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REFOCUSING THE CONVEYANCING DEBATE

The President of the New Zealand Law Society has "spoken out" about real estate agency fees. The President's purpose was to direct attention away from the conveyancing monopoly and towards the monopoly held by real estate agents.

The President's basic points were that real estate fees represent a higher proportion of the total cost of selling a house than conveyancing fees and secondly that real estate agents were a regulated monopoly whose job could well be done by others. In both these points Mr Haynes is undoubtedly correct and any questioning that follows should not detract from the support the gist of his remarks deserves.

If the strategy is to save the conveyancing monopoly, however, it may well fail, since the obvious response is that the two monopolies should be reviewed together. Indeed, some of those lawyers who were recently in difficulty for breaching the real estate monopoly are also keen to see the conveyancing monopoly end. The current situation is a classic example of the phenomenon that protection not only creates a comfort zone for the unadventurous but also a corral that confines those with initiative and energy.

The President went on to compare real estate agents' fees and those of conveyancers and showed that the former have not fallen, in real terms, since the abolition of scales, as rapidly as the latter. But two glosses have to be put on the President's remarks because these arguments may impact on other issues.

First, a conveyancer's fees and a salesperson's fees are not really comparable in an important respect. Conveyancing requires a level of knowledge and competence, but beyond that point any competent conveyancer can perform the task. Salespeople, on the other hand require important but less definable skills as well as determination. The result is that the distinction between a good real estate agent and a merely competent one is more marked than it is amongst conveyancers and good real estate agents will always be able to command high fees. Meanwhile, the less good may well be languishing with very little and highly erratic income and, unlike the lawyer, have no other obvious steady work. Their choice is to abandon the field or to moonlight in a different job altogether.

This also explains why lawyers have had to cut their fees more than real estate agents have done. There is an effective barrier to entry to real estate work in becoming an agent, while lawyers can more easily increase and decrease the proportion of their practice devoted to conveyancing in response to rises and falls in fees.

The second gloss is that the President sought to make a virtue out of what the rest of the world regards as a vice. Whereas real estate agents charge a commission, said the President, lawyers only charge for the work done. "Even if your house is sold the week it goes on the market, you have to pay every last cent of the commission."

The President evidently adheres to a labour theory of value, but the only true measure of value of anything is its worth to someone else. At any given price a quick sale is usually better than a slow one and so, if anything, commissions ought to decline as time passes rather than rise. The idea that a real estate agent who has expended a great deal of energy but failed to sell your house rapidly should be able to charge a higher fee than one who finds an immediate buyer is the kind of thinking that infuriates lawyers' clients. Lawyers are almost the last people who can charge by the hour and then add disbursements on top. Everyone else has to quote a fee for a job in advance. The consequences for cost efficiency and discipline of the two charging systems are obvious. (This does cut both ways, however. Transactional lawyers in particular could probably raise their fees in many instances if they focused on the value of the job to the client rather than the number of hours put into it.)

Also raised is the question of just what knowledge and skills conveyancers require. The President says that any non-lawyer conveyancers should have to be "suitably qualified". But what are these qualifications? This is a question that might have an unfortunate answer. In his recent judgment in *Dempster v Registrar-General of Land*, in the High Court, Auckland, 21 March 1997, M1555/95, Fisher J quoted the list of subjects that the Registrar-General believes that conveyancers should have passed at university. These included, as well as land law, contract, company law, planning law and land conveyancing and drafting. But the difficulty is that several of these subjects ceased to be compulsory in the law degree some years ago and, so far as is known, land conveyancing and drafting is not taught at any university, nor, probably, should it be. The segment on the subject in the professionals course, which is where it belongs, is minute.

Furthermore, it is at least theoretically possible for a lawyer who disappeared into MFAT before the Contractual Remedies Act was passed to emerge today after a lifetime of international conferences and conventions, and immediately start conveyancing without let or hindrance.

Thus the outcome of any rational consideration of what knowledge is required for conveyancing is likely to be that many lawyers would not be permitted to engage in it. Some would not weep over this and, indeed, wonder why those whose intention is to become barristers have to learn about the subject at all.

This show will run and run. The end is inevitable, only the timing is in doubt. The far-sighted lawyer will not be dreading the inevitable but will be preparing to grasp the opportunities offered. ❑

IN THE DISTRICT COURTS

Judge Kerr, Editor of the District Court Reports

THE BIOSECURITY ACT 1993

In *R v Bradshaw* [1996] DCR 872 Judge M.H.W. Lance QC was dealing with an accused who had been committed for trial to the District Court on a variety of offences under the Crimes Act 1961 and s 154 Biosecurity Act. All informations were laid indictably. After committal the Crown considered that, although the committal in respect of the Crimes Act charges was valid, the committal on the Biosecurity Act charges may have been invalid.

Counsel for the defence sought a ruling on whether the District Court accepted or declined jurisdiction in respect of all or any of the offences on which the accused had been committed. His argument in relation to the Biosecurity Act charges was that that Act did not expressly state the offences in question were crimes, nor that a person was liable to be convicted on indictment. The Crown argued that if it were Parliament's intention to make the offences under s 154 indictable, then it would have amended the First Schedule to the Summary Proceedings Act 1957 to make them triable on indictment in the District Court. The Crown submitted that the substantive charges under the Act could not be amended from indictable to summary, and were accordingly null and void. The Crown also contended that the receiving charges were properly triable in the District Court.

The learned Judge held that s 329(1) Crimes Act 1961 permitted the substantive charges under the Act to be tried on indictment, but because of s 28A(1)(a)-(e) District Courts Act 1947 which governed the jury trial jurisdiction of the District Court, and did not include the substantive charges laid under the Act, he concluded the District Court did not have jurisdiction to hear those charges. His Honour was clearly of the view that the District Court had jurisdiction to deal with the receiving charges.

He found that the committal of the Biosecurity Act charges had been made incorrectly, but having considered s 204 Summary Proceedings Act and a number of Court of Appeal decisions, found that although the committal to the District Court was a nullity, the committing Justices were not functus officio, and therefore the matter should be brought before those Justices so that an appropriate committal to the High Court might be made. As far as the receiving charges were concerned, His Honour considered it would be inappropriate for another Judge to determine if those charges should remain in the District Court or be sent to the High Court. His Honour found that on the information before him the receiving charges had "common characteristics" to the Biosecurity Act charges as they tended to have "similarity of characteristics ... the same general type of offending committed in generally the same circumstances " as provided by s 168A Summary Proceedings Act. That being so, His Honour was of the view that the receiving charges should be sent to the High Court, a commonsense approach with clear administrative advantages.

Although the ultimate decision for committal was in the hands of the Justices, the learned Judge in effect gave a direction to the Justices which meant they were not obliged to consider a difficult matter of law.

Section 154 defines various offences. Penalties are set under s 157. There are some eight offences such as having unauthorised goods in possession; buying, selling, exchanging, acquiring or disposing of unauthorised goods and others for which the maximum penalty is a term of imprisonment not exceeding five years and a fine not exceeding $100,000, or both. A corporation is liable to a fine not exceeding $200,000,

Other offences such as threatening, assaulting, or intentionally obstructing or hindering an inspector carry maximum penalties of twelve months, imprisonment or a fine not exceeding $15,000 or both, a corporation being liable for a fine not exceeding $75,000.

The Schedules to the Summary Offences Act 1957 were not amended to give the District Court an ability to deal with offences under the Act indictably.

"Indictable offence" under the Summary Proceedings Act, "means any offence for which the defendant may be proceeded against by indictment". A "summary offence means any offence for which the defendant may not, except pursuant to an election made under s 66 of this Act, be proceeded against by indictment;".

Because the Crown elected to proceed against the defendant indictably, and because the District Court was not given jurisdiction by the Schedules to the Summary Proceedings Act or in any other way, the only Court with jurisdiction was the High Court. However, had the Crown proceeded against the defendant summarily, then pursuant to s 66 Summary Proceedings Act, because the accused was liable for a term of imprisonment exceeding three months, he would have been entitled to elect trial by jury.

The situation seems somewhat anomalous. When the Act was passed, no provision was made to amend the Summary Proceedings Act to give the District Court power to deal with the offences indictably.

NEW ZEALAND SPORTS DRUG AGENCY ACT 1994

In *JWC v New Zealand Sports Drug Agency* [1996] DCR 939 Judge J Cadenhead heard an appeal from a finding that the appellant had committed a doping infraction after having been tested pursuant to the provisions of the Sports Drug (Urine Testing) Regulations 1994 (the Regulations).

The appellant was an Australian who competed in the New Zealand Beach Volleyball Competition held at Takapuna Beach, Auckland. After the finals she and her playing partner complied with a request from two officials of the New Zealand Sports Drug Agency to undergo sports drug testing. When the appellant had passed a sample of urine into the sample collection container, she and one of the drug testing officials left the sample collection area to process the sample and complete the necessary paper work. It was then noticed that the urine sample was still in an unsealed sample collection container, but was not the minimum volume of 80 ml required by reg 2 so as to comprise a "sufficient sample". The appellant consumed a drink, after which she passed more urine directly into the container holding the original sample. The time lapse between the first and second sample was between 15 and 25 minutes. The sample subsequently tested positive for a narcotic commonly found in pain killing digesic tablets. Digesic tablets were not normally considered to be a performance enhancing drug to a great degree, and the appellant had already disclosed that she had taken that medication. She was found to have committed a doping infraction and appealed against that.

The learned Judge found that the Regulations provided a substantive code for the collection of urine samples. He said that the Regulations –

> Therefore provide a substantive detailed code for the collection of a (urine) sample, and such Regulations clearly are for the benefit of both the competitor and the officials, and are directed at the integrity of any sample collected. Prima facie on these facts it would appear that the appropriate samples should have been collected pursuant to regs 22 and 23, and the provisions of those Regulations were not complied with. Originally an insufficient sample was provided, and the original sample was left unsealed for a matter of 15 to 25 minutes, when a later sample was mixed with it.

His Honour found that regs 22 and 23 were mandatory.The objective of the legislation set out in the preamble to the Act was to encourage drug free sport, and that objective would be frustrated if those Regulations were not mandatory as to substantial compliance, as a principal purpose of such statutory scheme went to the integrity of the sample, for the benefit of both competitor and official.

His Honour compared the "reasonable compliance" provisions of the Transport Act 1962 with the "substantial compliance" provisions of the Regulations, and concluded that the latter provided a higher standard than reasonable compliance. He further found that if there was no compliance at all with the Regulations, it could not be said there had been substantial compliance. The failure to seal the original sample was a substantive breach of the Regulations, and, that basic safeguard not having been carried out, could not be dismissed as a mere technical irregularity.

His Honour quashed the finding made against the appellant.

THE ANIMAL PROTECTION (CODE OF ETHICAL CONDUCT) REGS 1987

The defendant was charged with five offences under reg 3, it being asserted by the informant that the defendant had conducted experimental work involving the manipulation of live animals by injecting them with a zinc-based product, otherwise than in accordance with a code of ethical conduct relating to the welfare and humane treatment of the animal involved.

Judge J R Callander in *Ministry of Agriculture & Fisheries v Pickering* [1996] DCR 960, concluded s 19B Animals Protection Act 1960 and reg 3 of the Animal Protection (Code of Ethical Conduct) Regulations were intended to create "public welfare" offences.

His Honour found that the informant had to negative the defendant's assertion that his actions amounted to therapy or prophylaxis necessary or desirable for the welfare of an animal and those words did not amount to an exception, exemption, proviso, excuse or qualification under s 78(8) Summary Proceedings Act 1957, which had they been would have placed the onus of proof on the defendant. The informant succeeded in negating the defendant's assertion, as the therapeutic factors were incidental to the primary purpose of experimentation. The evaluations were neither necessary nor desirable, and were not carried out on experimental animals. The learned Judge also found that the defendant did not have the power to grant provisional approval for the field evaluations, and did not therefore act in accordance with the Code of Ethical Conduct.

The injecting of animals with zinc-based products was manipulation of those animals and not "therapy or prophylaxis necessary or desirable for the welfare of the animal" in terms of reg 2 of the Code of Ethical Conduct. Accordingly, the defendant was convicted as charged.

CRIMINAL INVESTIGATIONS (BLOOD SAMPLES) ACT 1995

Judge J P Doogue was dealing with an application for the making of a data bank compulsion order under s 40 Criminal Investigations (Blood Samples) Act 1995. The respondent had been convicted of burglary, an offence against s 242 Crimes Act 1961, which was a qualifying offence under the Act.

An affidavit from the applicant officer disclosed he had made the application pursuant to a directive from an Assistant Commissioner of Police, that in all cases where there had been a relevant conviction justifying the making of a data bank order, then police personnel were to apply for such an order.

Counsel for the respondent submitted that the police by that direction had fettered their discretion. The learned Judge had to decide whether there was a discretion, whether it had been fettered, and if it had, could the Court dismiss the application.

The learned Judge in *Police v Hita* [1997] DCR 30 concluded that the power to apply for an order that a convicted person give a sample of blood under s 39 of the Act was discretionary, the police being given a choice. The Legislature had not made making an application mandatory.

It was a feature of the Act itself that a Court had no discretion which it could use to guard against unfair or oppressive applications. The Court had no right to consider what might be regarded as relevant features such as the personal characteristics of the convicted person which pointed to the likelihood of further offending or non-offending.

Normally issues of whether or not a public official had properly exercised a statutory discretion, should be determined by application to the High Court for judicial review. However, a practical approach had to be taken, and as the only parties affected were before the Court, who had had an opportunity to make submissions, there was no need to call evidence, and there was no profit in looking for unnecessary procedural complications, the District Court should rule on whether the applicant had properly exercised its discretion.

If the decision to make the application was invalidly taken, then the Court ought not to act in consequence of taking that decision, the Court having power to shield a respondent from unjustified and needless applications. The application was dismissed. ❑

SPORTS PERSONALITY MERCHANDISING

Abraham van Melle, Victoria University of Wellington

finds that the lesson of Magic Merchandise v Lomu *is that merchandisers must explicitly deal with exclusivity in their contracts*

Prompted by the increasing professionalism of our sports, the marketing and promotion of sports personalities is an emerging business of some commercial significance in New Zealand. But there is a need for care in such activities. *Magic Merchandise v Lomu* (Barker J, 3 March 1997, HC, Auckland, CP 38/96), a striking out application, is a useful illustration of some of the difficulties that can be encountered through imprecise and incomplete merchandising agreements. The case concerned the promotion of high-quality prints of a painting of Jonah Lomu in action during an All Blacks' game. The painting was by prominent sports artist Craig Primrose and was to be reproduced by Magic Merchandise as a montage surrounded by four smaller photos of Mr Lomu. To this end Magic Merchandise had, through a series of letters, entered into two contracts. The first was with Mr Lomu, through his agents. (Mr Lomu was not personally involved in any of the negotiations relevant to the case.) The second was with the New Zealand Rugby Football Union, whose permission Mr Lomu required. Each would receive a royalty on the copies sold. The print run would be limited to 1100 prints, and all would be personally autographed by Mr Lomu. Magic Merchandise anticipated that the prints would be extensively promoted on television and other media and would retail, for a limited time, for $395 excluding GST.

Soon after this agreement was reached, Mr Lomu's agent and the Rugby Union ("Lomu") entered into an agreement for the production of another picture, this time of the Sydney rugby football ground. The picture was intended to promote trans-Tasman rugby and featured full length shots of Australian David Campese and Jonah Lomu in full flight. Magic Merchandise was concerned at the prospect of its "exclusive" offering being undermined by a what it saw as competing product and initiated legal proceedings claiming that Lomu had breached an express or implied exclusivity term in the contracts. It also alleged that the defendants had acted in breach of s 9 Fair Trading Act 1986 by remaining silent about exclusivity when not actually intending the deal to be exclusive. (It is unclear whether they had negotiated the Campese deal contemporaneously with or subsequently to the Magic Merchandise deal.) The defendants in turn unsuccessfully applied to strike out the claim on the basis that the contracts made no reference to exclusivity and that they had not deceived Magic Merchandise.

Barker J declined to strike out the claim as "the Court will not normally wish to deprive a party of his or her day in Court" if reasonable amendments will remedy shortcomings in the original statement of claim. (at 4) The implied term claim was arguable as was the s 9 claim (even if a something of a "makeweight"), but the express term claim was insupportable. As the striking out application had the effect of "concentrating and refining" the plaintiff's pleadings (at 6-7), the plaintiff was given seven days to file an amended statement of claim, otherwise the claim would be struck out. Costs of $1000 were awarded to Mr Lomu and his agents and $1000 to the Rugby Union owing to the "Spartan information" supplied in the notice of opposition and the failure to comply with a Master's timetable order for filing this document.

MERCHANDISING CONTRACTS

Merchandising, and the licensing of personal reputation in particular, is something of a grey area in the law. Are these contracts for the provision of the personality's services or contracts for the licensing of an intellectual property right? Clearly the commercial reality is that reputation is a tradable commodity, but legally no property right exists in reputation per se. No statute confers such a proprietary right and, at common law and under statutory fair trading laws, the appropriation of reputation by its "owner" is contingent upon showing a misrepresentation in trade. (Although in the US the "right of publicity" tort does not require deception to be proved.) Therefore it is perhaps inaccurate to refer to merchandising agreements as "licences" if no copyright work or trademark is involved. In reality merchandising agreements are contracts indemnifying the "licensee" against the otherwise inevitable deceptive trade practices litigation and, to the extent that agreements purport to confer exclusivity, they are restraint of trade contracts restricting the liberty of the "licensor" to enter into similar agreements in the future. At a substantive hearing Magic Merchandise would have had to overcome two hurdles. First, was there a restraint of trade term in the contract, and secondly, would this term have been enforceable?

