiency (generally citing North American academic work), and
- on the "wet" side, those seeking to maintain flexibility and judicial discretion to achieve equitable outcomes (generally drawing on English judicial analyses). This debate has been at its most vigorous in relation to the take-overs regime, but it also had a significant influence on the company law reform debates.

SHARES AND SHAREHOLDERS

Perhaps the most fundamental feature of a company is its ownership through shares which effectively limit the owners' risk to the subscription price. There is, however, a latent tension between the proprietary rights of individual shareholders and the aspirations of the majority for new direction or restructuring. Some of these tensions can be seen from sampling a smorgasbord of recent cases.

The importance of company law policies is illustrated by the enormously complicated and expensive *Equiticorp*. I have not read Smellie J's massive final judgment with care, and am not sure if the same circumstances would result in the same liabilities under the Companies Act 1993. Nevertheless, standing back from the fray, it does seem odd that a huge Crown liability was founded on s 62 of the 1955 Act (which provided at the time for only a $200 fine for breach), reflecting a capital maintenance policy which was effectively denounced by the Law Commission.

From the "dry" perspective, an unhelpful early sign came from across the Tasman in *Gambotto v WCP Ltd* (1995) 69 ALJR 266 (HCA), which insisted that a special majority could not expropriate the shareholding interests of a minority even for a price 30 per cent above the current market price for the relevant shares. The judicial rhetoric is heavy

on "rights" talk and "fairness", and remarkably intolerant of the market as a measurer of value. The majority of the Court accepted that a minority shareholder could be bought out involuntarily for a "proper purpose" (whatever that means) and with a fair procedure and a fair price (whatever they mean). One of the Judges was adamant that the share-markets should not be accepted as definitive on a "fair" price, observing that "the history of stock markets are overrun by examples of companies whose intrinsic value remained unnoticed by the market for long periods of time. The herd mentality exists in a stock market as in other areas of life. Judges cannot delegate to the market the duties of Courts to fix a fair price for shares!"

For "rights" talk on this side of the Tasman, we might recall one of the stages of the *Power Beat* [1995] 2 NZLR 568 litigation where Blanchard J indicated that a generous construction must be given to articles of association relating to shareholder voting so as not to interfere with the "democratic rights" of shareholders.

Somewhat curiously, the majority of the Court of Appeal in *Romco Corporation Ltd (In liquidation) v Walker* (CA 169/93; 29 December 1994) did not think that a subscriber for shares had performed its side of the contract by providing other shares it had contracted to provide as consideration because those shares had become valueless between the time of the contract and the time of performance. It remains unclear why company law or liquidation principles required any departure from the orthodox rules of contract (and the agreed allocation of risk).

On the topic of voting shares, the Court of Appeal had no difficulty in *Westpac Securities Ltd v Kensington* [1994] 2 NZLR 555, CA in concluding that a unanimous vote by holders of voting shares bound the company, irrespective of the position of redeemable preference shareholders. On the other hand, the Court of Appeal has held more recently (in *Waihi Mines Ltd v Auag Resources Ltd* (CA 111/96; 19 December 1996) that voting shares can be completely disregarded, when determining whether companies are "related", if the real power in the company lies in the hand of redeemable preference shareholders.

DIRECTORS

The responsibilities of directors remains the highest-profile topic in company law. The long title of the 1993 Act was designed to reflect two simple propositions, often overlooked by those involved in post-mortem rather than neonatal exercises: that there is an economic cost to excessive caution; and that business involves risk-taking. So the 1993 Act commences with references to:

- the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks; and
- efficient and responsible management of companies by allowing directors a wide discretion in matters of business judgment while at the same time providing protection for shareholders and creditors against the abuse of management power.

In my opinion, the long title to the 1993 Act (drawn from the Law Commission draft) is one of its most valuable features. In focusing on the benefits of companies, acknowledging the reality of economic risk, and recognising that directors are entitled to make business judgments, it contrasts with the earlier English legislative models which were determined to exact a high price for the "privileges" of incorporation and limited liability. Similarly, experience to date is that the Judges are reading the long title to the 1993 Act and using it as a guideline as they approach some of the less penetrable and less coherent provisions.

From the "dry" perspective, judicial thinking began promisingly in the pre-legislative area with the Privy Council in *Kuwait Asia Bank* [1990] 3 NZLR 513 reiterating the authority of the long-standing *City Equitable* [1925] Ch 407 formulation of directors' liabilities to their company. The Law Lords also reiterated the lack of a duty of care owed by a shareholder to the company or to creditors, and discouraged attempts to by-pass this proposition by resort to the concept of vicarious liability where shareholders employ (but do not directly instruct) directors. In short, the Law Lords were discouraging "backdoor" attempts to fasten liabilities on directors. That approach seems no less sound with the new legislation, which provides a fairly well defined front door for those with legitimate gripes about directors' activities.

The non-dry perspective received some encouragement when Thomas J in *Dairy Containers* [1995] 2 NZLR 30 launched into a prolonged attack on the *Kuwait Asia* reasoning, at least in relation to vicarious liability, although ultimately accepting the binding nature of the Law Lords' pronouncements.

The 1993 reform package was subjected to trenchant and justified criticism for the lack of clarity in relation to directors' duties, not least in relation to the mystical "proper purpose" requirement (s 133) and the risk-aversion incentives of the recast reckless trading provision (s 135). There have been no conspicuous signs of directors being hard to find, or of mass resignations by experienced commercial players. On the other hand, the impact of the restatement of directors' duties has not yet been addressed by the Courts because the cases coming before them have not required this to be done. The soundings among my commercial partners suggested that there might be some signs of a rise in the remuneration sought by independent directors; more careful consideration by "quality" independent directors of offers to join boards and a limit on the number of directorships which "quality" directors are prepared to accept.

Again, if such are the trends, it is hard to see that those are disadvantageous to either individual companies, individual directors or the corporate sector as a whole. There should not be many mourners for the demise of the old boys' club whose members might once have enjoyed a dozen or more public directorships.

The cases that have come before the Courts in the last three years have not directly concerned the restated duties. They have included mixed messages for directors. In *Leucadia National Corporation v Wilson Neill Ltd* (CA 111/96; 19 December 1996) the Court of Appeal confirmed that directors were entitled to act in reliance on independent experts' valuations and engage in a major restructuring which included the sale of major assets. (On this occasion at least, the market was accepted as the "acid test" of valuation.) The *Leucadia* litigation endorsed the proposition that it is wrong for the Court to substitute its opinion for that of management on management decisions arrived at in good faith (cf *Howard Smith* [1974] AC 821, PC).

On the other hand, where good faith is placed under suspicion, as in *Hetherington Ltd v Carpenter & Ors* (CA 243/5; 19 November 1996) the Court will lend its support to shareholder attempts to probe the issues: in that case, the free use of a London apartment with a rental value said to

be some 2,500 pounds per week, and vehicles which cost a total of $687,000. The case also serves to confirm judicial reluctance to accept ratification by a majority of shareholders of directors' actions which have a flavour of breach of fiduciary duties.

On directors' self-interest, the Court of Appeal was prepared in *Cottam* (1995) 7 NZCLC 260,821 to regard as arguable a duty said to be owed by directors to shareholders to ensure that the latter were fully informed of relevant matters before making a decision to sell to directors. The Court was also prepared to accept that the directors could be relieved of any benefit of acquiring at an undervalue (if such were shown).

In the High Court, there has been acceptance that advice given by a company's lawyers to directors is privileged against a liquidator (*Foley's Transport Ltd v Weddell NZ Ltd* Greig J, HC Wellington, M 1468/94; 26 March 1996) but that directors may be held to be parties to Fair Trading Act claims against a company (*Galloway v S & L Lie Ltd* Master Kennedy-Grant, HC Auckland, CP 994-5/92; 16 March 1994) although a settlement of litigation with the company would be taken as an implied settlement with directors (*Brooks v NZ Guardian Trust Co Ltd* CA 188/93; 17 December 1993).

More generally, I have detected some increase in the naming of directors as additional defendants in litigation brought against their company. This should be discouraged but, in the meantime, it is causing directors' insurance cover to be examined.

ENFORCEMENT OF RIGHTS & DUTIES

The much discussed minority remedies in the 1993 reform package have been little exercised. The approach taken by Justice Fisher in *Vrij* [1995] 3 NZLR 763 – would a prudent businessman in the conduct of his own affairs take the litigation proposed? – is sensible enough. But the initial hurdle, and the avoidance of a major debate at that stage, has been rather reinforced in, for example, *Re Kambrook Manufacturing (NZ) Ltd*, (Master Thomson, HC Wellington, M 505/95; 23 May 1996.

The suggestion by Elias J, a former Law Commissioner, in *Techflow (NZ) Ltd v Techflow Pty Ltd* (1996) 7 NZCLC 261, 138 that derivative remedies do not extend to proceedings outside the High Court at least illustrates the 1993 package's move away from the Commission's recommendation for concurrent District Court jurisdiction.

Enforcement of directors' duties by means of injunctions (including interim injunctions) was regarded by the Law Commission (and the legislators) as an incentive to directors to get it right in the first instance. Thus, from a company law perspective, there is room for some misgivings over the High Court's failure to grant interim injunctions in the context of the ongoing *Mercury Energy* (1995) 7 NZCLC 260,818 litigation, and also in the context of a director commencing a new business operation in competition with the company to which he owed directors' duties (*88 C-Force Textile Industries Ltd v Che* (Kerr J, HC Auckland, CP 44/96; 9 May 1996)).

The "oppression" remedies were not greatly changed by the 1993 reform package, although it is of interest to note that in *Shadgett v Apollo Fisheries Ltd* (Temm J, HC Auckland, M 876/92; 11 February 1994), the High Court's bold use of a "cutlass" rather than a "scalpel" to bring matters to an end resulted in the Court of Appeal deciding that too much of the defendant had been lopped off.

LEGAL PERSONALITY

The idea that a company is a legal entity separate from those who own its shares and conduct its affairs is fundamental to company law (and capitalism). On the other hand, there is a constant temptation for aggrieved creditors and controlling directors to overlook the distinction.

In *Equiticorp* [1996] 1 NZLR 528 the Court of Appeal stayed with its previous firm line of discouraging lifting of the corporate veil.

More generally, company lawyers were treated to an essay on rules of attribution (of agent's acts to a company), delivered by Lord Hoffman in *Meridian Global Funds* [1995] 3 NZLR 7. He set out to clarify the "directing mind and will" phrase from earlier case-law, to curb "anthropomorphism", and to emphasise that there is no such thing as a company "as such". He concluded that the answer lies in construction of the relevant statutory context, and not in metaphysics. Whether clarification has actually been achieved is not yet clear, but the company was lumbered with liability (and substantial costs).

COMPANY NAMES

One of the essential requirements of a company under the 1993 Act is that it has a name. The Commission proposed that there be some integration between the Trademarks Act, the Fair Trading Act and the Companies Act. That was not conspicuous in the 1993 legislation, as confirmed by Blanchard J in *Flight Centre* (1994) 7 NZCLC 260,612 where he held that the prohibition on registration of a name which would "contravene an enactment" did not extend to a name which might contravene the Fair Trading Act 1986 (s 9 of which proscribes misleading conduct in trade).

Subsequently, in *NZ Conference of Seventh Day Adventists v Registrar of Companies* (1966) 8 NZ CLC 261, 269, Fisher J suggested in effect that the Blanchard solution might be too crude (more of the cutlass?) but reached the same result by concluding that one could never say in advance that use of a particular name would result in misleading conduct. It seems likely that, if there is ever to be a sensible solution to the mess in this area, it will have to come from a rewriting of the legislation itself.

COMPROMISES WITH CREDITORS

One of the features of the new legislation was the breaking up of the old s 205 schemes of arrangement provisions into two different approaches: a vote of 75 per cent by value (and 50 per cent by number) of creditors could bring about a binding compromise without Court sanction; and the Court could sanction a compromise without a vote by creditors. In relation to the latter, the Court of Appeal initially confirmed that no prior agreement is required for the Court to order the compromise (*Suspended Ceilings II* (CA 55/96; 7 November 1996) but a differently constituted Court of Appeal revisited the topic in the same litigation. The second Bench indicated that the proper test for such an imposed compromise must be at least that it would be unreasonable not to impose the compromise, and that this test would hardly ever be met.

The Court's imposed compromise provisions were not recommended by the Law Commission, and were inserted at the select committee stage of the reform package's progress through Parliament. The absence of any coherent explana-

tion for the provisions created obvious difficulties for the Court in identifying the legislative intention and placing it in the context of the Act as a whole.

Although not yet fully tested in litigation, there remain real difficulties over the relevance of earlier and unclear law on "classes" of creditors for the purposes of creditor voting on compromises, and the overall result may be little different from the previous s 205 process.