Restraint of trade contracts will only be upheld by the Courts to the extent that the contract is necessary to protect the plaintiff's "proprietary" interests such as confidential information and business goodwill (*Stenhouse Australia Ltd v Phillips* [1974] 1 All ER 117) and to the extent that the term is "reasonable" with respect to the parties and to the public interest (*Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535). Arguably a sports personality's "reputation" is also a proprietary interest that should be recognised as this is a commodity of value if assigned to a third party. The fact that reputation is not legally recognised as a proprietary right in itself should not render the restraint illegal, as the doctrine does not purport to create or justify property rights but merely to enforce a personal remedy arising from a contract. (Indeed confidential information and business goodwill are not proprietary rights either.) An exclusivity term in a merchandising contract would most likely be reasonable if "made freely by [the] parties bargaining on equal terms". (*Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1967] 1 All ER 699. See dicta in *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 622 per Lord Reid, and applied in *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237.) Therefore the real difficulty for Magic Merchandise was simply in establishing that a restraint of trade term existed in the first place.

EXPRESS EXCLUSIVITY TERM

Magic Merchandise had originally pleaded breach of an oral and written contract. However Magic Merchandise was unable to identify any express oral exclusivity agreement in the normal sense of "an agreement between A and B made at a given time and at a given place". (at 4) The general dealings between the parties fell short of this standard. Furthermore, the written documents did not disclose an exclusivity term either. Magic Merchandise sought to show an express written term by the references in the documentation to a "limited edition", exclusive distribution rights, the limited period of distribution and sale, and the royalty provisions. Barker J held that none of those matters "on the normal reading of the documents" conferred exclusive rights and accordingly this part of the claim was struck out.

IMPLIED EXCLUSIVITY TERM

It is well settled that terms may be implied into a contract even though not expressly addressed by the parties at the time of formation. Terms may be implied by business custom, statute, or by the Courts in response to the facts of a particular case. Magic Merchandise argued that it was "a very well established practice" within merchandising industries that such agreements are exclusive and that exclusivity was necessary to give this contract "business efficacy".

Barker J noted (at 5) with respect to the "custom" argument that "[w]hether the plaintiff in such a young industry as that of marketing sporting heroes can plead custom or usage may be open to question". Under *Woods v N J Ellingham & Co Ltd* [1977] 1 NZLR 218 at 220, cited by Barker J, Magic Merchandise would have to show that exclusivity terms had achieved "notoriety" in this "particular department of business life" and that such usage is "certain" and "uniform as well as reasonable". Barker J noted that Magic Merchandise would have to amend its statement of claim to support such an argument. But even in jurisdictions where the merchandising industry is more mature, such as the United States, it would arguably be difficult to demonstrate such a custom. Merchandising is a diverse field and particular contracts will necessarily be negotiated on their own peculiar merits: both uniformity and certainty in terms may be lacking. Furthermore a Court will probably be slow to imply an exclusivity term based on industry custom, for this would place an onus on the parties in future contracts to expressly *dispel* such a notion if the contract was not to be exclusive (cf *Les Affréteurs Réunis Société Anonyme* v *Walford* [1919] AC 801). Clearly this would be problematic in all but the most settled industries.

In a substantive hearing a plaintiff may enjoy more success with a claim that a term should be implied by the Court into a particular contract in order to give the contract "business efficacy". Under *The Moorcock* (1889) 14 PD 64 at 68-70

> ... what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men ... .

Magic Merchandise argued that it was common ground that the parties receive something of value from the licensing contract and that the "licence would have little or no value unless it was exclusive". Arguably the high cost ($395) and "exclusivity" of Magic Merchandise's limited edition picture would make it vulnerable to competition, and while the matters in the documentation mentioned above were too imprecise to amount to an *express* exclusivity term, in a substantive hearing these matters may have bearing upon whether such a term should be implied to give business efficacy to the agreement. As the contract did not expressly provide that Mr Lomu and the Rugby Union were free to engage in similar activities elsewhere, there would be no absolute bar to implying such a term.

Barker J (at 5) adopted the criteria set by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376, which require that for a term to be implied into a contract the term must be: (1) reasonable and equitable; (2) necessary to give "business efficacy" to the contract; (3) so obvious that "it goes without saying"; (4) capable of clear expression; and (5) must not contradict any express terms of the contract. It seems that as an amalgam of the "business efficacy" test in *The Moorcock* and of the "obviousness" test proposed in *Southern Foundries (1926) Ltd v Shirlaw* [1940] 2 All ER 445, the test in *BP Refinery* establishes a high threshold for implying terms (Cheshire & Fifoot, Chapter 6). Under this test Barker J stated (at 5) that "the greatest difficulty is for [Magic Merchandise] to articulate the term, which has to be obvious and does not require any subjective enquiry". Barker J emphasised this point (at 8) saying that in amending its statement of claim

> the plaintiff should note especially that it is to give full particulars of the implied term alleged. Such [an] implied term must be so obvious that it goes without saying. I suspect that the plaintiff may have considerable difficulty in enunciating such a term. However, it must be given the opportunity to do so.

Even if it were obvious that a term of this nature be implied, the real difficulty would be in spelling out the precise details of the term. For how long would such a restriction apply? To which jurisdictions? To what sort of products or endorsements? Perhaps requiring the precise terms to be articulated is too harsh, given that the "understanding" alleged may have been of a more general nature: for example, no use of Mr Lomu's image on "something that could be placed on a wall" (at 4) during the commercial life of the first promotion. But the plaintiff is, after all, seeking to remedy a contractual defect by implying an onerous term that would restrict the defendant's liberty in future commercial activities. Certainly restraint of trade conditions have been implied into employment contracts (*Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 All ER 350), partnership agreements (as a function of fiduciary duties), and agreements for the sale of businesses (see *Trego v Hunt* [1896] AC 7). But "one-off" merchandising contracts may not involve the same degree of fidelity required of the parties by the Courts in the former situations. Exclusivity was really a matter which should have been considered by the parties at the time of formation.

At a substantive hearing the plaintiff would also have encountered obstacles in establishing the necessity of the term for business efficacy. In *Leisure Centre Ltd v Babytown Ltd* [1984] 1 NZLR 318 (CA) at 320 Somers J noted with respect to implied terms that

> [i]t would not be enough that such an implication is reasonable, or that the provisions are capable of supporting such an implication. The test is necessity – whether the terms ... require implication.

Obviously exclusivity bears upon the financial profitability of a contract, but it may not be necessary for its workability.

A similar situation to *Lomu* has recently arisen in *TV3 Network Services Ltd v MTV Networks Inc* over the "exclusive" license of the Beavis and Butthead TV series to TV3. (Court of Appeal, 16 July 1997, CA 133/97.) Here exclusivity had been addressed in the contract, but there was an ambiguity whether particular episodes not licensed to TV3, and subsequently licensed to TVNZ, were also subject to the exclusivity clause. The Court of Appeal has granted an interim injunction. At least in this situation the Court in a substantive hearing has recourse to the Contractual Mistakes Act 1977 and need not actually imply a term.

SECTION 9

Magic Merchandise also argued that, in the context of industry custom, the defendants breached s 9 Fair Trading Act 1986 by agreeing to the Campese picture knowing they had already made an agreement with Magic Merchandise. Barker J seemed sceptical of this claim's utility, but declined to strike it out as amendment could make it "viable" and it involved only evidence common to the other claims which would extend the hearing time by little. (at 7)

Of course the subsequent entering into of another agreement could not *in itself* be a deception. If anything this would only be a breach of an exclusivity term. (See discussion in *Sinclair v Webb & McCormack Ltd* (1989) 2 NZBLC paras 99-159 at 103,611.) Magic Merchandise's claim would have to be limited to conduct *prior* to the conclusion of its contract: namely, that in the course of the dealings with Magic Merchandise the defendants were deliberately silent in respect of whether the contract would be exclusive (irrespective of whether in fact the Campese picture negotiations had yet been initiated).

In cases that have gone to substantive hearings the Courts have considered whether the silence is "in all the circumstances" deceptive. Circumstances where silence has amounted to an actionable deception include the failure to disclose additional information to ensure that information already disclosed is not deceptive (*Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* [1987] ATPR 40-782) and the failure to correct a statement which has subsequently become untrue or discovered to be untrue. These cases all involve conduct on behalf of the defendant which if not corrected or qualified would be deceptive and are generally co-extensive with the scope of common law remedies. Lomu's conduct by contrast was purely passive. The defendants had done nothing to put Magic Merchandise "on the wrong track" as in the above cases.

A decision closer to Magic Merchandise's situation is *Demagogue Pty Ltd v Ramensky* (1993) 15 ATPR 40-203. In this case a building developer failed to disclose that the access way to a property it was selling would have to be built across an adjacent property which would require a road licence pursuant to the relevant statutes. The Court emphasised that s 52 Trade Practices Act 1976 (Cth), the Australian equivalent of s 9, is not limited to the common law interpretations of deception. (at 40,849) Under the Act this is a matter of fact and degree to be decided on the merits of each case. In holding that the developer's silence breached s 52, Black CJ remarked (at 40,845) that

> ... there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.

Gummow J, after an extensive survey of relevant case law, reached the same conclusion, seemingly on the basis that the requirement for a road license for vehicular access was "an unusual and unexpected circumstance" (at 40,846) and that the omission of this detail was therefore deceptive. If this test is correct then Magic Merchandise would have had to show that in the context of the merchandising industry the concurrent or subsequent negotiation of another poster deal would be unusual and unexpected.

CONCLUSION

In essence the claims of implied exclusivity and failure to disclose relevant information in *Lomu* skirt around what could be characterised as a "fidelity" issue: ie that the parties owed each other a duty of good faith and one party breached this duty. However the law has not yet approached this integrated and interventionist manner of resolving conflicts. Indeed in *Demagogue* Gummow J was careful to state that it was "unhelpful" to view s 52 as imposing a duty to disclose (although see the decision's editorial comment as to whether in practice this is the decision's effect!). To hold that Lomu's silence about exclusivity amounted to deception would possibly be stretching the argument on the facts. Likewise commercial certainty requires that contracts be interpreted on their express terms unless there are compelling reasons that other terms should be implied. While an exclusivity term could well be reasonable in this type of contract, subject to other terms it would probably not be *necessary*. Magic Merchandise duly filed the amended statement of claim, but the action has now been discontinued and settled out of Court.

Magic Merchandise is a salutary lesson for practitioners in this field. One can appreciate Magic Merchandise's position as it seems unlikely that it expected Lomu to enter into a competing arrangement. But the exclusivity issue was rather too important not to have been expressly addressed in the contract. The entrepreneur's interest in offering an elite and desirable product, which necessarily hinges upon exclusivity, conflicts with the interests of competitors in securing maximum commercial advantage from their reputations which are at their most potent at the peak of their careers.

A limited exclusivity term should be considered by the parties to merchandising contracts with respect to duration, product type, advertising, and geographical area – and it is imperative that the precise terms are articulated, particularly as "custom" does not yet appear to be established in this field. If no exclusive licence is forthcoming then at least the parties enter into the contract with their eyes open and aware of the risks. ❑

THE ROLE AND LIABILITY OF THE COMPANY SECRETARY

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explains the position of the company secretary under the 1993 reforms. This paper was given at the Institute for International Research's 1997 Company Secretaries' Conference

INTRODUCTION

The role of the company secretary has evolved over time. Historically, the company secretary was seen, (in the words of Lord Esher MR in *Barnett v South London Tramways* Co (1887) 18 QBD 815, 817) as "a mere servant". More recently, the office of the company secretary has become critical to the administrative and managerial tasks facing the modern company.

However, within the management structure of a 1993 Act company, little or no information can be found on the position of the company secretary. The Companies Act 1993 ("1993 Act") does not require the appointment of a company secretary, in fact, there is no mention at all of company secretary within the new legislation. This contrasts with the position under the Companies Act 1955 ("1955 Act") which makes appointment of a company secretary mandatory.

Despite the exclusion of the company secretary from the statutory reforms contained in the 1993 Act, in practice all large companies maintain this "phantom position" and the role of the company secretary remains largely unaltered.

Legal difference

Although the position of company secretary has survived, the exclusion of any reference to it in the 1993 Act has impacted in a legal sense on the nature of the office of company secretary.

Under the 1955 Act the company secretary was an officer of the company with attendant duties, mainly of an administrative nature. Commonly those duties offered the secretary ostensible authority to bind the company in areas of administration and management: *Panorama Developments v Fidelis Furnishing Fabrics* [1971] 2 QB 711; [1971] 3 All ER 16(CA).

By contrast, under the 1993 Act the company secretary has no specified duties and hence no such ostensible authority. Rather, he or she obtains his or her authority by delegation from the board. In determining the role and liability of the company secretary within the new legislation therefore, regard must be had to what extent the duties of a director may be delegated.

SECTION 130

Delegation of directors' powers is expressly provided for in s 130(1) of the 1993 Act. This section authorises the board, subject to the company's constitution, to delegate all powers except those listed in the second schedule of the Act. The powers which may not be delegated relate to the issue, acquisition, redemption or transfer of shares, distribution of capital, the provision of financial assistance, short form amalgamation and changes of the company name, registered office, or address for service. Those exceptions ensure that the function of directors and delegated persons within the company structure are kept distinct.

Effect of delegation

Effectively, the company secretary is treated as a de facto secretary and is responsible as such; this was recognised by the Supreme Court of Victoria in *Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd & Ors*, (1992) 10 ACLC 253

The term "director"

Under the 1993 Act the definition "director" is considerably broadened. It is possible, if not likely, that under the new definition company executives including the company secretary, whilst not formally appointed directors, may find themselves with duties and liabilities of directors (albeit to a lesser degree).

Thus in accordance with the 1993 Act, persons to whom a power has been delegated by the board, become subject to the duties of directors that are contained in ss 131 to 138 and to the provisions concerning transactions involving self-interest (ss 139-149).

DUTIES AND RESPONSIBILITIES

A critical motivator of the 1993 law reforms, was to increase the liability and responsibility of directors. This is reflected in the long title of the 1993 Act which in part states that the Act will:

> provide protection for shareholders and creditors against the abuse of management power.

A company secretary when exercising powers or performing duties delegated by a director is bound by the following duties:

Duty of good faith (s 131(1))

A company secretary must act in good faith and in what he/she believes to be the best interests of the company. It is important that this duty refers to the belief of the person exercising the duty (and not to that of a reasonable person). This preserves the existing common law duty of loyalty as expressed in *Re Smith and Fawcett Ltd* [1942] All ER 304 referred to as the "business judgment rule". Accordingly a Court will not question the exercise of powers by a director/secretary provided he or she has acted for the good of the company.

Duty to act for a proper purpose (s 133)

A company secretary must exercise power for a proper purpose. This recognises that a directors is in some respects a fiduciary and must use those powers for the purpose for which they were conferred; under this test even though a director may be acting in good faith, he or she may still be in breach of this duty.

Duty of care (s 137)

A company secretary must exercise the same care, diligence and skill that would be exercised by a reasonable company secretary in the same circumstances, taking account of the nature of the company and the transaction, and the scope of the delegated powers granted to the secretary.

The test to determine the degree of care and skill required is that which would be expected of an ordinary person with an ordinary degree of prudence in a similar situation *National Mutual Life Nominees Ltd v Worn* (1990) 5 NZCLC 66.

It is important to note that a duty of care only exists having regard to the nature of the secretary's responsibilities. Hence, a secretary cannot become liable (as a director might) for the acts or omissions of another director.

In order that company secretaries may fulfil the requirement to exercise care and diligence they must become specifically aware of the new procedural requirements in the 1993 Act and keep informed of any developments. Rogers J in *AWA Ltd v Daniels*, (1992) 10 ACLC 827, discusses the need for directors to keep informed;

> A director is obliged to obtain at least a general understanding of the business of the company and the effect that a changing economy may have on that business. Directors should bring an informed and independent judgment to bear on various matters that come to the board for decisions.

Self-interest

In furthering one's duty to act in the best interests of the company, the 1993 Act requires transactions in which a director has a self-interest to be disclosed to shareholders and that they be fair to the company. "Interest" encompasses a wide range of situations where the director is a party, to or set to derive a financial benefit from a transaction to which the company is a party.

The duties referred to above largely reflect the common law position that has prevailed for some time, thus the obligations set down in ss 131 to 149 of the 1993 Act do not require a company secretary to operate in any way differently from that required under the 1955 Act.

under the new definition company executives including the company secretary, whilst not formally appointed directors, may find themselves with duties and liabilities of directors

EXCLUSION FROM LIABILITY

Upon delegating power to the company secretary, the board can only be absolved of responsibility for any exercise of power by the delegate if the board believes on *reasonable grounds* at all times before any power is exercised, that the company secretary conforms with the duties imposed on the directors by the Act and the constitution. Further the board must properly monitor the exercise of the power by *reasonable methods*.

What amounts to "reasonable grounds" will turn on the individual circumstances of each case. Factors that will be of assistance in determining this issue will be; reliability, experience and expertise of the delegate, and the size and nature of the company's business.

What amounts to "reasonable methods" of monitoring delegates will require periodic reviews and inquiries made into the delegated persons' actions. The wording of the section suggests that the onus is on the board to establish that it has conformed with these requirements. In this context it is noteworthy that the Ontario Securities Commission in *Re Standard Trustee Ltd* (1992) 6 BLR (2d) 241, held that directors have a duty to question management where concerns exist as to management's ability to operate effectively.

LIMITATION OF THE POWER

Hand in hand with a consideration of the secretary's duties is the extent of their apparent authority. As already stated the 1993 Act restricts the delegate's power to areas of company business that fall outside of schedule two.

Generally, the presence of the company secretary is felt in managerial areas. However, there is no prima facie rule that the company secretary has authority to bind a company to a contract. This is reflected at common law. For example in *Barnett v South London Tramways Co* (1887) 18 QBD 815, 817 Lord Esher MR, commenting on the role of the company secretary stated:

> His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all.

This is reflected in *Panorama Developments* where the Court warned that in cases where a transaction at face value is unusual for the company to be entering into, it may not be safe to rely upon the secretary's sole approval.

CONCLUSION

In summary despite the fact that the 1993 Act contains no provision for the company secretary, in the writer's view that Act leaves largely unaltered the role and liability of the company secretary. All that has changed that is of any significance is the source of the company secretary's authority; no longer does that authority derive from holding the position of an officer of the company but rather from delegation of powers by the board. ❑

CLASS ACTIONS

Paul Radich and Richard Best, Bell Gully Buddle Weir, Wellington

discuss the class action procedure, which may be of increasing utility given the development of public law damages for breach of the Bill of Rights. This is part of a paper given at the 1997 AIC Administrative Law Conference

INTRODUCTION

The class action, or representative action as it is often called in Commonwealth jurisdictions, is a procedural mechanism enabling one plaintiff to act on behalf of a group of potential plaintiffs who share a common interest in the proceeding. Generally speaking all members of the group are bound by the decision which means they may enjoy the benefits of success and must endure the pains of defeat. The class action is important in an administrative law context because arguably it is a means of increasing state accountability by enabling actions to be brought against the Crown which would not otherwise be brought for reasons of risk and expense. Further, with recognition in *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 of a public law cause of action for breach of NZBORA, one can surmise that there will be greater attempted use of the procedure against the Crown. Significantly, the public law cause of action for breach of NZBORA may not be as complicated as certain causes of action in tort. Consider for example the policy-operational distinction existing in the law of negligence concerning the liability of public authorities, the need to prove fault, and the limited recoverable heads of damage existing in the law of torts generally (eg mental distress is often excluded as a separate head of damage (although the law in this area is developing)). A NZBORA action may also enable victims of wrongs to circumnavigate ARCIA (see *Innes v Wong* [1996] 2 HRNZ 618), not to mention statutory immunities which might otherwise be available to state officials. NZBORA is, as Casey J put it in *Baigent* (at 691), "something new in our legal pantheon", and it may now provide an effective basis for a class action against the Crown for damages.

The class action procedure stands to impact upon many areas of administrative law. In North America the procedure has been used "in areas such as civil rights, social security, environmental litigation, anti-trust violations, sex and racial discrimination" (J Griffiths "Class Actions in Administrative Law – An Australian Perspective" (1990) International Legal Practitioner 53, 56).

BENEFITS

There are major benefits in using the class action procedure. A useful summary is found in a recent article by Morabito (V Morabito "Class Actions: The Right to Opt Out Under Part IVA of the Federal Court of Australia Act 1976 (Cth)" (1994) 19 Melbourne ULR 615, 627-628):

> In the first place, it ... reduce[s] costs, increase[s] efficiency and [does] not expose defendants to conflicting judgments by enabling a single determination of issues which are common to members of a group. ... Secondly, it enhances access to justice by opening the "doors" of our Courts to those individuals with individually non-recoverable claims or whose claims would not have led to individual proceedings because of social or psychological barriers. ... Thirdly, the knowledge by potential defendants that numerous persons can, through the device of class actions, pursue legal remedies which were otherwise not available to them should provide potential defendants with a greater incentive not to break the law.

HISTORY AND DEVELOPMENT

It is fair to say that our legal system is to a large extent individualistic in nature. It is concerned primarily with disputes between individuals and with remedies for individuals. Probably as a result of this individualistic orientation the Courts have struggled with the notion of the class action. In the words of Yeazell (SC Yeazell *From Medieval Group Litigation to the Modern Class Action* (Yale University Press, New Haven, 1987) at p 2):

> [T]he class action forms an exception to a prevailing ethos. Anglo-American law has proved to be durably, perhaps obsessively, individualistic. In numerous contexts it exalts individual choice. From ancient doctrines of property to recent developments in ... constitutional law one finds expressions of the proposition that the individual is the bedrock unit both of social action and of legal thought.

The class action has its roots in the Court of Chancery. Indeed, prior to the fusion of law and equity with the Supreme Court of Judicature Act 1873, the class action procedure was employed only by that Court. To Courts of the Common Law it was alien. At first the Court of Chancery adhered to a rule of compulsory joinder, by which all persons interested in a proceeding were required to become parties. However, where large numbers of "interested persons" were involved the rule became unwieldy, giving way for the sake of convenience to the class or representative action (Ontario Law Reform Commission *Report on Class Actions* (Ontario Ministry of the Attorney-General, Toronto, 1982) at 5). "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent" (*Bedford v Ellis* [1901] AC 1, 8 per Lord Macnaghten). That said, prior to 1873 only equitable remedies could be claimed. Damages, a common law remedy, were not available (Ontario Law Reform Commission at p 6).

The Supreme Court of Judicature Act 1873 incorporated the representative action developed in the Court of Chancery, in R 10 of the Rules of Procedure scheduled to that Act. That rule underwent modification and its replacement in England today is O 15 R 12 of the English Rules of the Supreme Court. The New Zealand equivalent is R 78 of the High Court Rules:

> 78. **Persons having same interest** – Where 2 or more persons have the same interest in the subject-matter of a proceeding, one or more of them may, with the consent of the other or others, or by direction of the Court on the application of any party or intending party to the proceeding, sue or be sued in such proceeding on behalf of or for the benefit of all persons so interested.

The Rule clearly contemplates class plaintiffs and class defendants. (As to the latter, see *Bank of America National Trust and Savings Association v Taylor* [1992] 1 Lloyd's LR 484.)

"no representative action can lie where the sole relief is damages, because they have to be proved separately in the case of each plaintiff"

"SAME INTEREST" AND DAMAGES

The issue of what amounts to the "same interest" in the subject-matter of a proceeding was closely linked by the Courts to the issue of whether damages may be sought in a class action. Development of the procedure was stunted at an early stage by the English Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021, in which Fletcher Moulton LJ gave a narrow interpretation to the phrase "same interest" as used in the then English equivalent to R 78. In that case the 44 plaintiff cargo owners had goods on board the defendant's vessel at the time of its sinking, and sought damages for breach of contract and breach of duty relating to carriage of goods by sea. The Court of Appeal would not let the representative action proceed because the plaintiffs lacked the same interest, each contract being manifestly different. Fletcher Moulton LJ went even further, stating (at pp 1040-1041):

> But the writs even as proposed to be amended fail to comply with Lord Macnaghten's interpretation of the rule in another and most essential particular. The relief sought is damages. Damages are personal only. To my mind no representative action can lie where the sole relief is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.

This statement was effectively another reason for the class members not having the same interest. The reason for this is that Fletcher Moulton LJ was considering Lord Macnaghten's statement in *Bedford v Ellis*, of the prior practice in Chancery, as being the test for the codified class action rule (then R 9 of the Rules of Procedure). Like its later counterparts, the essence of R 9 was the "same interest" requirement. Lord Macnaghten's statement, already quoted above, was that "[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent". Fletcher Moulton LJ did not consider damages to be "relief sought which in its nature is beneficial to all those represented", and hence there was not the requisite same interest.

While only Fletcher Moulton LJ took this narrow view, "the passage came to be regarded until at least very recently as establishing that separate claims for damages could not be the subject of a representative proceeding" (*RJ Flowers Ltd v Burns* [1987] 1 NZLR 260, 268). The effect of *Markt* was to confine the class action procedure to non-monetary remedies, substantially weakening its utility. In New Zealand *Markt* was adopted without analysis in *Take Kerekere v Cameron* [1920] NZLR 302. However, later Courts gradually departed from *Markt*, which case can no longer be considered good law. There is little point in tracing all the subsequent developments here, as that was done comprehensively by McGechan J in the *Flowers* case (see also the recent discussion by the High Court of Australia in *Carnie v Esanda Finance Corporation* (1995) 127 ALR 76). Having analysed authorities subsequent to *Markt*, the most important concerning damages being *EMI Records Ltd v Riley* [1981] 2 All ER 838 (a somewhat fact specific case), McGechan J concluded (at 270-271) that the position prevailing immediately prior to R 78 was as follows:

(i) Members of the class to be represented were required to have a common interest in the proceeding, and in particular must all have been able to claim as plaintiffs in separate actions in respect of the event concerned, with no defences available applicable to some only of the class;

(ii) The representative action must have been beneficial to all of that class;

(iii) A representative action for damages was possible if both the above requirements were met, the action covered the whole or virtually the whole of the class of potential plaintiffs, and the consent of all represented members to payment of global damages to the representative plaintiff was given. Mere difficulty on the part of a class member in establishing individual loss was not a barrier (despite the common interest doctrine) provided such consent was established and global loss of all representative members could be established.

McGechan J thought that a similarly liberal approach should be taken under R 78; that while one must ensure the procedure is not used to work injustice, it should be applied and developed to meet modern requirements: "It is, as has been said, in *John v Rees* [1970] Ch 345, 370 'not a rigid matter of principle but a flexible tool of convenience in the administration of justice'" (271). Interestingly, His Honour opined that should the representative action he was considering (and which he allowed to proceed) become unmanageable due to emergence of significant factual disparities between the different represented plaintiffs, then the proceedings could be reconfigured. He said (at 273): "The proceedings may need to be reshaped as a number of separate representative proceedings, or by addition of some or all growers as individual plaintiffs" (see also *Carnie* at 91). His Honour was thus taking a very flexible approach to use of the class action procedure. So if, for example, it emerges in a given case that a large represented class has two distinct subgroups, then rather than dismissing the procedure altogether, two sub-class actions could be instituted.

The question of class actions and damages was again considered briefly in an interim application heard by Barker J in *Taspac Oysters Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442. In that case the plaintiffs sought to represent themselves and other oyster farmers, all of whom had suffered economic loss from the alleged negligence of the defendant in supplying defective Hardiflex spat sticks used to catch oyster organisms. The sticks broke and degraded, with most farmers losing their catch. On behalf of the class the plaintiffs sought a declaration that the defendant was liable to each of those represented and for themselves they sought damages totalling $287,704. They did not seek a global award of damages for the whole class. The defendant argued that the class action procedure was inappropriate. While there were features common to all class members, the defendant argued that different issues would arise, such as the extent of reliance placed by members on the defendants' actions and words, seasonal variations at the different oyster farms, defences such as contributory negligence, and issues of causation and remoteness.The defendant's argument did not convince Barker J, who seems to have taken the same flexible approach as McGechan J in Flowers. As in *Taspac*, the defendant in *Flowers* argued that there were differences which precluded use of the class action procedure, to which McGechan J responded (at p 272):

A class action may still proceed if what is sought, so far as the class is concerned, is merely adeclaration of the defendant's liability to the class

> Unless I am to elevate the mere expression of contest by a defendant into an automatic barrier to a representative action, I cannot regard these contentions as decisive.

Barker J proceeded to set out the three-pronged summary of McGechan J in *Flowers* (above), and seems to have concluded that the third element relating to damages was not satisfied because the plaintiffs did not seek a global award. Nevertheless, His Honour concluded that in light of the authorities which he had canvassed, the plaintiffs' proposed course seemed justified. He would not, at that early stage in the proceeding, disallow the class action procedure.

Barker J's decision is not, however, to be considered more liberal than that of McGechan J in *Flowers*. McGechan J's three-pronged summary is not a list of essential prerequisites for bringing a class action, which Barker J appeared to recognise. The first two elements are essential, but the third must only be satisfied where damages are sought on behalf of the class. A class action may still proceed if what is sought, so far as the class is concerned, is merely a declaration of the defendant's liability to the class. In coming to his decision, Barker J (at p 446) referred to the judgment of Vinelott J in *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229 and said the following:

> Vinelott J did not regard [the dictum in *Markt* (quoted above)] as foreclosing representative actions for damages. Rather, he considered that a representative action should not be permitted where that manner of proceeding might allow a claim not otherwise available or might close off a defence which otherwise could be mounted. A proper approach is to obtain a declaration of liability if damages can be established thus creating a res judicata on issues other than damages. That representative proceeding would then have to be followed by individual claims by members of the class, previously represented, to establish their own individual damage.

This was the path pursued by the plaintiffs in *Taspac* a path which McGechan J expanded on, with reference to later English authorities, in *Flowers* with his third point of summary referring to global damages.

Support for McGechan J's expansion (which to date is the most liberal statement in New Zealand as to when damages may be sought in a class action), can be found in a later decision of the English Court of Appeal. In *Irish Shipping Ltd v Commercial Union Assurance Co plc* [1990] 2 WLR 117 Staughton LJ said (at p 131):

> In [the] state of the authorities it is not, in my judgment, the law that claims for debt or damages are automatically to be excluded from a representative action, merely because they are made by numerous plaintiffs severally or resisted by numerous defendants severally. The rule is more flexible than that.

Guidance as to the meaning of "same interest" can also be taken from the High Court of Australia's recent decision in *Carnie*. The tests laid down have been described as "very liberal" (D Kell "Renewed Life for the Representative Action" (1995) 13 Australian Bar Review 95 at p 97). McHugh J (Brennan J endorsing this point) said (at p 95):

> In my opinion, a plaintiff and the represented persons have "the same interest" in legal proceedings when they have a community of interest in the determination of any substantial question of law or fact that arises in the proceedings. Other factors may make it undesirable that the proceedings should continue as a representative action, but that is a matter for the exercise of discretion, not jurisdiction.

Similarly, Toohey and Gaudron JJ made a statement to the effect that persons will have the same interest in a proceeding if "there is a significant question common to all members of the class" (p 91). Finally, Mason CJ and Deane and Dawson JJ said (at p 78):

> It has been suggested that the expression "same interest" is to be equated with a common ingredient in the cause of action by each member of the class. In our view, this interpretation might not adequately reflect the content of the statutory expression. It may be it extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings. Be that as it may, it has now been recognised that persons having separate causes of action in contract or tort may have "the same interest" in proceedings to enforce those causes of action.

DISCRETION TO DISALLOW USE OF CLASS ACTION PROCEDURE

A final point to note is that the Court has a discretion to disallow use of a representative action under R 78. As McGechan J said in *Flowers* (at p 264):

> The rule permits representative proceedings with the consent of other plaintiffs. That power is not to be misunderstood as permitting plaintiffs to bring representative proceedings in situations which would not otherwise be permitted by the Court.

The Court might exercise its discretion to disallow the procedure when it appears a claim is trivial or not well grounded. ❑

CER: HARMONISATION OF BUSINESS LAW

Rembert Meyer-Rochow

reviews progress towards closer legal relations

This article examines the extent to which the Australia and New Zealand Closer Economic Relations Trade Agreement (hereafter referred to as CER) has resulted in legal harmonisation between Australia and New Zealand.

Since the CER agreement was entered into, legislation has been harmonised as has the application of such legislation and of the common law by the Australian and New Zealand Courts. This article will, in particular, examine the extent to which the Australian and New Zealand judiciaries have acted in a harmonious manner as a result of CER. It will be seen that whilst the Australian and particularly the New Zealand judiciary have been conscious of the goal and benefits of trans-Tasman legal harmonisation, there are also some areas of the law in which differences between Australia and New Zealand have arisen since CER.

The article also discusses the emergence of trans-Tasman law as a result of CER, and concludes with a consideration of the need for a trans-Tasman Court.

THE CER AGREEMENT

The CER agreement was entered into by the Australian and New Zealand governments on 13 April 1982. The objectives of CER are stated in article 1 as being:

(a) to strengthen the broader relationship between Australia and New Zealand;

(b) to develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;

(c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and

(d) to develop trade between New Zealand and Australia under conditions of fair competition.

In 1988, in accordance with the agreement, negotiations were conducted by the Australian and New Zealand governments to review the operation of the agreement. These negotiations gave rise to an agreement by the two governments to move towards a single trans-Tasman market for both goods and services from 1 July 1990 onwards. As a result of this agreement, a Memorandum of Understanding (MOU) on the Harmonisation of Business Law was agreed to, under which the two governments agreed to examine the scope for harmonisation of business-related law, in the following areas:

(a) companies, securities and futures laws;

(b) competition law;

(c) consumer protection;

(d) copyright law;

(e) commercial arbitration;

(f) the law relating to the sale of goods and services between two countries;

(g) mutual assistance between regulatory agencies in the administration and enforcement of business laws;

(h) further recognition and reciprocal enforcement of Court decisions in each country, including enforcement of injunctions, orders for specific performance and revenue judgments.