LIQUIDATIONS

Although not as "sexy" a topic as corporate governance, corporate insolvency is where the chickens come home to roost, and where much of the interesting litigation begins. The objectives of the 1993 legislation, and the Law Commission, were generally limited to procedures because of the ongoing work of the Commercial Affairs Division (then of Justice, now of Commerce) on substantive rules.

The adoption of the new statutory demand procedure in place of the previous s 218 notice (and its deemed insolvency on non-compliance) has probably eased the path of recalcitrant debtors. Thus, in *Credit Link (Manawatu) Ltd v Personal Computer Power (1985) Ltd* (HC Wellington, CP 598/95, 5 March 1996) Master Thomson advised that the creditor should get summary judgment first before taking any step toward liquidation. If not, the law is far from clear as to who bears the onus of proof (and how much) when there is argument over contestability of a debt.

One area where the 1993 reforms have had an impact is the Court of Appeal's acceptance that subordination of debt does not infringe the general pari passu (equal treatment of creditors) principles of liquidation (eg *Stotter* [1994] 2 NZLR 655). This seems to me to be a good example of the reforms bringing about a greater recognition of commercial reality than was otherwise the case.

The responsibilities of liquidators have been little touched on to date, although in *Leucadia National Corporation v Wilson Neill Ltd* (Fisher J, HC Auckland, CP 365/94; 12 July 1996) the High Court emphasised that liquidators have a statutory responsibility to take credible proceedings against identifiable and solvent villains (including claims against a major creditor).

REMOVAL FROM THE REGISTER

Some recent cases have illustrated some of the conceptual (and practical) implications of the process of restoring to the Register those companies which have been removed. In particular, it has been held that the restorative provisions extend to validating the actions of third parties – thus the Commissioner of Trade Marks' allowing of an extension of time to a non-existent company became valid for all purposes once the company was restored to a register, even though a challenge to the decision pre-dated that restoration (*Natural Selection Clothing* [1995] 2 NZLR 148).

Also worthy of note is *Re Ocean Shipping Ltd* (Fisher J, HC Auckland, M 348/96; 16 July 1996) where the High Court held that a company should be restored to the Register as the Registrar of Companies had removed it, despite a creditor's objection, and thus denied the creditor's right to have a full and thorough investigation of the financial history of the failed company.

THE COMPANY LAW MONITORING GROUP

The Monitoring Group (now run from the Ministry of Commerce) has been operating since early 1995. It has approached suggestions for change by categorising them as technical and uncontroversial, and substantive, or policy, matters.

The work on the first category has produced two substantial reports, in December 1995 and June 1996, In part, these have been translated into a variety of provisions in the Statutes Amendment Bill currently before the House. Commerce has some expectation that, legislative priorities permitting, a further Statutes Amendment Bill will be introduced later this year and give effect to further technical recommendations.

The second phase is essentially "on hold" pending imminent Cabinet decisions on Commerce's work and resource priorities.

OTHER WORK IN PROGRESS

Similarly, the word from within the Ministry of Commerce is that matters as the long-overdue personal property securities legislation, and work on substantive changes to insolvency law (including voluntary administration for companies), awaits political decisions and the allocation of priorities within the Ministry's work programme.

IN SUMMARY

It *is* too soon to say what impact the 1993 reform package has had. There has certainly been substantial work for those engaged in drafting company constitutions and appropriate resolutions, and in advising directors on their obligations.

The Courts have not yet had to examine in any detail the overall themes of the 1993 reform package. For that reason, at least, they have not had to consider the North American jurisprudence or the divergences between our current company law and the approaches which prevailed in the past.

Nevertheless, the High Court and the Court of Appeal Judges who have been dealing with company law issues have examined them carefully, and with awareness of the general intentions of the reforms. Judicial awareness is doubtless assisted by the fact that three former Law Commissioners involved in the company law reform project have subsequently joined the ranks of the senior judiciary – Keith J and Blanchard J on the Court of Appeal, and Elias J in the High Court.

In the end, I incline to optimism in this progress report, notwithstanding its interim nature. It does appear that, in larger corporate enterprises, there has been proper attention given to corporate governance and administration issues. Nor, as they say, has the sky fallen on directors (hard hats may still be a sensible precaution). On the other hand, there have not been many cases involving spectacular examples of directors' negligence or corruption. Such cases bring their own risks for the general approach of the Courts (and possibly Parliament) to company law. Time will tell.

After delivery of this address I read the Minister of Commerce's recent parliamentary reply in which he advised that the Coalition Government intends to amend the Companies Act to require disclosure of environmental impacts. This of course runs contrary to the thrust of the 1993 reform package which was to concentrate on "core" company law reform, reflecting the Law Commission's advice that companies legislation was "not the appropriate vehicle for imposition of general social reforms". In other words, if environmental impacts should be disclosed, this should apply to sole traders, government departments, Crown agencies, trusts, and partnerships, and be in environmental, not companies, legislation. It is an unfortunate omen ... ❑

THE SALE OR OTHER DISPOSITION OF LAND...

Ray Mulholland, Massey University

writes in defence of the requirement of writing

Much ink has been spilt over the need to retain the requirement of written evidence before contracts for the sale or other disposition of land can be enforced, eg Dugdale D F *"Do we need the Contracts Enforcement Act?"* [1993] NZLJ 239, Richardson N. *"The Doctrine of Part Performance"* [1994] NZLJ 396.

This requirement has a provenance stretching back as far as anything in our legal system. The author here focuses upon recent development in this area of law, and especially upon the recent English experience.

The statute provides a classic illustration of the overlay of case law onto statute law. The requirement of written evidence cannot be considered in isolation from the associated equitable doctrine of part performance, which, from its inception has provided an exception to the statute which may be exercised at the discretion of the Court.

HISTORICAL PERSPECTIVE

The present provision requiring written evidence before contracts for the sale or other disposition of land may be enforced is s 2 Contracts Enforcement Act 1956, a re-enactment of s 4 of the (English) Statute of Frauds 1677.

The reasons for the passing of the Statute of Frauds quickly receded into history and need not be considered here. The practical integrity of the Statute has been maintained by judicial attitudes towards the application of the equitable doctrine of part performance. At present, it could be said that the Courts increasingly regard reliance upon the Contracts Enforcement Act as a privilege.

Interestingly enough the notion of part performance in the Courts of equity preceded the passing of the Statute by many years. Equity would not decree of specific performance unless there had been some part performance. Thus in *Marquis of Normanby v Duke of Devonshire* (1697) 2 Freem. 216; 22 ER 1169 it was said:

> before the statute of frauds and perjuries, this Court would not execute a parol unless it had been executed in part on one side or the other then it could, because it was but reason, when one party had performed of his part that the other party should be compelled to perform of his part.

Early transactions were binding not by the force of the agreement itself but by the "delivery of the thing" or the payment of the price.

But from the earliest times exceptions were allowed to the Statute on grounds that were evidential rather than equitable. Thus the delivery and acceptance of the land in dispute was, from the earliest years, accepted as adequate part performance, that is the Statute had no application to an action founded upon an executed consideration, *Butcher v Stapely* (1689) 1 Vern. 363; 23 ER 524, *Walsh v Londsdale* (1882) 21 Ch D 9. This practice has been continued into the present time, *Kingswood Estate v Anderson* [1963] 2 All ER 783, *Wakeham v Mackenzie* [1968] 2 All ER 783.

It was also early accepted that if the contract was admitted in the course of proceedings the Statute was avoided, *Simon v Metivier* (1766) 1 Black w 599; 96 ER 317, a practice still current, *Steadman v Steadman* [1976] AC 536; *Regent v Millett* (1976) 133 CLR 679.

It was also accepted that the Statute was inapplicable where the "transaction" was subject to resolution by estoppel, *Walker v Walker* (1740) 2 Atk 98; 26 ER 461.

But in many instances equity simply allowed the avoidance of the Statute on the ground that an equity had arisen, as, for example, where, in the expectation of a contract a party had outlaid expenditure on the land in dispute, *Lester v Foxcroft* (1701) Colles PC 108; 1 ER 205. Significantly, equity Judges appeared to be little concerned to justify their avoidance of the Statute on the grounds of legal principle.

This vast jurisdiction in the avoidance of the Statute was drastically curtailed in the 19th century when the commercial community demanded strict certainty and precision in contract formation. Equity was largely eliminated from the arena of contract law and by the House of Lords decision in *Maddison v Alderson* (1883) 8 App. Cas. 467, acts of part performance were ineffective unless they could be shown to be "unequivocally and in their own nature referable to some such agreement as that alleged" (at 479, per The Earl of Selbourne). This meant that the doctrine of part performance was virtually reduced to a rule of evidence.

This situation persisted until the decision of the House of Lords in *Steadman*. It was there laid down that to establish adequate part performance;

> ... you take the whole circumstances, leaving aside evidence about the oral contract, and see whether it is proved that the acts relied on were done in reliance on a contract; that will be proved if it is shown to be more probable than not. (at 541-542 per Lord Reid)

Steadman concerned a property settlement following a marriage breakdown under which the husband was to take over the house property at an agreed price. The agreement had not been reduced to writing. The wife sought to resile from the agreement when she found that the house property would attract a higher price on the open market.

The House of Lords decision is aglow with the language of estoppel. The House of Lords clearly based its decision on the unconscionable conduct of the wife in having concluded an agreement and then unconscionably seeking to rely upon s 40(1) Law of Property Act 1925 (E & W). But, the actual detriment sustained by the husband was minimal.

The decision in *Steadman*, in effect, maintained the requirement of writing intact but accorded the Courts a very wide discretion to avoid the requirement in those instances where the Court regarded it appropriate to do so.

PART PERFORMANCE

Thus over the years the Courts have reserved to themselves a right to avoid the statutory requirement of writing. Judicial policy in this respect has been dictated by numerous factors.

Prior to the 19th century it is probably true to say that the requirement of writing meant little because if some detriment could be proved as a result of a contacting party relying on the Statute an action in estoppel was available which completely sidestepped the Statute.

The 19th century Courts accepted the new and rigid common law classical contract theory with its clear rules as to agreement and bargain based consideration. This brought the requirement of writing into much sharper focus and the Statute would not be avoided unless the acts of part performance provided "unequivocal" evidence of the alleged contract. Estoppel, as an alternate cause of action, was forced underground.

Throughout this long history there does not seem to have been any sustained and concerted judicial criticism of the requirement of writing.

It is well to remember that the Statute does not require land contracts to be set out in full in writing. Such contracts need only be evidenced in writing. But a note or memorandum must be signed by the party to be charged.

In determining what amounts to an adequate note or memorandum the Courts have also shown considerable flexibility. The "authenticated signature" fiction greatly extended the nature of the required signature. A printed or written name is adequate *Leeman v Stocks* [1951] Ch 941. It is possible to join documents to obtain the necessary signature, *Saunderson v Purchase* [1958] NZLR 588.

THE ENGLISH EXPERIENCE

The decision in *Steadman* despite its undoubted pragmatic rationality, did not find favour in England.

The Law of Property (Miscellaneous Provisions) Act 1989 was passed following a report of the Law Commission; Law Com. No 164.

The purpose of this legislation was, apparently, twofold; firstly, to obviate the confusing notion of a contract that is binding but unenforceable by an action on the contract but may be enforceable by other means. Secondly, to remove the injustice a party who had not signed a memorandum, which had been signed by the other party, but had executed acts of part performance, could enforce the contract against the other party but not vice versa.

The Act, in effect, abolishes the doctrine of part performance, by prohibiting oral contracts in land and, by s 2, contracts for the sale or other disposition of land will be validated only if made in writing which incorporates all the terms of the contract which have been agreed upon, and signed by both parties.

It would seem that such a provision will create as many problems as it will solve.

It was apparently anticipated that the development of proprietary estoppel could serve to replace the old equitable doctrine of part performance; Law Com. No 164, para 4.13, 5.2, 5.4, 5.5, but see Davies, C "Estoppel an Adequate Substitute for Part Performance" (1993) 13 OJLS 99.

Significantly this Act did not abolish the requirement of writing but, indeed, extended it from a requirement of written evidence to the requirement of a contract set out fully in writing.

The English Courts have already deliberated on this legislation in the six years of its existence and have clearly indicated that they are prepared to place a broad interpretation upon it so as to maintain the integrity of the requirement of writing. In other words this contemporary legislation is being subjected to exactly the same judicial process which the Statute of Frauds was subject to throughout its long history.

In *Spiro v Glencrown Property Ltd* [1991] 1 All ER 600, the exercise of an option was held not to be subject to s 2 whereas the actual grant of the option was a "contract for the sale or other disposition of land". In *Record v Bell* [1991] 4 All ER 471, a collateral contract was found to exist to give effect to a letter of variation which had not been incorporated into the original contract.

RECENT STATUTORY EXTENSIONS

Apart from dispositions of real property there has been a substantial increase in the statutory requirements of writing in recent years.