Some of these areas have, since the agreement to the MOU, been harmonised to some extent, via legislation.

WHAT DOES HARMONISATION MEAN?

The agreement to harmonise business-related law between Australia and New Zealand raises questions as to what harmonisation in fact is. As stated by Farrar, ("Harmonisation of Business Law Between Australia and New Zealand" (1989) 19 VUWLR 435 at p 445) [h]armonisation is a very ambiguous concept.

One view is that legal harmonisation between two counties requires that the laws of such countries as contained in legislation should be identical. On the other hand, the view of Farrar, (ibid) as well as that of Barker J (of the High Court of New Zealand) and Beaumont J (of the Federal Court of Australia) appears to be that harmonisation, as agreed to in the MOU on the Harmonisation of Business Law, can be achieved without direct replication of statutory laws between two countries, and that

> it can mean working towards laws which are complementary with each other in that they are each compatible with the Treaty objective of free trade. (As stated by Collinge, *Address to the New Zealand Law Conference*, New Zealand Law Society Conference papers 1987 at p 61.)

Farrar writes (at 445-446):

> Harmonisation is simply a means to an end. In the case of CER the end is the establishment of a free trade area. ... [Harmonisation requires steps to] be taken to eliminate obstacles to the establishment of this.

Collinge states (at 61) with regard to the first view of harmonisation that it

> can be discarded as an exclusive interpretation because it would restrict flexibility of action and fail to allow for differences between the two countries. ... [H]armonisation does not mean the necessary adoption of identical policies but rather the commitment to make free trade work.

and Elliott ("CER at the cross-roads" [1995] NZLJ 47) notes that

> In 1991 the New Zealand Minister of Commerce, Philip Burdon, explained what was meant by harmonisation. He said that the Government's approach to the harmonisation of business laws between Australia and New Zealand did not extend to full assimilation. He stated that the purpose of CER was the enhancement of New Zealand and Australia's economic welfare, but at the same time both countries should be able to pursue distinct policy objectives if they desire to.

While the two governments appear to have adopted the more flexible view of what legal harmonisation constitutes, it will be seen that the failure by both countries to exactly replicate each other's laws also has some significant disadvantages. On the other hand however, it is also important that Australia and New Zealand should be able to pursue distinct, and alternative policies if they desire. In particular, it would, in the writer's opinion, be a great disadvantage to New Zealand if New Zealand was, as a result of CER, not permitted to pass legislation which it believed was necessary to improve its economic performance.

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LEGAL HARMONY

An examination of legal harmony between Australia and New Zealand can be divided into two separate categories. The first category, legislative harmony, concerns itself with the various laws enacted by either country. The second category, judicial harmony, concerns itself with the judicial interpretation of such legislation by each country's Courts, as well judicial decisions relating to principles of common law.

Legislative harmony

The range of post-CER legislation which one could describe as being harmonious between New Zealand and Australia, is too great to discuss in any detail in this article. However, numerous examples of such legislation exist (see Barker & Beaumont "Trans-Tasman Legal Relations - Some Recent and Future Developments", [1992] ALJ 566 at 568-573) and include legislation relating to consumer protection, competition, anti-dumping, Australian counsel practising in New Zealand (and vice versa), Court orders made in one jurisdiction being served on a person or corporation existing in the other, subpoenas issued under a proceeding in one country requiring a person in the other to attend, and reciprocal enforcement of registered judgments.

It appears that the New Zealand legislators are far more conscious of the benefits of taking into account Australian legislation when drafting legislation, than Australian legislators are when drafting legislation. Indeed, Pengilley "On trans-Tasman banter and things CER" [1990] NZLJ 199 at p 200) has commented that:

> One of the objectives of CER is to "harmonise" commercial legislation in our two countries. I hope we can do so. My impression is that New Zealand will, and does, take into account Australian legislation in drafting its commercial laws. I believe, however, that there is a singular attitude in Australia of benign bewilderment when it is suggested that there should be consideration of New Zealand legislation when our laws are enacted - let alone any thought that Australia should really seriously consult with New Zealand when drafting its commercial legislation.

Judicial harmony

The New Zealand judiciary (and to a less apparent extent, the Australian judiciary has embraced the concept of trans-Tasman legal harmonisation and has demonstrated an awareness that Court decisions should if possible, be consistent with that of the other country.

In *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731, 756 Barker J and R G Blunt, in a combined judgment stated that

> there is a wealth of Australian precedent on which New Zealand Courts have drawn and should continue to draw. The close relationship between the New Zealand Act and the Australian Trade Practices Act 1974, the goal of harmonisation of commercial statutes and an increasingly shared interpretation of commercial law in both common law and statutory areas, makes reliance on Australian precedent almost inevitable.

and in *Commissioner of Inland Revenue v JFP Energy Inc*, [1990] 3 NZLR 536 Richardson J stated that

> It is well established following New Zealand's commitment to CER that commercial legislation applicable to Australia/New Zealand transactions should in the ordinary course be accorded the same interpretation on either side of the Tasman.

One area where considerable effort has made by the New Zealand judiciary to ensure trans-Tasman consistency has been in the application of New Zealand's Commerce Act 1986 and Fair Trading Act 1986. These Acts were based on Australia's Trade Practices Act 1974.

For example, in *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd*, [1987] 2 NZLR 647 a plaintiff claimed that the Authority had entered into contracts which had the purpose or effect of substantially lessening competition in the car rental market.

Section 3 Commerce Act 1986 provides that

> Market, means a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense.

whereas s 4E Trade Practices Act 1974 states that

> ... market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

It was submitted to the Court by the defendant that the New Zealand definition of market in s 3 Commerce Act 1986 differed from the Australian definition in s 4E Trade Practices Act 1974 on the basis that the reference to fact and commercial common sense in the New Zealand Act meant that in New Zealand, the Court should give more weight to the views of business when defining the relevant boundaries of a market. Despite this difference in the wording of the Australian and New Zealand legislation, Barker J disagreed with the defendants submission, stating (at 669) that

> the reference in the Act to commercial common sense (as distinct from any other kind of common sense) as the yardstick by which to determine a market is another and more straightforward way of articulating the Australian definition.

His Honour then made specific reference to the CER agreement, stating that

> I should have been sorry to have reached an opposite conclusion and to have held the cases on the Australian definition inappropriate; the impetus for the legislative change in New Zealand in the trade practices area came from the Australia/New Zealand Closer Economic Relations trade agreement .... In these early days of the operation of the Act in this country, it will be helpful to be able to draw on the Australian experience ...

In *Taylor Bros Ltd v Taylor Group Ltd* [1988] 2 NZLR 1, the Court had to consider a dispute between two parties who both wished to use the name "Taylors" with regard to their linen hire businesses. An action was brought by the plaintiff against the defendant based on the tort of passing off and a claim that the defendant had breached s 9 of the Fair Trading Act (equivalent to s 52 Trade Practices Act).

In considering the potential application of Fair Trading Act, which at the time of the trial had only been in force for approximately six months, McGechan J noted that the case was quite possibly the first in which s 9 was used by a trader in an attempt to prevent a rival from using that trader's name. His Honour noted (at 26-27) that:

> The Fair Trading Act 1986 has its genesis in requirements for harmonisation of trade practices as between New Zealand and Australia related at least in part to the CER Treaty. ... [T]he New Zealand provisions presently relevant to a substantial extent have been derived from their Australian counterparts. The leading authorities in Australia, as at late 1986 interpreting and applying such Australian provisions would have been known to the draftsman of the New Zealand Act. ... [T]he Australian experience has been that enforcement through proceedings by rival traders predominates. Presumably the intention of the New Zealand legislation is to permit likewise.

His Honour then referred to various principles which had been established by Australian Courts with regard to interpretation and application of various provisions of the Trade Practices Act, and awarded an injunction preventing the defendant from using the name Taylors in connection with its linen hire services.

The decision was appealed to the Court of Appeal, which gave rise for the opportunity for further judicial comment on the effect of CER on the interpretation of legislation. Cooke P commented (at 39) that the Fair Trading Act was largely derived from the Trade Practices Act, and also indicated that consistency with Australian cases would occur in New Zealand, stating that New Zealand Courts

> are ... fortunate in being able to profit from Australian judicial authority and experience in applying the New Zealand Act. Consistency in the application of the legislation in the CER countries should clearly be aimed at so far as reasonably practicable.

"I think that Australasian uniformity and reciprocity in commercial law are goals to be pursued by the Courts as well as the legislature"

In *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158 the Court had to consider s 43(1) Commerce Act, which excludes the application of Part II "in respect of any act matter or thing that is, or is of a kind, specifically authorised by any enactment ... ".

In applying s 43(1), Cooke P noted that

> The wording of s 43(1) is close to that of s 51(1)(b) of the Trade Practices Act 1974 ... from which Act the provisions of our Commerce Act 1986 were largely copied. The Australian section is directed at conflicts between their Act and "acts or things" done in a State under State legislation. The language is not identical. Nevertheless, if there were a clear and settled body of Australian judicial authority laying down principles as to the meaning of "specifically", I should be strongly disposed to follow it. ... I think that Australasian uniformity and reciprocity in commercial law are goals to be pursued by the Courts as well as the legislature.

Commerce Commission v LD Nathan & Co Ltd, [1990] 2 NZLR 160, 164-165 concerned LD Nathan & Co's liability under the Fair Trading Act for selling children's night clothes which did not comply with applicable product safety standards. Greig J, in considering sentencing, took account of sentences imposed by Courts from decisions under similar sections of the Trade Practices Act. His Honour noted that the Fair Trading Act was substantially modelled on the provisions of Part V of the Trade Practices Act, and referred to the New Zealand Court of Appeals decision in *Taylor Bros*.

Although *Taylor Bros* was not a case which dealt with a contravention of the sections dealt with by the Court in *Commerce Commission v LD Nathan & Co Ltd*, Greig J nevertheless was of the view that (at 164-165)

> the principle of consistency and the benefit that we can obtain from the application of Australian decisions in the same field is clear and is equally applicable to these appeals.

A final example of judicial harmony occurring as a result of CER is *Douglas Pharmaceuticals Ltd v Ciba-Geigy AG* [1990] 2 NZLR 47 (CA) which concerned an application for the extension of a pharmaceutical patent on the basis that the owner of a patent had been unable to reap adequate remuneration from the patent due to regulatory delays. Somers J, for the Court, stated that when extending a patent, conditions should be imposed protecting the patent from being infringed between the time of its expiry and its extension. His Honour noted that this practice conformed with that of Australia's, stating that such conformity was a desirable feature emphasised by CER (at 54).

DISHARMONY DESPITE CER

Legislative disharmony

There are some distinct legislative differences between the law in Australia and the law in New Zealand. Some examples include New Zealand's Accident Compensation Rehabilitation and Insurance Act 1992, and New Zealand's contract and commercial law reform legislation. Numerous differences also exist between Australia and New Zealand with regard to companies legislation and tax legislation. Further, it appears possible that the growing divergence between the Australian and New Zealand governments on economic philosophy could lead to further differences in future legislation.

There is also a degree of disharmony between Australia and New Zealand with regard to the way legislation designed to achieve the same purpose has been worded. As stated above, the Australian and New Zealand governments views as to what legal harmonisation constitutes, does not include exact replication of legislation. The problems caused by the failure to replicate legislation exactly are demonstrated, for example, by *Electricity Corporation Ltd v Geotherm Energy Ltd*, [1992] 2 NZLR 641 in which the Court considered s 36 of the New Zealand's Commerce Act 1986, which deals with misuse by a corporation of a "dominant position" in a market. Section 36(1) begins with the words

> No person who has a dominant position in a market shall use that position for the purpose of ...

The corresponding section of Australia's Trade Practices Act 1974 (s 46(1)) dealing with such conduct begins with the words:

> A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of ...

In *Electricity Corporation Ltd v Geotherm Energy Ltd*, Gault J (at 649), referred to the Australian legislation, stating that

> ... harmony in the trade practices laws of New Zealand and Australia not only makes good sense but is also a stated Government objective in the context of the CER agreement

However, with regard to the difference in wording between the Australian and New Zealand sections, His Honour identified the potential for differences in the law as a result of such wording, stating that the Court was

> ... not satisfied that use of a market position necessarily is the same as use of market power. ... In many cases there will be little difference between the position under the Australian provision and that under the New Zealand s 36. However, in what necessarily must be a tentative view expressed at this stage, we are not convinced that they will be the same in all cases.

Judicial disharmony

While there has been judicial harmony as a result of the CER agreement, New Zealand Courts have demonstrated that Australian decisions will not be followed if they are considered to be incorrectly decided, or inappropriate for New Zealand.

The High Court of New Zealand acted contrary to established Australian authority in *Fisher & Paykel Ltd v Commerce Commission*. [1990] 2 NZLR 731. Fisher & Paykel (F & P) was in 1990, the only manufacturer of whitegoods such as refrigerators, freezers, washing machines, dryers and dishwashers. F & P had established over a period of time a network of whitegoods dealers who sold through 450 retail outlets out of a total number of approximately 800-850 outlets which existed in New Zealand at the time. On each dealer, F & P imposed an exclusive dealing clause requiring the dealer not to stock or sell the whitegoods of any other distributor (the agreement being terminable, without penalty, by either party upon giving 90 days' notice).

Pengilley has described the decision of the New Zealand Court in Fisher & Paykel *as both extraordinary and discriminatory, and "detrimental to the free trade concepts of the CER Treaty"*

The New Zealand Commerce Commission was of the view that such an agreement breached s 27(2) Commerce Act, which provides that:

> No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

The Commerce Commission was further of the view that the anti-competitive effect of the clause was not outweighed by any public benefit which would justify the granting of an authorisation under s 58 Commerce Act.

The High Court however, reversed the decision of the Commerce Commission, finding that the pro-competitive effects of the arrangements out-weighed any anti-competitive aspects of the arrangements, and that the exclusive dealing arrangements thus did not substantially lessen competition in the New Zealand whitegoods market. The Court further noted (at 767) that a competitor of F & P's was free to offer a F & P dealer a comparable agreement to that which it currently had with F & P, and that the dealer could terminate without penalty the exclusive dealing contract that it presently had if it wished to do so.

While s 47 of the Australian Trade Practices Act contains a section which deals specifically with exclusive dealing agreements, the more broadly worded s 27 of New Zealand's Commerce Act prevents (or at least on its wording is capable of preventing) the exact type of conduct covered specifically by s 47 Trade Practices Act. As stated by Pengilley, [1991] *Australian Corporate Lawyer* 19 despite the structural differences between the Australian and New Zealand legislation:

> The fundamental question in each country is whether there was anti-competitive purpose or effect involved in the arrangements.

Pengilley has described the decision of the New Zealand Court in *Fisher & Paykel* as both extraordinary and discriminatory, and "detrimental to the free trade concepts of the CER Treaty". Pengilley is critical of the Court's decision, as Australian Courts have been strongly against permitting exclusive dealing agreements to be used by suppliers of goods who are in strong market positions. He cites as an example of the Australian position *Re Ford Motor Co of Australia Ltd* ((1977) 32 FLR 65) in which the Australian Trade Practices Tribunal held that Ford, by having an agreement with dealers only to sell its cars and car-parts, (with a 30 day termination period exercisable by either party) was in contravention of the Australian exclusive dealing section, even though it had only a 22 per cent market share (cf *Fisher & Paykel*, where F & P was estimated to have more than a 50 per cent market share). He writes that the decision, as well as in his view being inconsistent with Australian authority, might well be regarded by Australians as

> blocking New Zealand market to Australian manufacturers. The New Zealand manufacturer, on the basis of prior Australian decisions, has, however, a very liberal access to the Australian market. ... [T]he future of CER depends upon a reversal of the *Fisher & Paykel* reasoning. (at 19-20)

Limbury, ("New Zealand Decision Should be Followed" *Australian Law News* Oct 1990, 54) on the other hand, supports the New Zealand High Court's decision in *Fisher & Paykel*, and retorts to Pengilley's claim that the decision is discriminatory against Australians by pointing out that no tariffs apply to whitegoods sold between New Zealand and Australia, and that

> Other impediments to traders seem to favour Australia. ... [T]he availability of special federal R&D tax incentives and various forms of State Government assistance to firms in Australia are certainly not consistent with a level trans-Tasman playing field. ... In fact, Australian State and Federal assistance programs to Australian industries paid $A3.9 billion in 1988-1989 ... whereas New Zealand industries received no such assistance. These differentials in government assistance may be discriminatory, but that is not a criticism that can be made of the *Fisher & Paykel* decision.

In fact, Australian State and Federal assistance programs to Australian industries paid $A3.9 billion in 1988-1989 ... whereas New Zealand industries received no such assistance

Despite these apparent advantages to Australian traders, *Fisher & Paykel* (which was in the writer's view sensibly decided) signifies that New Zealand Courts will not follow Australian precedent which they disagree with.