This requirement has usually been implemented to assist the protection of consumers. By s 5 Hire Purchase Act 1971 hire purchase agreements are to be in writing; Credit Contracts Act 1981 s 24, Real Estate Agents Act 1976 s 62, Door to Door Sales Act 1967,s 6, Residential Tenancies Act 1986 s 13, Consumer Guarantees Act 1993 s 5, Motor Vehicles Securities Act 1989 s 6, all require written contracts.

The somewhat enigmatic provisions of s 49A Property Law Act 1952, were inserted by the 1980 Amendment Act. They are apparently a substitute for ss 1-3, 7-9 of the Statute of Frauds. They are modelled on s 53 of the (English) Law of Property Act 1925.

This section extends the requirement of writing, apparently in full. Section 49A(1) reads:

> No legal interest in land may be created or disposed of except by writing signed by the person creating or conveying the same ...

This provision contains an exception in the case of resulting, implied, or constructive trusts and preserves the doctrine of part performance, s 49A(5)(d).

This section has received little by way of judicial interpretation but in *Sutherland v Wadham* [1992] NZFLR 455, 459, Williams J confirmed that even in the case of land the writing may be dispensed with when to deny the trust would be to carry out a fraud. There seems to have been no discussion of the viability of the requirement of writing when these provisions were inserted by the 1980 Amendment Act.

THE REAL ESTATE INDUSTRY

Even if the requirement of writing were repealed the real estate industry would continue to base transactions upon written contracts.

The industry has a long-standing practice of negotiating on the basis of written contracts. The standard form contract drawn up by the Real Estate Institute and the New Zealand Law Society is universally used. Verbal negotiation is frowned upon. Even verbal agreements prior to the signing of a written contract are not favoured. It is perhaps significant that the amount of disclosure required in the standard

form contract has tended to increase with the successive editions of the Standard Form Contract.

Written contracts overcome possible difficulties associated with pre contractual negotiations or "agreements to negotiate", and can obviate the prospect of actions under the Fair Trading Act 1986.

The increasing use of tendering where conditions of tender will be drawn up by the vendor, has reinforced the practice of writing.

The standard form used by the Real Estate Industry has been found generally acceptable.

LAW COMMISSION RECOMMENDATIONS

In drawing up submissions for a new Property Law Act the Law Commission gave extensive consideration to the requirement of writing: NZLC PP 16 p 34, "A New Property Law Act" Part 4, NZLC R29.

The Commission recommended the retention of the requirement of writing and included the existing provisions of the Contracts Enforcement Act and s 49A of the present Property Law Act in the proposed Bill (clauses 38, 39) but in a slightly modified form.

The reasons put forward in support of the retention of the requirement of writing may be summarised:

- The existence and terms of oral contracts are always difficult to establish. The abolition of writing would lead to increased litigation. Writing minimises disputes and provides reliable incontrovertible evidence of the terms and existence of the contract which would be available for future reference: (adopting recommendations of the English Law Commission).
- It is desirable that contracts for the sale of land should not become binding before the parties have obtained legal advice.
- If parties are required to contract in a manner governed by certain formalities there is a much better chance that they will use a form of agreement which has been found to be generally acceptable such as the form approved by the New Zealand Law Society and the Real Estate Institute and in general use throughout New Zealand.

According to the New Zealand Law Commission:

> The Law Commission in England considered and rejected simple repeal of the section and concluded, in an English conveyancing context, that this could not be recommended. It was noted that there was "absolutely no support for this proposal" ... (para 2.6). "Some thought it quite irresponsible" ... The principle justification for continuing to require formalities for contracts dealing with land was thought to be the need for certainty". (NZLC pp 16, p 107)

CONCLUSION

On balance it is submitted that the requirement of writing should be retained.

- The requirement has a very long provenance.
- Over the years a universal practice has evolved of reducing contracts dealing with land to writing.
- Writing assists in securing the intention of the parties to conclude a contract.

At the same time the Courts have developed rational devices for avoiding the Statute in instances where it is clear that a contract has been concluded. Although these devices and especially the doctrine of part performance may appear ingenuous, in reality they have worked and have provided a method whereby Courts can redress a situation in cases where the enforcement of the requirement of writing would lead to injustice.

There would thus seem to be two opposing but equally compelling forces. One requiring that contracts for the sale or other disposition of land should be set out in writing. The other dictating that certain land contracts should be enforceable despite the absence of writing.

Future development in this area could depend upon the development of estoppel. Should estoppel resume its pre-19th century status as a concept freely and robustly applied by the Courts alongside contract, then the issue of writing could be largely side-stepped. Estoppel has a completely flexible remedy, which is entirely at the discretion of the Court, and would probably provide adequate redress in case of reliance loss where a contract had been partly executed. Estoppel would not, of course, necessarily provide specific performance of the actual contract, as the old equitable doctrine of part performance did, although there would be nothing to prevent estoppel decreeing specific performance, where such was an appropriate remedy.

In the case of fully executory contracts the situation is more difficult. Unless there had been some unconscionable conduct on the part of one party, as in *Steadman*, it is probable that the statute would prevail.

In *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88 the defendant had concluded an oral agreement with the plaintiff and had resiled from the contract after the plaintiff had taken possession and spent $10,000 on the premises in dispute. Tipping J exhaustively considered the doctrine and came down strongly against allowing estoppel any inroads into the Contracts Enforcement Act:

> At no stage however has it been held that equity will relieve against the consequences of the statute on general principles of estoppel. (p 108)

Prior to the 19th century this was exactly what equity did. The doctrine of part performance is a specialised application of estoppel.

Tipping J also limited acts of part performance to acts which "clearly amounts to a step in the performance of a contractual obligation" p 109. With respect, this is taking a very limited view of the application of the doctrine. Equity had no compunction at avoiding statutes in instances where to apply a statute would condone fraud: cf the Statute of Limitation, *Trevelyan v Charter* (1935) 4 LJ Ch 209, 214.

The doctrine of part performance is specifically preserved in the Contracts Enforcement Act and in cl 40 of the Law Commissions's draft Property Bill: NZLC R 29, p 62. This indicates that the Legislature is allowing the Courts a discretion as to when to avoid the statute.

Limiting the doctrine of part performance to acts done in execution of the actual contract opens the door to conveyancing practices being devised to satisfy such a requirement: cf *Walsh v Lonsdale* (1882) 21 Ch D 9.