In *Wineworths Group Ltd v Comité Interprofessionel du Vin de Champagne* [1992] 2 NZLR 327 the Court of Appeal upheld another decision which was described by Pengilley [1991] *Australian Corporate Lawyer* 16 as a decision which he anticipated would lead to significant problems for the Closer Economic Relations Treaty, if it was not overruled.

The plaintiff in that case, the Comité Interprofessionel du Vin de Champagne (the CIVC), was a body created under French law, which had the role of ensuring protection of the name champagne for use only with regard to wine produced in the district of Champagne in France from grapes grown in that district. The CIVC and three leading French champagne producers brought proceedings against Wineworths Group Ltd, seeking an injunction preventing Wineworths from selling as champagne sparkling wine not produced in the Champagne district in France. The plaintiffs argued that the word champagne described a specific product, produced in France in a certain style, and claimed that use of the term to describe sparkling wine produced outside of France constituted passing off as well as a breach of s 9 Fair Trading Act (equivalent to s 52 Trade Practices Act).

The Court of Appeal unanimously held that the producers of genuine Champagne had acquired in New Zealand a class goodwill of the kind recognised as entitled to protection in *J Bollinger v Costa Brava Wine Co Ltd* [1960] Ch 262 and *J Bollinger v Costa Brava Wine Co Ltd (No 2)* [1961] 1 All ER 561.

This position was taken in contrast with the position in Australia, where the production of sparkling wine had commenced at a date far earlier than that at which parties within New Zealand had begun to produce such wine. Cooke P accepted that in Australia, the word champagne had a generic usage, being used by Australians as a term referring simply to sparkling wine, regardless of its origin (at 331). His Honour stated that despite such generic usage in Australia such usage

> ... cannot be permitted in New Zealand to defeat the New Zealand specific usage. This Court has been and is sympathetic to progress in integrating the general market in the two countries as far as reasonably practicable, and has been willing therefore to develop the law to protect the legitimate interests of Australian traders; see the *Budget* case [*Dominion Rent A Car Ltd v Budget Rent A Car Systems (1970) Ltd* [1987] 2 NZLR 395] and *Vicom New Zealand Ltd v Vicomm Systems Ltd* [1987] 2 NZLR 600, 605. The protection of illegitimate interests is a different matter. It seems to me that the ... importations of Australian champagne ...have ... been in violation of the common law goodwill rights in this country of the producers of true Champagne.

In *Tot Toys Ltd v Mitchell* [1993] 1 NZLR 325 the Court considered the Australian case *Hogan v Koala Dundee Pty Ltd* (1988) 12 IPR 508 in which Pincus J stated (at 517)

> I think the law now is, at least in Australia, that the inventor of a sufficiently famous fictional character having certain visual or other traits may prevent others using his character to sell their goods and may assign the right so to use the character.

Fisher J summarised the reasoning of the decision in case *Hogan v Koala Dundee Pty Ltd* as being that the tort of passing off enabled the unauthorised use of a fictional character to be prevented on the basis that (at 360)

> by the use of ... the applicant's image, the respondent had deceived the public into thinking that the respondent had an association with the real persons who stood behind the image. The suggested damage was that the applicant's opportunities for exploiting their character merchandising rights had been diminished by the respondent's actions.

Fisher J was unwilling to adopt the reasoning expressed in case *Hogan v Koala Dundee Pty Ltd*, stating in words which sum up the problem posed for the New Federal Courts by CER generally:

> The desirability of consistency in commercial matters between two CER countries suggests that if at all possible the New Zealand Courts should follow the character-merchandising approach favoured in Australia. However, one might be excused some hesitation before following too quickly down that particular path.

Next month Mr Meyer-Rochow seeks and suggests a Trans-Tasman jurisprudence. ❑

SEXUAL ABUSE PROSECUTIONS – COMPLAINANT DELAY

CRIMINAL PRACTICE

edited by

Catherine Cull

The number of prosecutions involving allegations of historical sexual abuse has increased remarkably over the last seven years and this has led the Courts, police and the Crown to look at fundamental issues such as: time limits to prosecutions of this nature; rights of the complainant to a trial versus the rights of the alleged offender to a fair and speedy trial; the Court's right to prevent an abuse of its process and the procedure by which the Court can do that.

It has become common for applications to be made pre-trial based on complainant delay. Before discussing the case law relating to this issue there are several matters which are not legal ones but commonsense ones which should be borne in mind when reading this article:

1. The word delay infers that it is "normal" to complain as soon as the offending occurs and if that does not occur then there is "delay". In the author's submission to refer to this issue as "delay" means accepting a premise that a complaint, if true, is made immediately, which has clearly been challenged and disputed. The Courts and Crown should not focus on why the complainant has delayed and whether was the delay justified, but should look at the merits of the case and in particular the quality and clarity of the complaint itself. Issues relating to the timing of the complaint are for a jury to assess.
2. From experience, abuse which is disclosed a long time after the offending tends to be more violent and more damaging than that which is immediately disclosed. Often this is because of the circumstances surrounding the offending eg inter-family, threats of or actual violence, and the age of the complainant. Why, if an offender can successfully traumatise a victim should they avoid trial because it has taken the victim years to balance their lives and feel safe in complaining? Doesn't that perpetuate and further increase the abuse to the victim? Doesn't that attitude encourage offenders to further traumatise their victims with threats in order to prevent them complaining?

   It seems peculiar that an accused can be spared the ordeal of a trial because they have so affected a victim that she or he cannot complain immediately.
3. To work from the premise that sexual offending is immediately complained about is to believe that everyone of every age can identify and label certain actions as abusive.
4. It is accepted a Court can decide if it is safe for a matter to go to trial, but, how can an historical abuse claim be unsafe when all matters can be cross-examined on before the jury for them to assess; there is no statutory limitation to such claims and the real issue, that of credibility, can only be assessed by a jury?

CASES ON DELAY

In general when an issue of complainant delay is to be argued it is done pursuant to either a s 347 Crimes Act 1961 application or an application for a stay of proceedings, which relies on the inherent jurisdiction of the Court to protect its process.

Such applications have been the subject of several judgments:

In *R v ETE* (1990) 6 CRNZ 176 charges were brought against an elderly man for sexual offences dating back to 1976. It was argued that the delay by the two complainants in reporting this matter to the police was so prejudicial and unfair to the accused in conducting his defence that the Court should direct that the prosecution proceed no further.

At p 182 Holland J stated:

> In exercising that discretion, however, a Judge must be careful not to make the law, or to exercise his discretion contrary to the law. The fact that there is no time limit in the statute is a matter of policy. In order to obtain a discharge there must be established to the satisfaction of the Judge something more than mere delay so as to render the continuation of the proceedings to be unjust.

He went on to say:

> Quite clearly delay causes prejudice to an accused person. The possibility of establishing an alibi is unlikely to have survived. Witnesses may or may not be available but in any event their recollection of events is likely to be tarnished. I am, however, satisfied that nothing has been established in this case by way of prejudice to the accused that would not be common to any accused where there was a delay in commencing a prosecution. As the law imposes no time limit, I do not consider that a Judge should exercise his discretion to prevent a prosecution merely because he is concerned that delay might prejudice an accused in the absence of any evidence of particular prejudice.
>
> In the present case this conclusion may seem harsh, particularly in view of the health of this elderly applicant demonstrated before me at the hearing. Matters purely of compassion cannot, however, be relied on in exercising a discretion under s 347.

The charges were not dismissed and the matter proceeded to trial.

In *R v W* (T 83/93) (1994) 11 CRNZ 662 Justice Williamson had to determine a similar matter. The accused was charged with rape and sexual violation of his step-daughter from 1980 – 1990. The complainant made a complaint in 1991 but no charges were laid. The police felt she was incapable of giving evidence in Court as she had difficulty in talking about the alleged incidents. The complainant then began to receive regular counselling and in 1993 she returned to the police and the accused was charged.

At p 664 Justice Williamson stated:

> A reading of these authorities confirms that delay alone is not sufficient to justify a stay or a discharge. Some prejudice or unfairness must be established.

He held that it was the function of the jury to determine the complainant's credibility and that the jury would be apprised of all the facts regarding the delay in complaining. Accordingly there would be no prejudice or unfairness to the accused, resulting from the delay, which would prevent the accused from receiving a fair trial.

At p 666 he noted:

> In such situations it can hardly be unfair to prevent an alleged offender from benefiting because of the disability caused to the alleged victim by the offence.

In *R v B* (1993) 11 CRNZ 174 the accused applied for an order pursuant to s 347. In 1983 proceedings had been taken in the Family Court alleging sexual misconduct by the accused and his wife. That original complaint was amended to conform with the parents' admission during the hearing that they were unable to provide adequate care and protection in respect of their daughter. After the Family Court matter was resolved the police investigated matters. The view taken was that there was "evidence available but insufficient to prosecute". The file was subsequently closed.

In 1992 when the complainant was 20 years old she re-activated the complaint and charges were laid. At p 178 Tipping J stated:

> I have carefully reviewed the authorities which I have mentioned, and indeed certain others referred to by counsel which I have not found it necessary to cite. In my judgment the authorities demonstrate that in the course of considering all the circumstances of the case the Court should remember, as a starting point, that there is no statutory period of limitation.
>
> The reasons for the delay and its consequences should be examined. As to the consequences the key issue is whether the delay has caused the accused disadvantage of such a degree that his right to a fair trial has been put in jeopardy. If there is a serious risk of that the prosecution should generally be stopped. To continue in those circumstances, involving a serious risk of a miscarriage of justice, would, in my judgment, normally amount to an abuse of the process of the Court.

The Judge then perused all the points raised by the accused:

1. Death of a witness;
2. Deliberate earlier decision not to proceed;
3. Absence of records;
4. Medical evidence;
5. Corroboration warning.

He ultimately discharged the accused stating that the consequences of the delay were for B potentially at least, detrimental and seriously so. In particular he placed great weight on the death of a very important witness for the accused.

In *C v R* [1994] 2 NZLR 621 the complaints were of acts which took place 41 years and 28 years ago. The complainants were the niece and nephew of the accused. At the time of the complaints the accused was 71 years old and the complainants 44 years old and 41 years old respectively. The counts in the indictment were stayed. Justice Smellie held at p 625:

> The cases appear to recognise that there can be specific prejudice which relates to loss of records, non-availability of witnesses, and more generally presumptive prejudice arising simply from the fact that in a case such as this where delay is of such great length, prejudice can be inferred.

At p 627 he further stated:

> I am prepared to hold as a matter of law that a consideration of the merits, ie whether the applicant is guilty or likely to be found guilty if the trial proceeds, is irrelevant.

In *R v D* (1995) 13 CRNZ 306 Fisher J reviewed the authorities to date and at p 308 stated:

> The Court has both inherent (*Moevao v Dept of Labour* [1980] 1 NZLR 464, 481-482 (CA); *DSW v Stewart* [1990] 1 NZLR 687, 702) and statutory (s 347 of the Crimes Act) powers to discharge an accused where delay has been such that the proceedings would amount to an abuse of process or would preclude a fair trial. Abuse of process is limited to inexcusable delay by authorities once a complaint has been brought to their attention as distinct from delay by a complainant: ibid; *S v R* (1994) 12 CRNZ 78. Where an abuse of process in that form is established, the fact that the prosecution may have a strong case and that there is evidence of an admission by the defence will not preclude a stay: *C v R* (1994) 2 NZLR 621, 628. But if the ground upon which the defence relies is that the total lapse of time between the alleged offence and the trial will or might be prejudicial to the defence, and will thus preclude a fair trial, the apparent merits of the prosecution and defence cases may be taken into consideration: *R v Accused* [1993] 2 NZLR 286, 287-288 (CA); *S v R* at p 81. In the latter situation the Court can have regard to such factors as the length of the delay, the justification for the delay, the strength and nature of the evidence for each party, the clarity and credibility of the complainant's evidence, whether there is an unequivocal denial from the accused and the nature and extent of the prejudice caused to the accused by the lapse of time. In some cases the delay may be so great that it will be reasonable to infer prejudice without proof of specific prejudice but this must depend on the particular circumstances of each case: *R v Accused*.

At p 309 he went on to say:

> Delays in the order of 16 to 24 years must be examined with special care but are not necessarily fatal. The Court's power to discharge an accused on the basis that delay prejudices a fair trial is to be exercised sparingly. Thus trials have been allowed to proceed or have been upheld, in *R v Accused* (CA 260/92) [1993] 2 NZLR 286 (5 to 19 years delay) and *R v Accused* (CA 215/94) (1994) 12 CRNZ 500 (CA) (20 to 29 years) although discharges have been granted in others eg; *C v R* [1994] 2 NZLR 621 (28 to 41 years) and *S v R* (1994) 12 CRNZ 78 (23 to 28 years). The circumstances of each case must be determined indi-

vidually to assess other relevant factors.

In *J v Police* [1996] 1 NZLR 195 the accused was 79 years old and he was charged with the rape of four daughters from 1948 to 1961. He essentially admitted sexual intercourse but denied the absence of consent. Justice Hammond adopted the tests set out in *R v D* (supra) and further stated at p 198:

> I am content to adopt that summary. I would add only this, in relation to "explanations" by complainants. Some Judges appear to have begun to utilise the language of civil limitation statutes in the context of these kinds of issues. For instance, in *S v R* (1994) 12 CRNZ 78 Holland J spoke of the delay of a complainant in making her complaint as being "inordinate and inexcusable". With respect to pursue that language may well be to erect the very thing Parliament eschewed adopting: a limitations regime. That is not to say that the reasons for delay may not be relevant; but if it is to be suggested that there is some sort of burden on the complainant which has to be overcome, and that the test is anything like that noted, I would have respectfully to disagree.

His Honour set out the various matters which should be considered when looking at an application for a stay:

(a) length of delay;
(b) justification for delay;
(c) strength and nature of evidence for each party;
(d) clarity and credibility of complainant's evidence;
(e) whether an unequivocal denial from the accused;
(f) nature and extent of prejudice caused to the accused by the lapse of time.

In *R v The Queen* [1996] 2 NZLR 111 there was a 20 year delay in complaining. Justice Tipping stated at p 112:

> The first point is that an order for a permanent stay on the grounds of delay should only be made in exceptional cases.

At p 114:

> The reasons for the delay will obviously be important because the fairness of putting the accused on trial at all may depend, at least in part, on whether the delay is, as the Court of Appeal put it, without justification. Fairness in this respect, ie whether it is fair to put the accused on trial at all, will usually involve a balancing of the accused's interests with those of the public and the complainant. Against the starting point of no statutory limitation a case must be truly extreme before the inherent jurisdiction to prevent abuse of process can be invoked on this basis. In summary I would consider cases of this kind in two stages:
>
> 1. The accused is entitled to a stay if he can show that the delay has caused specific prejudice jeopardising a fair trial to the extent that there is a serious risk of a miscarriage of justice if the trial proceeds.
> 2. Even if he cannot show that, the accused is entitled to a stay if, in all the particular circumstances, the delay is so long and unjustified that it would be an abuse of process to put him on trial at all.

PROCEDURAL ISSUES

Each case appears to be dealt with solely on its individual facts, but the procedure by which the determination should be made does not seem to have ever been discussed.

Firstly, should cases of historical abuse be prosecuted at all? Should the Crown have a list of criteria it applies when deciding to prosecute? It is suggested that it is not for the Crown to decide whether reasons for delay are justified or whether the length of delay taints the merits of the allegations. This is a matter for the community and therefore its representatives, Judges and juries. In my view the involvement of Crown Solicitors in such matters requires a subjective judgment which is not within their scope of duty. If they have before them a valid and fully investigated complaint they must proceed unless of course there are other evidential difficulties. Issues such as counselling, repressed memories and so on and the effect that that has had on the complainant again should not be assessed by the Crown but by a Court.

Some Courts have adopted the view that to determine such applications, evidence, in some form, must be tendered by the complainant as to their reasons for delay. This has most often been done by way of affidavit or signed statement. On most occasions the complainant is then required for cross-examination at the pre-trial hearing.

Although the pre-trial application relates only to issues of delay, the requirement of the complainant to give evidence of any sort before trial appears to negate the aim and purpose of the provisions of s 185C Summary Proceedings Act 1957.

Section 185C states:

> 185C. Evidence of complainant – (1) Notwithstanding anything in Part V of this Act, at any preliminary hearing to which this Part of this Act applies, the complainant's evidence shall be given in the form of a written statement, and the complainant shall not be examined or cross-examined on that statement unless –
>
> (a) The Court is satisfied that the complainant has been advised of the right to give evidence in the form of a written statement but nevertheless wishes to give evidence orally; or
> (b) The Court orders, either of its own motion or on the application of the defendant, that the complainant's evidence be given orally on the ground –
>   (i) That the written statement of the complainant, together with any other evidence tendered, is not sufficient to justify putting the defendant on trial; or
>   (ii) That it is necessary in the interests of justice that the evidence be given orally.

In *W v Attorney-General* [1993] 1 NZLR 1 the Court of Appeal looked specifically at s 185C and whether it was "necessary in the interests of justice" for leave to cross-examine the complainant to be granted.

At p 7 of that judgment the President of the Court of Appeal held that:

> For a general principle it can only be said that there must be some special reason in the particular case to justify departure from the ordinary rule that the complainant in a sexual case, young or old, male or female, is not to be required at the preliminary hearing to give oral evidence or to submit to cross-examination.

Some examples were given of situations where cross-examination may be permitted, namely:

1. Identity may be disputed and counsel for the defendant might wish to pin the complainant down to a description of the offender before she became more familiar with the appearance of the defendant.
2. Special ground to suspect collusion or to contend for that reason that severance of trials should be ordered.

3. Some special factor relating to the admissibility of a complaint.

The question for the Court will be whether the alleged need claimed by the defendant constitutes a sufficiently special and pressing reason for departing from the general rule of protection of the complainant.

> The point to be emphasised is that any case where departure from the general rule in s 185C is justified must be truly exceptional. (p 9)

If no application has been made pursuant to s 185C, or if such an application has been denied, it is submitted that the complainant cannot be compelled to give evidence at a pre-trial hearing and that issues of delay which relate to the complainant can only be raised at trial in cross-examination of the complainant. The justifications given for the delay then become a matter for the jury to take into account when deciding their verdict.

If the defence wishes to argue that it is prejudiced by delay for specific reasons such as death of witnesses or alibi, that certainly can be raised at a pre-trial hearing but, it is not appropriate to have the complainant present to give evidence or to be cross-examined in respect of their delay at that pre-trial hearing. Such factors must be weighed against the evidence of the complainant as it stands at depositions. Issues such as credibility should not be looked at by the Court at this stage.

In my view, if the intention was to prevent cases from being tried because of complainant delay then a statute of limitations would apply. (The legislature was clearly conscious of such a feature because, for example, in s 134 Crimes Act 1961 it has imposed a 12 month time limit.)

The Court of Appeal in *R v Accused* (CA 160/92) [1993] 1 NZLR 385 at p 392 stated:

> It is possible to imagine a case in which allegations of sexual misconduct are so vague or relate to a time so long ago, without justification for the delay, that it would be unfair to place an accused on trial upon them. Then the possibility of exercising the protective inherent jurisdiction would fall for consideration in all the circumstances of the particular case. But the present case is clearly not in that class. The reasons for the delay in complaining have not been explored; the defence did not apply for leave to cross-examine the complainants at the preliminary hearing. The three complainants give vivid and detailed accounts of the conduct alleged by each against the accused and the surrounding circumstances. A reading of their written statements produces a sense that the accused's claims of vagueness are largely unreal.

There can be no dispute with the established principle that where the period of delay is long it can be legitimate for the Court to infer prejudice without proof of specific prejudice and that whether that inference should be drawn, or whether in all the circumstances of a particular case it is unfair to place the accused on trial, must depend on the particular circumstances. (See *R v Accused* (CA 260/92) [1993] 2 NZLR 286.) The question the author has is what procedure should be adopted by the Court to determine the fairness of putting the accused on trial when the objection relates to the delay on behalf of the complainant in complaining?

In the view of the author such a determination can only take place either at depositions if grounds are established for the complainant to be cross-examined pursuant to s 185C or at trial after the evidence. To make the decision at any other time and to make the complainant give evidence before trial is not consistent with the aims of protecting our victims from stress and the accepted view of the community about sexual abuse victims.

It is the view of the author that other statutory provisions and case law support the above propositions.

Section 23AC Evidence Act 1908 provides:

> **23AC. Delay in making complaint in sexual cases** – Where, during the trial of any person for an offence against any of ss 128 to 144A of the Crimes Act 1961 or for any other offence against the person of a sexual nature, evidence is given or a question is asked or a comment is made that tends to suggest an absence of complaint in respect of the alleged offence by the person upon whom the offence is alleged to have been committed, or to suggest delay by that person in making any such complaint, the Judge may tell the jury that here may be good reasons why the victim of such an offence may refrain from or delay in making such a complaint.

This enables the trial Judge to direct a jury specifically on the issue of delay in complaining. In view of that section, does that not suggest that the issue of complainant delay is one for the jury to weigh up and is not a matter for the Judge to investigate and determine pre-trial? What is the purpose of this section if not to cover situations which include historical abuse?

Reference is also made to *R v Schmid* (1992) 8 CRNZ 376. At p 379 the Court of Appeal per Holland J stated that:

> evidence that may be relevant to delay will not be relevant if delay does not become an issue in the trial.

In this case there was nothing to indicate that at the time the evidence of the complainant was given any attack would be made on the credibility of the complainants because of their delay in making complaints, notwithstanding the pre-trial application for discharge based on the considerable delay in the complainants making a complaint. In the absence of such an attack, however, the evidence justifying the delay was prejudicial. The appropriate course was for the complainant to be cross-examined and then re-examined as to the reasons for the delay. Evidence can then be called in addition from others if required. It is not open to the Crown to lead evidence justifying the delay to pre-empt such cross-examination.

CONCLUSION

In conclusion it is argued that:

1. It is for a Court to determine whether a validly investigated allegation should proceed to trial, it is not for the Crown to exercise its discretion to prosecute based solely on the timing of the complaint.
2. A case of historical abuse should only be stayed in exceptional and specified circumstances. Such circumstances are to be established by the accused and can be grounds for a s 185C application if such matters need to be put to the complainant.
3. A complainant should not be required to justify the timing of the complaint in order to validate the prosecution pre-trial.
4. Issues such as:
   (a) Complainant counselling;
   (b) Circumstances surrounding the laying of the complaint;
   (c) Mental and physical health of accused and complainant;

   can all adequately be cross-examined on. ❑

LITIGATION

edited by
Andrew Beck

PRIVILEGE AND THIRD PARTIES

The status of communications between solicitors or their clients and third parties is a matter which continues to give rise to litigation. Communications with accounting advisers are of particular interest in the light of Law Commission proposals to extend the privilege for communications relating to legal advice (*Evidence Law: Privilege* (Preliminary Paper No 23, 1994)) and concerns as to what might happen should accountants and lawyers form hybrid partnerships. An aspect of this was recently considered by the High Court in *Dinsdale v CIR* (1997) 18 NZTC 13,244.

PRINCIPLES

Where the communication with a third party is made predominantly for the purposes of litigation, there is no doubt that it will be privileged. It is communications made in the context of seeking or providing legal advice which cause difficulty.

As the law stands, communications between a client and an accountant to obtain legal advice do not fall within legal professional privilege, although they may well be confidential, and therefore subject to the discretionary protection of the Court under s 35 of the Evidence Amendment Act (No 2) 1980.

Communications between a solicitor and an accountant are not privileged unless the accountant is acting as the agent of the solicitor or the client: *C-C Bottlers Ltd v Lion Nathan Ltd* [1993] 2 NZLR 445. Where the accountant is consulted for an independent opinion, neither the opinion nor the material on which it is based is privileged: *R v King* [1983] 1 All ER 929, 931 (CA).

In order for legal professional privilege to apply, the communication between solicitor and client must be confidential and the solicitor must be acting as a legal professional. It will not apply where the advice given is primarily of an accounting (*Olender v US* 210 F 2d 795 (1945)), or entrepreneurial nature (*Leary v Commr of Taxation* 47 FLR 414).

Where a solicitor is consulted in the presence of an accountant, this may destroy the confidentiality of the communication, and thereby the privilege: see Maria Italia "Legal Professional Privilege and Accountant-Client Confidentiality" (1996) 2 NZJTLP 75, 81. This is unlikely where the accountant is involved for the purpose of providing complementary advice. Even if the communication is confidential, however, the opinion of, and communications with, the accountant would not be protected by privilege. There is nothing (apart from the general confidentiality discretion) to prevent the accountant being called to give evidence as to what was said to him or her, or any opinion provided. Obviously, the accountant could not give evidence on communications between solicitor and client unless privilege had been waived.

Finally, privilege is not destroyed because a solicitor discloses a privileged document to an accountant in confidence: *C-C Bottlers Ltd v Lion Nathan Ltd* [1993] 2 NZLR 445. Waiver can only be brought about by the client, and would not normally be inferred from an authorised disclosure to an accountant. The situation is essentially the same as where an accountant hears what a solicitor says to a client.

DINSDALE v CIR

In *Dinsdale*, the ANZ Banking Group was facing the possibility of prosecution by the Inland Revenue Department for non-disclosure of certain documents. The bank's solicitors instructed its auditors to carry out a review of matters relevant to the prosecution. The auditors prepared a report, a copy of which was sent to the Department. The report referred to a number of interviews which had been conducted, and the Commissioner requested notes made at several of these. The bank claimed both litigation and legal professional privilege.

Although the Court found that the threat of prosecution was seen as real, it concluded that the dominant purpose for which the documents were brought into being was to identify the relevant documents and to provide an explanation for the earlier non-disclosure. The defence of a possible prosecution was only subsidiary; litigation privilege was therefore not available.

Eichelbaum CJ held that the communications at the interviews were not made in professional confidence, and the presence of a solicitor at the interviews could not have conferred any privilege. Even if the auditors could be regarded as the agents of the solicitors, the communications were not between solicitor and client. At best they could be regarded as communications between solicitors and third parties. This was insufficient to attract legal professional privilege, and the documents therefore had to be disclosed.

The bank was possibly unlucky to have failed on the litigation privilege issue. The potential prosecution was undoubtedly the major factor which induced the bank to undertake the review which resulted in the report. The Court stressed the bank's other purposes: its expectation that, if it could produce evidence of a sufficiently thorough search, a prosecution could be avoided, as well as its desire to restore its credibility with the Department. The matter was finally clinched by the Court's inspection of the particular documents requested, which led to the conclusion that these other purposes were indeed the dominant purposes for which they had been prepared.

If one takes a step back, however, and examines the reason for litigation privilege, requiring disclosure seems less obvious. The client would have been encouraged to make a complete disclosure to the solicitor so that the solicitor would be in a position to be able to present the best defence possible. Had it turned out that the earlier disclosure had in fact been inadequate and a prosecution inevitable, it would hardly seem fair that these documents be regarded as discoverable. The whole process was coloured by the threat of litigation. Once litigation is clearly within contemplation, it seems somewhat artificial to take very specific documents out of the wider context.

As far as legal professional privilege is concerned, the decision makes the position very clear. Accountants are not protected in the same way as solicitors, and communications with them are not privileged, even when a solicitor is involved, or when they are performing the same role as a solicitor. Although the issue of confidentiality will normally be relevant, the application in *Dinsdale* was under the Tax Administration Act 1994, which meant that only solicitor client privilege could assist the bank.

MERGED PARTNERSHIPS

In its preliminary report, the Law Commission was apparently leaning in favour of extending legal professional privilege to communications with persons other than solicitors for the purpose of obtaining legal advice. The situation of tax accountants was cited as a particular example (see paras 66-70). The present attitude of the Commission, however, seems to be rather different. This has led to a suggestion that, should merged partnerships between accountants and lawyers become a reality, the whole firm would lose the ability to offer clients the protection afforded by legal professional privilege.

This may be something of a straw creature in that there does not appear to be any great movement towards merged partnerships at the moment. The issue nevertheless remains important in principle: there would be a significant disincentive to merge if privilege were to be in jeopardy. It is suggested, however, that the principles as illustrated in *Dinsdale*, *C-C Bottlers* and the other authorities can be applied to a merged partnership without any great problems. The conclusions would be as follows:

- Communications between a client and a non-legal partner would not be privileged, but would generally be confidential.
- Communications between a legal and a non-legal partner would not be privileged, but would generally be confidential.
- Communications between a client and legal partner in the presence of a non-legal partner would be privileged.
- Privilege would not be destroyed by showing a privileged communication to a non-legal partner.
- Communications between a client and a legal partner would not be privileged where that partner was not consulted chiefly for legal advice.

It can therefore be seen that the situation is no different from that where a solicitor consults an independent accountant. The fact that the two are partners does not seem to have any consequences for the operation of the doctrine of privilege.

The anomaly pointed out by the Law Commission remains, in that legal and non-legal partners could perform the same task with different results as far as privilege is concerned. This raises the wider issue of extending the ambit of privilege, which does not appear to enjoy much support in the legal profession. From the point of view of principle, however, it would be a better solution than removing the privilege from certain solicitors.

In her comparative study of the position in New Zealand, England and Australia (cited above), Maria Italia suggests that the Tax Administration Act be amended to include an accountant client privilege, similar to that available under s 20 of the English Tax Management Act 1970. This would certainly offer clients greater protection as far as the Department of Inland Revenue is concerned. To ensure a consistent approach, however, the question needs to be addressed as a matter of principle, and should include all qualified persons offering legal advice.

RULE 426A HEADACHES

The new approach of the Court of Appeal to R 426A of the High Court Rules was discussed in the June issue of the *Journal*. The essence of the decisions in *McEvoy v Dallison* (1997) 10 PRNZ 291 and *NZ Kiwifruit Marketing Board v Waikato Valley Cooperative Dairies Ltd* (1997) 10 PRNZ 431 was that the rule is to be seen as a case management tool rather than a barrier to justice. The Court was at pains to distance itself from the approach taken in a number of High Court decisions which had considered the prejudice to the other party.

The position has now been complicated by a further decision of the Court of Appeal, according significant weight to the prejudice suffered by an individual defendant, and refusing leave to proceed under R 426A. In *Pearman v Carr* (1997) 10 PRNZ 507 some five years had elapsed between the commencement of proceedings and a second application for leave under R 426A. During that time, the proceeding had not progressed beyond the statement of defence.

The crucial factor, however, was that one of the defendants suffered a heart attack in January 1996, and was under increased risk of a stroke should the matter proceed to trial. The Court held that such "significant and unusual" prejudice could not be ignored. Accordingly leave was refused to proceed, but only against this particular defendant. (The other defendants did not contest the application for leave, presumably because of *McEvoy*.)

The Court saw no difficulty in refusing leave against some only of a number of defendants, or in concluding that the case could not be "managed to a just outcome" because the defendant had suffered a heart attack. However, given that this personal prejudice was the major distinguishing feature between the case and one such as *NZ Kiwifruit Marketing Board v Waikato Valley Cooperative Dairies*, one may perhaps be forgiven for feeling a trifle confused.

Case management must concern the progress of a proceeding through the system, not the position of individual litigants. If there have been unacceptable delays, the proceeding should be struck out altogether. To investigate the individual circumstances of each litigant seems to go well beyond the call of case management. That is not to say that leave should have been granted in this case; rather that the basis on which the Courts will act has become very convoluted and, hence, difficult to predict with confidence.

The confusing consequences of the decisions of the Court of Appeal are illustrated by the decision in *Re Mantle* unreported, Master Gambrill, 4 June 1997, HC New Plymouth M67/95, a testamentary promises claim which had been in progress for some four years without discovery being completed. The defendant, who was one of the beneficiaries under the will, and an important witness, was 82 and unlikely to be able to give adequate evidence.

The Court said:

> I am satisfied the prejudice to the Defendant is substantial and the Plaintiffs are not coming to grips with the control of this action. It is grossly unfair and it has deprived the legitimate beneficiary of the assets in the estate which Mrs Hill particularly has inherited. Provisions allowing testamentary promises to be recognised give a Plaintiff a privilege overriding the testator's testamentary wishes and that privilege should not be abused. However, in the light of the Court of Appeal decision in *McEvoy*, I do not feel that I can debar the Plaintiffs from being heard in this Court on a claim which Counsel submits has merit. I cannot identify delay which is so great that the Plaintiffs can be said to have forfeited his or her right of access to the processes of the Court.

Had the decision in *Pearman v Carr* been available, the Court might have decided otherwise. The uncertainty which has been generated is most undesirable: something will have to be done urgently by the Rules Committee to make it clear how R 426A is to be approached.

CASE BRIEFS

CALDERBANK LETTERS

As from 1 February 1996, Calderbank letters have received legislative recognition in R 46A of the High Court Rules. However, the rule does little more than encapsulate the common law idea of an offer made without prejudice save as to costs, and there is no corresponding rule in other Courts. The judicial interpretation of such letters accordingly remains important, and the recent Court of Appeal decision in *Health Waikato Ltd v Van der Sluis* (1997) 10 PRNZ 514 is significant.

In that case, the Employment Court gave judgment for an amount which had previously been offered in a Calderbank letter. The Court also awarded costs, effectively giving no weight to the offer when making the final costs award. The Court of Appeal held that the approach of the Employment Court had been justified, because the total offered had simply been too low, considering the amount of costs which had already been incurred. It is clear that, to be effective, the offer must take the whole situation into consideration, not only the substantive amount claimed.

The Court also held that an offer which was silent as to costs already incurred would not be interpreted so as to include an offer to pay costs in addition to the amount offered. In ordinary circumstances, therefore, a Calderbank offer will be seen as "all-in". The offer should either include an allowance for costs, or make specific mention as to what is offered with regard to costs.

The other point made by the Court is that sufficient time must be allowed for consideration of an offer. In the case in point, the Court held – disagreeing with the Employment Court – that the 12 days between the offer and the commencement of the trial was sufficient. The case was essentially a simple one, and the plaintiff had enough time to consider the offer. It seems likely that the Court's approach will be adopted in respect of R 46A as well.