The decision in *Dellaca* is oriented to a common law rather than an equitable approach. It seems difficult to see how such an approach could cope with a situation where a clear equity had arisen and reliance upon the statute amounted to equitable fraud as for example where there was extensive improvement effected to land in the expectation of a contract and by relying on the statute a defendant could take the benefit of the improvements; *Lester v Foxcroft* (1701) Colles PC 108; 1 ER 205. ❑

HARBOUR JURISDICTION AND CHARGES

Dr Kenneth Palmer, The University of Auckland

tries to reconcile two recent cases on District and Regional Council powers and the effect of invalidity of bylaws

The practical manifestations of major legislative reforms predictably take five years or so before the consequences surface in the Courts. Two recent decisions of the High Court arising out of the reorganisation of local government in 1989, appear to confirm the comment. Both decisions involve harbours and charges for facilities. In *Whangarei District Council v Northland Regional Council* [1996] NZRMA 445, Baragwanath J, the Regional Council failed in a claim for marina charges. In the second decision, *Bradey v Northland Regional Council*, High Court, Whangarei, AP 25/95, judgment 25 October 1996, Elias J, the Regional Council succeeded in a claim for a port use charge. In both decisions, the same counsel appeared.

WHANGAREI DISTRICT COUNCIL CASE

Turning first to the *Whangarei District Council* case, the judgment of 82 pages underscores the multiplicity of legal issues arising. In essence, the District Council had paid to the Regional Council under protest, several sums relating to annual license and mooring fees for marina facilities in three local harbours. The District Council brought proceedings claiming to recover the sums, and the Regional Council counter-claimed for further amounts allegedly payable under bylaw and resource consent charges, and another sum for boat levies collected from vessel occupiers.

The judgment first considers the nature of the local government reforms which occurred in 1988 and 1989 under the Local Government Amendment Act (No 3) 1988. On 1 November 1989, the Harbour Board, which had developed the marina facilities, was dissolved and its functions reallocated between the Regional Council and the District Council. The Order in Council prepared by the Local Government Commission, provided for the vesting of the particular marina sites in the Whangarei District Council, but vested in the Regional Council, except as otherwise provided, the functions, duties and powers of a Harbour Board under the Harbours Act 1950. Other relevant dates were 1 October 1991, the date upon which the Resource Management Act 1991 came into force, dividing resource management functions at the mean high water springs mark between Regional and District Councils. Further, on 3 October 1991, the Foreshore and Seabed Endowment Revesting Act 1991, revested areas of the seabed held by local authorities in the Crown.

The Harbours Act 1950, s 232(37), empowered the fixing of rents under bylaws for moorings provided by the (former Harbour) Board. An initial question was whether the District Council or Regional Council succeeded to the bylaw power under s 232(37). His Honour noted that the Harbours Act drew no clear distinction between regulatory and propriety functions, and as shown in *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, a licence fee would not necessarily be limited to the recoupment of administrative costs. It was apparent from the Order in Council that the marina structures were vested in the district which therefore largely took over the former Harbour Board functions relating to the provision and maintenance of the marinas. However the region was required to exercise the residual regulatory powers within the harbour limits. The District Council, being responsible for actual maintenance, had the power under the Harbours Act, s 232(37), to fix the rental for moorings enjoyed by boat owners. The Regional Council could not rely upon that power to justify the collection and imposition of the charges levied.

Turning to the Resource Management Act 1991, under s 424(2)(a), a bylaw made under the Harbours Act 1950 in respect of any part of the coastal marine area, was deemed to have been lawfully made by the Regional Council, and could continue in force until the expiration of three years. His Honour was not prepared to accept that this transitional provision validated the bylaw as a power available to the Regional Council. The allocation of responsibility already made by the Local Government Commission in 1989, could not be reopened by the broader subsequent transitional provision under the RMA. His Honour commented that in *West Midland Baptist Association v Birmingham Corporation* [1970] AC 874, the House of Lords had held that:

> an Act of Parliament does not alter the law merely by betraying an erroneous opinion of it; although the position will be different if the provisions of the enactment would only be workable if the law was as Parliament supposed it to be. (p 458)

His Honour found the submission that the RMA effected an implied amendment to the 1988 Act and the Order in Council, would be so clumsy and productive of uncertainty that he would decline to ascribe any such intention to Parliament.

In the alternative, the Regional Council sought to justify the charges as duly made under s 36 of the RMA. It contended that the District Council was deemed to be the holder of a coastal permit, in terms of s 384(1)(c), and thereby liable to charges made. An interesting issue was whether or not the

right of use or the authorisation of the activity as a permitted use, could also be construed to have the status of a resource consent in terms of s 36. In general terms, new activities within the coastal marine area would under s 12 RMA, require a resource consent, unless expressly allowed by a rule in the regional coastal plan or proposed plan. Further s 20 provided continuity for existing lawful activities for an interim period. Section 20(1) regarding existing uses, was held to be not applicable as the activities did not fall under s 12(3), but came within s 12(2). However, under s 384 RMA the existing permissions in respect of the coastal marine area, were deemed to be a coastal permit granted under the RMA. One of the marina sites clearly came within s 384(1). The status of the two other sites was more complex, having originally been authorised through zoning changes at the District Scheme level. Adopting a fair large and liberal interpretation of s 384(1)(a), His Honour construed the pre-condition of qualification for an existing permission in relation to planning matters, to cover not only permissions granted under planning consents, but also permission granted under the broader head of a permitted use under the zoning ordinances. Secondly, the further condition under s 384(1)(b) that a licence or permit should have been granted under the Harbours Act, would cover the situation where the Harbour Board had authorised itself to proceed with marina development. Accordingly, a deemed coastal permit was established under RMA, s 384, and the Regional Council was entitled to make a proper charge under s 36(1)(c).

His Honour agreed that councils did not have a general discretion to depart from the scale and to recover additional charges

The next issue was whether the charge made and levied was in fact a valid charge under s 36 RMA. The charge power under s 36 could reflect in part the broader resource management duty, under s 35, to gather information, monitor effects and keep records. However, as the Regional Council had no proprietary interest in the marina structures or facilities, the charges which would be justifiable under s 36 would be limited to RMA functions.

The fact that the Regional Council sought by a single scale of charges to impose fees for both Harbours Act and Resource Management Act functions signalled a risk of confusion of the inconsistent statutory concepts. The charge for use of a seabed area, as reflected in *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, CA, was no longer available to the Regional Council. His Honour considered various authorities on the scope of charges, including *Stapleton v Auckland City* [1969] NZLR 95. Referring specifically to s 36 RMA, His Honour agreed with a passage of the Planning Tribunal in *Aifric Developments Ltd v Wellington Regional Council* [1995] NZRMA 97, that councils did not have a general discretion to depart from the scale and to recover additional charges. The Regional Council's activities and monitoring of the utilisation of the marina berths, could not be related to actual on-site work or in relation to actual costs of remediation of pollution and oil spills occurring. The administration and maintenance of individual marina berths were undertaken by the District Council. Further, the District Council supplied a warrant of fitness, under the Building Act 1991, s 45, at the expense of the district.

A further justification was advanced by the Regional Council, namely that it had certain deemed powers under the Building Act 1991, to monitor the structural conditions of the fuel berth, but this function could not be charged for under the RMA.

As a procedural defence, the Regional Council relied upon s 716D LGA, which limits the quashing of a special order, unless the proceedings are commenced within six months of the making of the special order. His Honour did not read s 716D as confined to special orders made for the purposes of the LGA alone, as distinct from the RMA. Charges made under s 36(2) RMA could adopt the special order procedure. There were strong policy reasons for an application of the statutory time limit in the present context. Decisions were made and policy formed on the basis that special orders are valid. However, the application of s 716D, depended on whether the Regional Council actually exercised the charging power under the RMA. Further, s 716D could have no application to the Regional Council's claim founded on the Harbours Act which was altogether outside its jurisdiction. Considering the facts, His Honour found that the Regional Council did not elect to rely on the RMA power.

Finally, the Regional Council fell back on s 690A LGA. This states that a council may, by bylaw or resolution prescribe fees payable in respect of any service given, where the enactment contains no provision authorising the charge, but does not provide that the service is to be given free of charge. His Honour found that s 690A could not apply as there was no relevant service provided by the council, that the RMA did provide a specific charging power, and that the charge for the service if made under the RMA exceeded the authorised formula.

In conclusion, the counterclaim by the Regional Council failed, and the claim by the District Council to recover the payments made under protest succeeded. His Honour referred to the Judicature Act 1908 s 94A, relating to the jurisdiction to grant relief where payment was made under a mistake of law. Reference was made to *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 that as a general principle, claims made under an ultra vires demand should be repayable. The claims were not made in settlement of a dispute. Judgment was given for the District Council.

THE BRADEY CASE

By way of contrast, in *Bradey v Northland Regional Council* (above), Bradey operated a charter yacht, and was required by the Regional Council to pay a substantially increased port charge for the use of various wharf facilities in the Bay of Islands. The particular large wharf at Paihia was not used by Bradey as a matter of personal preference. It was alleged that the port charge had been substantially increased to finance the upgrading of the Paihia wharf. It was alleged that the upgrading decision was unlawful, due to a failure to obtain ministerial consent, and the increased charge was not lawful. (Formerly the Harbour Board had been able to subsidise port maintenance from commercial operations.) In addition, it was claimed that the bylaw charge could not be used to recover capital expenditure. The claim to recover the port charge had been upheld in the District Court. The District Court Judge had declined to find the bylaw fixing the charge to be unreasonable or ultra vires, or that the

failure of the minister to approve the works affected the right to recover under the charge. From this decision, Bradey appealed.

In the High Court, Elias J set out initially a statement of principles relating to validity of a bylaw. Reference was made to *Mt Cook National Park Board v Mt Cook Motels Ltd* [1972] NZLR 481, at 485, regarding the use of licence fees to extract revenue. Further reference was made on the point to *Stapleton v Auckland City* [1969] NZLR 95.

Regarding the legislative authority to levy the charges, which was challenged by Bradey on appeal, Her Honour turned first to the Harbours Act 1950, s 2, and the definition of harbour dues. These dues included port charges but did not include items imposed by or payable to a port company. The abolition of harbour boards and establishment of port companies under the Harbours Amendment Act (No 2) 1988, and the Port Companies Act 1988, was considered. The alteration to rating powers formerly given to harbour boards, and now found in the Rating Powers Act 1988, was noted. It was agreed, that the bylaw charge in the present case, depended upon the interpretation of the Harbours Act, s 232(10A), which conferred a power to fix and authorise port charges relating to vessels navigating or plying within a port.

it would appear that the respective Judges could have differing views regarding a failure to obtain ministerial consent, as a condition to activities forming the basis of a bylaw

After consideration of the definition of a port, which included a harbour, and the definition of a harbour, Her Honour concluded that port charges could be made by the former Harbour Board. A port charge could be imposed to fund the harbour works such as upgrading the Paihia Wharf, as constituting a shipping purpose (as provided for under the former s 96). Her Honour found that although the amendment to the bylaw, substantially increasing the licence fee for Bradey, referred to a licence fee for passenger boats, the intention and understanding was that the fee was in effect a port charge, and intended to recoup the capital costs of upgrading the wharf.

Overall, the licence fee or port charge had to be reasonable regarding the objects of the Act. Her Honour found that the increase in the licence fee, aimed at recouping for the Harbour Board (shortly before abolition) the cost of the Paihia Wharf upgrade over a 25 year period, was reasonable and was not designed as a revenue gathering fee in the sense of a general tax. The increase in fee of approximately 366 per cent was not unreasonable nor was the charge unequal in its application or arbitrary or oppressive. The ground that the port charge was not authorised, or unreasonable, failed. The Regional Council, as successor to the Harbour Board, in relation to the wharf facilities, was entitled to levy the fee.

However, a further question arose, namely whether a condition precedent of ministerial approval for the Paihia harbour works, required under s 55A of the Harbours Act, which had not been obtained, prevented recovery.

Her Honour noted that s 55A, was introduced by the (No 2) 1988 Amendment at the time of establishment of the port companies. It was suggested that the provision was introduced to provide ministerial control to prevent harbour boards, which had been divested of their commercial port activities, from setting up competing commercial operations. [This contention would be supported by the provisions of the subsequent Local Authority Reorganisation (Property Transfers) Act 1990, s 10 relating to transitional activities of another former harbour board.]

The Harbours Act s 55A stated that it would not be lawful for any harbour board or local authority, except with the prior consent of the minister, to expend in the undertaking of any harbour works certain prescribed amounts ($300,000 in relation to the Northland Harbour Board). The Paihia Wharf upgrading costs exceeded the prescribed amount, and although an application had been made to the minister for consent, no consent had been granted to date. By definition, the harbour works covered were those intended to be used for "shipping purposes" which was defined to include a purpose that conduces to the safety or convenience of ships (other than yachts ... or other boats used exclusively for recreational purposes), or facilitates the shipping or unshipping of goods and passengers. Her Honour found as a matter of statutory interpretation that ministerial consent was necessary (by implication finding that reference to recreational purposes did not cover boats which plied for hire). Further, the purpose of unloading goods and passengers was seen as falling within the use of the wharf, and therefore requiring the consent.