APPEARANCES IN APPEALS FROM AUTHORITIES

The role of counsel appearing for an Authority in an appeal from one of its decisions was discussed by the Court in *Portage Licensing Trust v Auckland District Licensing Agency* (1997) 10 PRNZ 554. Tompkins J held that the right of an Authority to appear on an appeal should be exercised sparingly, and only in those cases where circumstances make representation appropriate. As examples, he cited appeals involving wider questions of administration of a particular statute, as in *NZ Paper Mills Ltd v Otago Acclimatisation Society* [1992] 1 NZLR 400 and those where there is no opposing party, such as *Tararua Foundation v Liquor Licensing Authority* [1995] 2 NZLR 296.

Where it is appropriate for counsel to appear, it is important that the role of counsel be restricted to assisting the Court, rather than supporting the Authority's decision in an adversarial way. In *Portage Licensing Trust*, the Court was critical of the adversarial stance adopted, and held that the impartiality of Tribunals must be seen to be maintained. While there may be a fine line in some cases between upholding a decision and assisting the Court, it seems clear that the submissions by counsel will have to be presented in a disinterested way.

Another point to note in relation to such appeals is that raised by McGechan J in *Moonen v Broadcasting Standards Authority* (1995) 8 PRNZ 335. An Authority whose decision is being appealed must be served, but should not be cited as a party to the appeal. If the Authority wishes to be heard it may give notice and be treated as a respondent, but it should not be brought in as a matter of course. Although Part X of the High Court Rules is somewhat ambiguous, the Rules Committee has noted *Moonen* as a correct statement of the position.

APPEALS FROM DISPUTES TRIBUNALS

It is well-established that the scope for appeal from Disputes Tribunals is extremely narrow, and strictly limited to matters of procedural irregularity causing unfairness: *NZI Insurance New Zealand Ltd v Auckland District Court* [1993] 3 NZLR 453. What has never received a proper airing is the possibility of a second appeal once an appeal has been considered by the District Court.

The issue arose for decision in *Graham v Disputes Tribunal, New Plymouth* (1997) 10 PRNZ 547, where a challenge to appeals from Disputes Tribunal decisions was brought alternatively as an appeal and an application for review. Fisher J held that appeals are statutory creatures and that s 50 of the Disputes Tribunals Act 1988 permits only one appeal, to the District Court. There was therefore no jurisdiction for an appeal to the High Court, and the appeal was struck out. (Mr Graham nevertheless succeeded in his application for review.)

While it is undoubtedly true that s 50 only provides for appeals to the District Court, and all appeals must have a statutory foundation, the Court did not consider other legislative provisions. The District Courts Act 1947 accords a general right of appeal from any final order of the Court to any party to any "proceedings" in the District Court (s 71A(1)). "Proceeding" is defined as any application for the exercise of civil jurisdiction other than an interlocutory application (s 2(1)) and "final order" is defined as a final "determination or direction" of the Court (s 71). An appeal from the Disputes Tribunal is an exercise of civil jurisdiction, and the determination of an appeal is a final order. It is therefore arguable that there is a further right of appeal to the High Court.

It may well be that there are sound policy arguments for limiting the rights of appeal from Disputes Tribunals to a single appeal. If this had been the legislative intention, however, there would have been no difficulty in expressing it in s 50. As it is, the legislative position remains equivocal. The matter does not appear to have been fully argued before Fisher J, which is unfortunate. Although there will never be a large number of such appeals, this was an ideal opportunity to resolve the jurisdictional question.

REVIEWING APPROVAL OF DISBURSEMENTS

In *Bank of Nakhoda v The Fishing Vessel "Abruka"* unreported, Paterson J, 28 May 1997, HC Auckland AD763/96, the Court had allowed disbursements as approved by the Registrar. The Registrar gave the parties an opportunity to comment, but no submissions were received and a judgment was sealed. The defendant then applied under R 59 of the High Court Rules for review of the Registrar's decision. The Court held that there was no jurisdiction to entertain such a review.

Although R 59 is framed in wide terms, and appears to give an unfettered power to the Court to review any decision of the Registrar relating to disbursements, the Court held that the principle of the finality of sealed judgments took precedence. It will be different where a party has not had the opportunity to be heard: *Steel v Bruce County Council*, Hardie Boys J, 12 March 1986, HC Greymouth M19/85. In such a case, the order is a "nullity"; otherwise, the sealed judgment will be regarded as final.

Finality of orders must be an important consideration, and in the circumstances it appears that the Court was fully justified in the approach taken by it. It does seem odd, however, that this should be treated as a matter of jurisdiction. Failure to observe rules of natural justice should make a decision reviewable, not a nullity, and there may be other reasons why a sealed order is incorrect. The real problem lies in how to rectify a sealed order in the light of R 540. It is suggested that the approval of disbursements does not form part of a judgment at all; the judgment is that disbursements be approved by the Registrar. Accordingly, if the Registrar's decision were altered on review, there would be no question of recall even if the amount had been included in the sealed order; the Court could order rectification. The practical solution is clear, however: objection to the Registrar's decision should be taken immediately.

NEW TRIAL

In the ongoing saga of *Collier v Creighton*, an interesting point came up before Robertson J: 22 April 1997, HC Christchurch CP 13/89. After unsuccessful appeal to the Court of Appeal and Privy Council, Mr Collier made an application under R 494 High Court Rules for a new trial in the High Court. (The original trial took place in 1991.)

The Court noted that there appeared to be little authority on the point apart from *Hikuwai v Sandford Ltd* (1996) 9 PRNZ 587, where Thorp J had held that there was no power to order a new trial in such circumstances. Robertson J considered the arguments in principle and concluded that the approach taken in *Hikuwai* was correct. The Rule had to be seen in the context of the judicial hierarchy, and once a matter had been finally determined in a higher Court, the jurisdiction to order a new trial was no longer available.

It is suggested that this must be sound; it would be unacceptable to take a matter on appeal and then seek to reopen the trial because the outcome of the appeal was found unsatisfactory. A more difficult question may arise where the appeal has not yet been determined. Such a question arose in *Green v Broadcasting Corporation of New Zealand* [1988] 2 NZLR 490, where an application for a rehearing was refused after an appeal had been filed but the jurisdictional issue was not considered. There may be reasons why an appeal is filed at an early stage, and this should not necessarily preclude an application for a new trial.

In the end it probably comes down to a sensible exercise of discretion; the longer an appeal has been pursued, the less reason there is to go back to the trial. There does not seem to be any doubt, however, that once an appeal has actually been heard, the Court appealed from will not consent to rehear the matter.

LEAVE FOR DEFAMATION PROCEEDINGS

In *Mountain Rock Productions Ltd v Wellington Newspapers Ltd* McGechan J, 26 June 1997, HC Palmerston North CP 34/94, the Court reviewed the decision of the Master allowing defamation proceedings out of time: (1996) 9 PRNZ 604, discussed at [1996] NZLJ 380.

McGechan J held that the filing of a memorandum can, in an appropriate case, amount to a "step" in the proceedings which postpones the time bar. However, to qualify as a step, there must be some "genuine and authorised procedural act within the limits of the rules and recognised practice of the Court". Correspondence, negotiation and briefing of witnesses do not qualify; the act must also be bona fide, rather than a mere device.

In the circumstances, the Court held that the memorandum filed was sufficient. There is a widespread practice involving the use of such documents, and this memorandum fell within the practice. There was an extant directions application which had been adjourned sine die, and the memorandum also sought leave under R 426A. It was therefore an acceptable way of approaching the Court, and counted as a step.

McGechan J went on to make it clear – differing from the Master – that the granting of leave under s 50 of the Defamation Act 1992 will be approached in a similar way to applications under R 426A after *McEvoy v Dallison*: the purpose of the section is to ensure that cases are being genuinely pursued and to apply case management techniques to them. Leave would have been granted in this case because it could still be "managed to a just outcome". ❑

INTERNATIONAL LAW AND LEGALISING CANNABIS

Kevin Dawkins, University of Otago

assesses the impact of treaty obligations on this topical issue

The Drug Policy Forum discussion paper *Alternative Systems of Cannabis Control in New Zealand* (Wellington, July 1997) briefly considers the seldom mentioned question of the impact of New Zealand's international legal obligations under multilateral drug control conventions.

New Zealand has signed and ratified two such conventions: the 1961 Single Convention on Narcotic Drugs, as amended by a 1972 Protocol, and the 1971 Convention on Psychotropic Substances. In addition, New Zealand has signed but not yet ratified the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Would relaxation of the present prohibitionist policy towards cannabis would be compatible with New Zealand's obligations under these treaties, particularly those imposed by the 1961 Convention? To answer that question I propose the following decriminalisation model as a test case. Under this proposal several activities now prohibited by the Misuse of Drugs Act 1975 would cease to be criminal offences where they involve only small amounts of cannabis and are done in private for personal purposes by persons over a minimum age (say, 18). The decriminalised activities would be:

- Acquisition, possession and use of cannabis
- Possession of equipment or substances for using cannabis
- Cultivation of cannabis
- Supplying cannabis on a non-remunerative or quasi-remunerative basis not resulting in profit
- Using or permitting private premises to be used for any of the preceding activities

Although these proposals are rudimentary and may seem ambitious they provide a template for measuring a comprehensive decriminalisation regime against the relevant treaty obligations. Later, I consider two alternative models which achieve liberalisation by means short of full decriminalisation. The proposals have been limited to small amounts of cannabis in recognition of the provisions of the 1961 Convention requiring parties to impose penal prohibitions on trafficking and related activities.

1961 CONVENTION

Definitions and control measures

This Convention applies to "cannabis", "cannabis resin" and the "cannabis plant", all of which are (wrongly) treated as "narcotic drugs". "Cannabis" is defined as "the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops)". In turn "cannabis plant" means "any plant of the genus cannabis" while "cannabis resin" is the "separated resin, whether crude or purified, obtained from the cannabis plant".

Different controls apply to these different forms of cannabis. Cannabis (marijuana) and cannabis resin (hashish) are included in Schedule I alongside the major natural and synthetic opiates and cocaine. They are therefore subject to all the general control measures under the Convention including arts 4(1)(c), 33 and 36(1) (below). By contrast, cultivation of the cannabis plant falls outside the general control regime and is the subject of special provision in arts 22 and 28(1) (below). The leaves of the cannabis plant are also separately provided for in art 28(3) (below).

Inappropriately, cannabis and cannabis resin are also included in Schedule IV with truly narcotic drugs like heroin. Parties are invited to adopt special measures for Schedule IV drugs "having regard to [their] particularly dangerous properties". (art 2(5)(a)) However, because these special measures are left to the discretion of each party, they do not create mandatory obligations beyond those applicable to Schedule I drugs.

Cannabis leaves and seeds

According to the official records of the conference that adopted the Convention, the seeds and leaves were excluded from the definition of "cannabis" because they were considered relatively innocuous when compared with the "narcotic" and "addictive" properties of the tops of the plant and its resin (see Leinwand (1971) 10 *Columbia J of Transnational Law* 413, 417). Consequently the seeds were exempted from all control measures while the leaves were made subject only to an obligation in art 28(3) requiring parties to adopt "such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant".

It is clear from both the drafting history and terms of the provision that a party may discharge its general obligation under art 28(3) without criminalising activities involving small quantities of cannabis leaves for personal use. Thus art 28 as a whole is headed "Control of Cannabis" whereas in the original draft version the title was "Prohibition of Cannabis" (Leinwand, above, 419). Furthermore, in terms of art 28(3) a party could satisfy its obligation to prevent "misuse" by distinguishing between activities related to private use and the same acts involving amounts in excess of permitted maximum quantities. The obligation to prevent "illicit traffic" could equally be fulfilled by retaining a general prohibition on dealing in cannabis with an exception for the non- or quasi- remunerative supply or exchange of small amounts of leaf material for personal use.

To that extent the Convention would permit the decriminalisation of a form of marijuana consisting of the leaves of the cannabis plant without the flowering or fruiting tops. That also applies to the seeds which fall outside the Convention's general scheme of controls. However decriminalisation of the leaves and seeds alone would introduce an untenable legislative distinction between different forms of cannabis, leaving the two most commonly used preparations in New Zealand still subject to total prohibition. As recently reported by the Ministry of Health, these are marijuana (typically a mixture of the flowering tops and small stalks as well as the dried leaves), and cannabis or hash oil which is a viscous and concentrated substance produced by solvent extraction of both the leaves and tops (*Cannabis*, The Public Health Issues 1995-1996, June 1996, 6).

Acquisition, possession and use

The 1961 Convention says nothing about "acquisition" of drugs. In the absence of an explicit obligation to criminalise this act, the present prohibition on the acquisition of cannabis in the Misuse of Drugs Act would seem to reflect a domestic policy preference. As for "use" and "possession" three provisions are relevant. First, under art 4(1)(c) parties are required to take "such legislative and administrative measures as may be necessary to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, *use* and *possession* of drugs". Although at first glance this provision might appear to present a significant obstacle to any party proposing to decriminalise possession and use for personal purposes, there is an important qualification on its operation. Art 4(1)(c) appears under the heading "General Obligations" and is stated to be subject to the other provisions of the Convention. As a general provision it cannot bind parties to impose criminal sanctions on personal possession and use if such an obligation is not clearly stipulated in the particular provision dealing with activities that are to be treated as "punishable offences". (art 36(1) below)

Apart from the reference to "use" in art 4(1)(c) there is a distinct lack of emphasis on use itself elsewhere in the Convention. While art 2(5)(b) mentions the prohibition of "possession or use" as a special control measure for Schedule IV drugs like cannabis and cannabis resin, it was seen earlier that such measures are left to the discretion of each party. So a party may, but is not legally required to, criminalise use. Moreover, while art 36(1) identifies "possession" as something which must be treated as a punishable offence, it makes no reference to "use".

The second provision bearing on domestic prohibition is art 33 which provides that parties "shall not permit the *possession* of drugs except under legal authority". Here again this general obligation certainly entitles parties to prohibit possession though it does not require prohibition as such. On the contrary, decriminalisation of possession of small amounts of cannabis "under legal authority" would appear to be entirely consistent with its terms. Even read in conjunction with art 4(1)(c) above, art 33 does not oblige parties to impose criminal sanctions on possession for personal use. A party may legitimately decide to deal with non-medical use and possession for that purpose through drug awareness and education programmes designed to discourage use.

However the most important provision is art 36(1) which specifically deals with penal obligations. It requires parties to make "possession" a "punishable offence" when committed intentionally. Although the reference to "possession" could include possession for personal use the more convincing interpretation is that the term is confined to possession as a link in illicit trafficking. Both the context and the drafting history of art 36(1) support the view that the obligation under the provision can be fully met by making possession for the purpose of trafficking an offence under domestic law without criminalising possession for personal use. In particular, "possession" in art 36(1) appears in a trafficking context where all the other listed activities have some connection with drug production or distribution: "cultivation, production, manufacture, extraction, preparation, *possession*, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation". In addition, art 36(1) was based on a provision in an earlier draft chapter entitled "Measures Against Illicit Traffickers". Although in its final form the Convention did not adopt the draft's division into chapters, art 36(1) nonetheless appears in a part of the Convention directed at trafficking – it is preceded by a provision headed "Action Against the Illicit Traffic" and followed by another on "Seizure and Confiscation". As well, there is no mention of "use" alongside "possession" in art 36(1). Had the provision been intended to require the criminalisation of possession for personal use, it seems a fair conclusion that use itself would also have been included as a punishable act.

Cultivation and supply

The 1961 Convention permits parties to cultivate the cannabis plant for the production of cannabis or cannabis resin provided they do so under the control of government agencies. (art 28(1)) Apart from the controls applicable to such large-scale licensed cultivation, the only specific obligation in relation to cannabis cultivation arises under art 22 which provides that a party shall prohibit cultivation whenever prohibition is the "most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic". This provision plainly does not oblige parties to impose criminal sanctions on the private cultivation of small quantities of cannabis for personal use. Since it is left to each party to decide whether prohibition is the "most suitable measure", there is nothing to prevent a party from decriminalising private cultivation of amounts of cannabis which neither threaten the "public health and welfare" nor contribute to the "illicit traffic".

Nothing in arts 4(1)(c) or 36(1) disturbs that conclusion. The general obligation in art 4(1)(c) to take necessary legislative and administrative measures applies to "manufacture" and "production" but not to "cultivation" which is defined in art 1(1) quite separately from those other terms. On the other hand, while art 36(1) does refer to "cultivation", for the reasons given earlier in relation to possession the provision is directed at activities in the chain of trafficking rather than at acts associated with personal use.

In the context of art 4(1)(c) the supply of small amounts of cannabis without remuneration or for insignificant remuneration seems to fall outside "distribution" and "trade". Similarly, "offering", "offering for sale", "purchase", "sale", "distribution" and "brokerage" in art 36(1) refer to commercial or trafficking transactions rather than donative or quasi-donative transfers for personal use. That view is reinforced by overseas reports which, after examining the terms of the Convention, recommended that the gratuitous or non-profit private supply of small amounts of cannabis should be excluded from criminal liability.

Ancillary offences

The 1961 Convention does not address ancillary activities such as possession of equipment for using drugs or permitting premises to be so used. The only explicit obligation with any bearing on these activities is in art 37 which simply states that any drugs, substances and equipment used in or intended for the commission of an offence under art 36 "shall be liable to seizure and confiscation". Because this provision is predicated on art 36 it is confined to equipment and material used for commercial production, manufacture, preparation and so on. In any event, art 37 does not oblige parties to enact separate offences in respect of possession or use of such things.