Having concluded that ministerial consent was necessary, and not obtained, the important question was one of consequence of this invalidity. Her Honour stated after reference to various major academic authorities on "administrative law", that "These deep waters were hardly stirred in argument and I shall not attempt more than is strictly necessary to answer the points raised" (p 20). Her Honour observed, after noting distinctions between public and private law and jurisdictional validity, "In particular, I am not convinced that a distinction between 'substantive' and 'procedural' challenge is desirable, or that the limits of collateral challenge depend upon whether the defect is 'patent' or needs to be established by evidence. Limits to collateral challenge are unavoidable because the consequence of unlawful public agency action is not necessarily invalidity: see eg *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1; *Reid v Rowley* [1977] 2 NZLR 472. When a collateral challenge will be permitted was probably incapable of determination by hard and fast rules. The only reliable pointers would be the seriousness of the error and all the circumstances of the case and whether the challenge was central to the case before the Court. Her Honour stated:

> I do not think it matters whether the defect is one of vires or procedural error or whether it can only be established by evidence. Rights of appeal are sufficient protection against error in the collateral attack and the alternative is the inconvenience of separate proceedings, such as the Judge suggested here. In the circumstances of the present case I am of the view that the appellant fails on both limbs of the approach suggested.

Her Honour found the validity of the expenditure of the Paihia Wharf was not central to the appellants' defence to the claim for payment of the licence fee. The defence was collateral challenge at a remove. The challenge that the charges were illegal expenditure was remote from the central issue and was not determinative of the validity of the charge

which, being authorised, could be justifiable as a port charge in any event. Further, the breach was not so flagrant or serious that it could be said with confidence that invalidity was the likely outcome. The specific power of the Attorney-General under s 55A(11), to enforce by civil proceedings a breach of the section, would be unnecessary if the defect were serious enough to give rise to obvious invalidity. [Another view could be that the Attorney-General was empowered to act without a relator request.] It was possible that validation might yet be obtained from the minister. Her Honour concluded:

> I am unable to agree that in the circumstances the outcome of review proceedings is likely to result in a determination of invalidity of the bylaw, much less that such consequence was highly probable.

On this conclusion, the appeal failed, and judgment for the Regional Council to cover the port charge was confirmed.

The summary of the reasons given by Elias J, for finding that non-compliance with the condition precedent of ministerial consent under the Harbours Act, s 55A, did not invalidate the claim, can be contrasted with a statement of Baragwanath J in the *Whangarei District Council* case (at 476). One of the defences raised by the District Council (but not already noted above) was that the Regional Council, in amending the Harbour Board bylaw, was required under RMA, s 424(6), to obtain the consents of the Minister of Conservation and the Minister of Transport jointly, as a condition before any alteration could come into force. In fact the ministerial approval had been sought and purportedly given. However, regarding the effect of non-compliance with the statutory condition precedent, Baragwanath J had no doubt that non-compliance would have invalidated the special order procedure. Accordingly, it would appear that the respective Judges could have differing views regarding a failure to obtain ministerial consent, as a condition to activities forming the basis of a bylaw. In *Bradey*, the substantial content of the levy imposed under the bylaw arose directly out of the work for which there was no lawful authorisation.

It is of interest that the views expressed by the academic authorities on "Administrative law", relate mainly to applications for review of decisions and validity in a public law context. The judgment quotes from the *A J Burr* decision, being a declaratory application, regarding the discretion of a Court on a finding of procedural error or breach in a planning application procedure. By contrast, in the *Bradey* situation, the claim was in the nature of a civil action to recover a debt for port charges, being close to a claim in contract between a customer and a provider. In this situation, one may express some hesitation in the reasoning which allows a public authority, the Regional Council, to recover a debt, which appears to arise directly and substantially out of expenditure, which does not have the lawful approval of a Minister as a clear statutory pre-condition. Validation under the Illegal Contracts Act 1970 was not applicable. It is not realistic to expect one small consumer to take immediate judicial review proceedings, especially having regard to the absence of effective legal aid funding. The possibility that the minister might, after several years' silence, at some date in the future, approve by retrospective validation under Order in Council, the construction work, appears a very tenuous basis for declining weight to the unlawful action defence. Further, the unstated problem of invalidity in relation to other boat operators levied with the port charge, who may have paid the charges, ought not to have constituted a relevant legal ground for declining to uphold the proven facts of the unlawful activity defence in the in personam claim.

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Although the High Court clearly has a discretion in an application for review or a declaration, regarding the giving of relief (see *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 at 42-44, and *A J Burr* (above), the breadth of the discretion to reflect the public interest, is not necessarily applicable to a claim to recover a debt based on a contractual type relationship. Courts (other than Disputes Tribunals) do not have a general discretion to decide a debt case on grounds of fairness or justice. In a broad sense, a fair outcome may have resulted in the *Bradey* decision, in that the public benefited from the work carried out, and other boat operators were presumably prepared to pay the increased licence fee to recoup the costs. Otherwise, all the ratepayers in the region would eventually meet the costs through the regional rates levy.

By way of analogy, the matter of collateral challenge may arise in any challenge to the validity of a rates assessment, by virtue of the Rating Powers Act 1988, s 138. In *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41, at 53, CA, the Court had no difficulty in rejecting the claim that the validity of the rate could not be challenged (on a declaratory application), where the rate was obviously beyond the reasonable powers of the local authority. Under LGA, s 716D applies a six months' time limit to challenge of a special order making a bylaw, which has a similar collateral challenge limitation rationale. In the *Whangarei District Council* case, Baragwanath J held (at 476) that the section was not limited to a special order made under the LGA, and there were strong policy reasons for an application of the statutory time limit, after which no challenge will be entertained. But the Judge found the section had no application to the Regional Council claims founded on the Harbours Act which was altogether outside its jurisdiction. Had this section been raised in or relied upon in the *Bradey* judgment (by analogy), the legal basis for rejecting the defence would have been more persuasive. It could have been argued that the bylaw was within the Harbours Act powers (that the Regional Council ought to have had the benefit of the privative section for a bylaw made by the abolished Harbour Board), and the consent omission was, in context, a technical procedural defect not affecting continuing validity of the bylaw, and recovery of the charges.

In conclusion, the *Bradey* judgment, with respect, regarding the continuing failure to obtain ministerial consent for the expenditure, and the distancing of that failure as remote collateral challenge which could provide no defence in the hands of the appellant, leaves some unanswered questions on the matters of legal principle and discretion. "These deep waters" may indeed need a further stir. ❑