Discretionary control measures

The fact that most parties to the 1961 Convention have criminalised activities involving cannabis is far from conclusive evidence that the Convention requires them to do so as a matter of international legal obligation. Besides the open-textured nature of the main control provisions, the Convention also gives a wide margin of discretion to parties in implementing domestic control measures. For instance, apart from specifying several acts that are to be made offences, art 36(1) leaves it to each party to decide whether to impose criminal sanctions on "any other action which in the opinion of such Party may be contrary to the provisions of this Convention". The Convention further recognises the freedom of parties to adopt stricter measures than are expressly required (art 39) and to impose discretionary special controls on Schedule IV substances like cannabis and cannabis resin. (art 2(5)) Seen in that light, current state practice in prohibiting cannabis activities can be explained in terms of special control measures adopted for reasons of domestic policy over and beyond the mandatory requirements of the Convention.

1988 CONVENTION

Personal purposes

The 1988 Convention contains what initially appears to be a problematic provision in art 3(2). Under this provision a party is required to adopt "such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, *the possession, purchase or cultivation of narcotic drugs ... for personal consumption contrary to the provisions of the 1961 Convention*". Since the 1988 Convention applies to cannabis as a "narcotic drug" under the 1961 Convention, the emphasised words could be taken as implying that the possession, purchase and cultivation of cannabis for personal use (though strangely not use itself) have always been punishable offences under the 1961 Convention. However, because the 1988 Convention is intended to supplement the 1961 Convention, the better view is that art 3(2) is intended to remove any doubt on the point by creating a fresh and prospective obligation to criminalise these activities.

Nonetheless, since New Zealand is not a party to the 1988 Convention it is not legally bound by art 3(2). At most, as a signatory state which has not ratified the Convention New Zealand is required under the general law of treaties not to do anything that would defeat the object and purpose of the Convention until it has made clear its intention not to become a party (Vienna Convention on the Law of Treaties 1969, art 18(a)). Even so, it must be doubted whether the decriminalisation of the activities referred to in art 3(2) of the 1988 Convention would amount to an act contrary to the object and purpose of the Convention. From its title to its text the 1988 Convention proclaims as its central purpose the improvement of international co-operation in suppressing illicit drug trafficking.

Other measures

Art 3(2) of the 1988 Convention must also be read together with art 3(4)(d) which provides that a party may adopt other measures "as an alternative to conviction or punishment ... of an offence established in accordance with para 2". Although these other measures are not specified, they are broadly described as relating to the "treatment, education, aftercare, rehabilitation or social reintegration of the offender". Since in context this list of purposes does not appear to be exhaustive (the immediately preceding provision introduces them with the words "such as"), parties therefore retain a considerable discretion to adopt measures other than criminal prohibitions in dealing with possession, purchase and cultivation of cannabis for personal use. Even in terms of the purposes stated in art 3(4)(d) a decriminalisation regime for small amounts of cannabis for personal use could be defended as a means of "social reintegration" of a class of persons presently subject to a prohibitionist policy of dubious social utility.

Reservations and declarations

It also remains open to any party proposing to ratify the 1988 Convention to attach a reservation or interpretative declaration to its instrument of formal acceptance. By such means a ratifying party may record its intention not to be bound by a particular provision, its conditional undertaking of an obligation or its understanding of specific definitions and terms. For example, Germany ratified the 1988 Convention subject to a declaration in respect of art 3(2) that its domestic law might change; and on signature the Netherlands also recorded its understanding of various provisions including the scope of the discretionary legal powers relating to the prosecution of offences referred to in art 3(2).

1971 CONVENTION

This Convention incorporates a control regime broadly comparable to that under the 1961 Convention for hallucinogens, amphetamines, barbiturates and other synthetic drugs. Schedule I includes tetrahydrocannabinol (THC) which is the primary psychoactive constituent of cannabis. However the Convention has no application to the proposed decriminalisation regime which does not include separated or synthesised THC. Furthermore, the obligation in art 7 of the 1971 Convention requiring parties to prohibit possession and use of THC except for scientific and medical purposes does not apply to THC levels occurring naturally in any part of the cannabis plant, cannabis resin or cannabis preparations.

SUMMARY

Implementation of the proposed decriminalisation regime would not contravene New Zealand's obligations under the 1961 Convention. Despite the terms of art 3(2) of the 1988 Convention, decriminalisation still remains a domestic option because New Zealand has not ratified that treaty. Even if New Zealand were to do so it would retain a discretion to adopt measures other than criminalisation for activities involving small amounts of cannabis; and it could also reserve its legal position in relation to such matters.

ALTERNATIVE MODELS

Two alternative models warrant brief examination. In each case a form of decriminalisation has been achieved by means incontrovertibly within the terms of both the 1961 and 1988 Conventions.

De facto decriminalisation

Dutch policy towards small amounts of cannabis for personal use represents a pragmatic compromise between total prohibition and de jure decriminalisation (see van Vliet (1990) 18 *Hofstra Law Review* 717; Leuw and Marshall, *Between Prohibition and Legalisation: The Dutch Experiment in Drug Policy*, 1994). Under the revised Opium Act 1976 a distinction is drawn between "drugs presenting unacceptable risks" (mainly heroin, cocaine, LSD and amphetamines) and "cannabis products" (marijuana and hashish). Penalties for drugs with unacceptable risks have been substantially increased with a corresponding reduction for cannabis and cannabis resin. Although acquisition and use of any controlled drugs are not offences, the legislation retains prohibitions on possession, cultivation and supply.

However, under law enforcement and prosecutorial guidelines possession of up to 30 grams of cannabis for personal use will not result in prosecution (in practice the limit is reported as nearer 50 grams). This amount was apparently based on a calculation of a personal supply sufficient for about two weeks' use, allowing for sharing with others. The guidelines also tolerate a quasi-legal retail trade in cannabis, mainly in coffee shops where "house dealers" can confidently expect not to be prosecuted so long as they observe certain conditions such as selling only small quantities, and only to persons over 18.

Expiation

In 1987 South Australia amended the Controlled Substances Act 1984 to provide for an "on-the-spot" fine procedure for "simple cannabis offences" which are defined as possession or use in private of small quantities of cannabis, possession of equipment for use in the preparation or consumption of cannabis, and cultivating plants for personal purposes. Together with the Controlled Substances (Expiation of Simple Cannabis Offences) Regulations, the new legislation introduced the Cannabis Expiation Notice (CEN) System for dealing with small-scale cannabis activities (see Sarre (1990) 23 ANZJC 299; (1994) 6 *Current Issues in Criminal Justice* 196). Under this procedure anyone over 18 alleged to have committed a "simple cannabis offence" must be given an expiation notice before any prosecution is commenced. If the offence is expiated by the payment of a fee within 60 days no prosecution for that offence may be instituted. Although any substances or equipment seized in connection with the alleged offence are forfeited, payment of the fee does not in law amount to an admission of guilt.

Much like the Dutch approach, the introduction of the CEN system was accompanied by substantial increases in the penalties applicable to serious offences. As a result of amendments in 1991 intermediate steps have also been added to the penalty scale for small-scale activities involving more than "simple" amounts but less than the quantities specified for "large scale" trafficking.

While the original expiable amounts of cannabis were reduced in 1990 the quantities still remain at significant levels. For example, posession of less than 100 grams of cannabis or cultivation of fewer than ten plants (irrespective of size) attracts an expiation fee of $150.

Under the Drugs of Dependence Act 1989 (ACT), as amended in 1992, a police officer who reasonably believes that a person has committed a "simple cannabis offence" *may* serve an offence notice on that person. Invariably the police choose this option rather than commencing a prosecution (Sarre, above, 199). If the alleged offender pays the prescribed penalty within 60 days of service of the notice, no further proceedings may be taken and the offender shall not be regarded as having been convicted. The relevant offences, all of which attract a penalty of $100, are possession of not more than 25 grams of cannabis, cultivation of no more than five plants and using cannabis.

A similar procedure has also been introduced in the Northern Territory by a 1996 amendment to the Misuse of Drugs Act 1990. This allows the police to issue a penalty notice of up to $200 for cultivation of no more than two plants or possession of up to 50 grams of cannabis plant material, ten grams of cannabis resin, ten grams of cannabis seed and one gram of cannabis oil.

Compliance with the Conventions

One reason the Dutch adopted their self-styled policy of "normalisation" instead of de jure decriminalisation was to avoid any allegation that the Netherlands was in breach of the 1961 and 1988 Conventions. Even though the official Dutch view seems to have been that neither Convention necessarily requires parties to impose criminal sanctions on small-scale cannabis activities, the amendments to the Opium Act and the selective moratorium on enforcement were intended to relax controls without appearing to resile from the Netherlands' treaty obligations. So the absence of any prohibition on the acquisition or use of cannabis or any other controlled drug can be justified on the ground that the 1961 and 1988 Conventions do not require parties to criminalise these acts. At the same time the formal retention of offences of possession, cultivation and supply satisfies those who take a very broad view of the obligations imposed by the Conventions. Furthermore, in deciding not to prosecute small-scale cannabis activities the Dutch can rely on the fact that neither Convention imposes any obligations relating to enforcement. In fact each expressly recognises that the requirement to criminalise various activities shall not affect the principle that such offences "shall be defined, *prosecuted* and punished in conformity with the domestic law of a Party" (1961 Convention, art 36(4); 1988 Convention, art 3(11).

The expiation systems in force in Australia, are also applications of that general qualification. While they formalise the expiation procedure as a mandatory or permissible option to criminal prosecution, they are perfectly compatible with arts 36(4) and 3(11) which reserve the right not only to prosecute offences in conformity with domestic law but also to "define" or "describe" those offences.

CONCLUSIONS

Neither the terms of the 1961 Convention nor any future obligations that may arise under the 1988 Convention constrain New Zealand from decriminalising small-scale cannabis activities. Both treaties leave parties considerable latitude in developing domestic drug control regimes and can fairly be interpreted to accommodate a comprehensive cannabis decriminalisation model. Of the other options, the Australian expiation procedures provide a convenient model for relaxing the present prohibitionist policy by means that are completely compatible with the 1961 and 1988 Conventions. If recent public opinion is any gauge, the expiation model may offer the most acceptable alternative to prohibition, at least in the short term. A recent poll on the question shows public opinion moving in favour of decriminalisation (35 per cent for, 57 per cent against, 7 per cent unsure) with 74 per cent of respondents supporting the introduction of instant fines for small amounts of marijuana (*National Business Review*, 24 April 1997, 1, 16). ❑

ARMED FORCES DISCIPLINE AND LEGAL ADVICE

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considers the impact of the Bill of Rights Act on service summary proceedings

The last three issues of Butterworths' *Bill of Rights Bulletin* featured three articles on the impact of human rights on military discipline in New Zealand. These examined arrest and detention, search and seizure in the military context, and the constitutional basis of military trials in the light of the right to a fair and public hearing by an independent and impartial tribunal.

While policy and legislative change is desirable in many instances, common sense and reasonableness will often ensure compliance with the requirements of the New Zealand Bill of Rights Act 1990 (BORA). This article examines a feature of military summary trial which is, in the author's submission, clearly in breach of the BORA.

The right to make full answer and defence (which falls within the scope of the right to a fair hearing under s 25(a) BORA) involves, by implication, the right to legal representation during proceedings. With respect to proceedings before a court-martial, the right is catered for under RPs 67 to 69 of the Armed Forces Discipline Rules of Procedure 1983 (RPs). However, the situation is different for summary proceedings under the Armed Forces Discipline Act 1971 (AFDA). This article looks at this disparity between the two tiers of military proceedings, and asks:

- What are the rights of an accused to legal representation during summary proceedings?
- Is the current practice of the New Zealand Defence Force (NZDF) consistent with those rights?
- Could the NZDF restrict the given rights in an attempt to preserve a disciplinary system which delivers "swift justice" by military commanders "at the coal face"?

SUBSTANTIVE RIGHTS

In determining the substantive rights of an accused in summary proceedings, four provisions are relevant: ss 24(c) and (d) and 27 (1) BORA; and art 14(3)(b) International Covenant on Civil and Political Rights (ICCPR).

Sections 24(c) and (d) BORA

Sections 24(c) and 24(d) BORA read:

> **24. Rights of persons charged** – Everyone who is charged with an offence -
>
> (c) Shall have the right to consult and instruct a lawyer; and
>
> (d) Shall have the right to adequate time and facilities to prepare a defence.

Interestingly, BORA goes further, in this respect, than the Canadian Charter of Rights and Freedoms 1982. There is no equivalent provision to s 24(c) in the Canadian Charter.

Before considering the application of these provisions to summary procedures, we must determine exactly what the substantive rights involve. In particular, what does "consult and instruct" mean in s 24(c); and what does the term "adequate time and facilities" infer?

In *R v Royal*, 11 March 1993, H C Hamilton, T66/91, Penlington J held that the adequacy of the time and facilities given to an accused to prepare a defence requires to be assessed on the facts of each case. By itself, this does not help a great deal. However, Penlington J made it clear that the right must be given substance in a practical way. By way of example, the provision of law books and relevant case authorities to an unrepresented accused would be of no use without a lawyer to explain their meaning and application.

This lends weight to the minimum requirement that an accused's right to "consult" a lawyer involves the right of any person charged with an offence to seek legal advice from a solicitor. The question remains, however, as to what the right to "instruct" a lawyer embraces. Specifically, does it include the right to be represented by counsel during proceedings? A narrow interpretation of the right in s 24(c) would be: that it only provides the accused with the right to seek advice and instruct counsel to prepare a defence or submissions for proceedings. However, there are a number of factors that point to the right to "instruct" as encompassing active representation during proceedings.

To begin with, the words of s 24(c) advert to the possibility that Parliament envisaged the right to include representation. If "consult" is given its ordinary meaning and interpreted to accord a right to seek legal advice to prepare one's defence, then, by logical extension, "instruct" should be taken to confer a right to have legal counsel actively represent the accused. This was the implicit approach of the Court of Appeal in *R v Shaw* [1992] 1 NZLR 652. A date was fixed for trial. However, prior to that date, counsel for the accused advised that this clashed with another fixture and requested an adjournment. The Judge refused the application and the accused proceeded to conduct his own defence. On appeal against conviction, the Court of Appeal held that the accused had been deprived of his rights under ss 24(c) and (d) BORA. Consequently, the conviction was quashed. There is evidence, therefore, that the Courts regard the prohibition of active representation by legal counsel as amounting to a breach of s 24(c).

Furthermore, the Court indicated that ss 24(c) and (d) reflect an inherent right of an accused to be represented by legal counsel, pointing to its earlier decision *R v West* [1960] NZLR 555.

Section 27(1) BORA

> 27. **Right to justice** – (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

There can be no doubt that summary proceedings before a disposing officer within the military involve determinations which attract the application of s 27. Such determinations affect the interests of the person concerned and involve a range of possible penalties, including the loss of liberty through detention. Therefore, it is clear that summary proceedings must observe the principles of natural justice.

Canadian case law has concluded that the principles of natural justice may include the right to representation by counsel. The crucial issue in concluding whether or not this is so is that, for a fair trial, a person must be afforded the opportunity to present his or her case adequately. *Re Howard* (1988) 26 Nfld 410 explains that there will be circumstances (having due regard to the nature of the offence, the complexity of any defence and the gravity of the consequences) where the opportunity to present one's case adequately demands legal representation. Specifically, Thurlow CJ pointed to six factors to be considered: the seriousness of the charge and of the potential penalty; whether any points of law are likely to arise; the capacity of the person concerned to present the case; the complexity of the procedures concerned; the need for reasonable speed in adjudication; and the need for fairness (in that case) as between prisoners and as between prisoners and prison officers. The Court in *Re Howard* concluded that counsel should only be excluded if the case is "uniquely simple".

Article 14 ICCPR

While the right expressed in s 24(c) BORA has no counterpart in the Canadian Charter, ss 24(c) and (d) are in fact based on art 14(3) of the ICCPR, which reads, in part:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him, in any case where the interests of justice so require...

Article 14(3)(b) is thus almost identical to s 24(d) BORA in its wording, except that it expressly defines the right as including the right of an accused to consult a lawyer for advice. In the case of s 24(d), this right is implied through the application of *R v Royal*.

Article 14(3)(d) adds weight to the conclusion that s 24(c) includes the right to be actively represented by legal counsel during proceedings. Indeed, it goes further by requiring that an accused be informed of that right where the interests of justice so require. Therefore, a further question arises: should the right affirmed in s 24(c) be interpreted to include the right to be informed of that right?

Obviously, the ICCPR is an important reference point for the interpretation of BORA. On that basis, the author sees the effect of art 14(3) to be as follows: it emphasises the right to adequate time and facilities, as expressed in s 24(d) BORA; it emphasises the common-law interpretation of s 24(c) BORA as including the right to active legal representation during summary proceedings; and, finally, it adds to the right expressed in s 24(c) BORA so that accused must also be informed of their rights under that provision, where the interests of justice so require.

CURRENT PROCEDURES IN THE NZDF

The second question posed above was whether or not the current practice of the NZDF is sustainable in light of the substantive rights discussed. In brief, the RPs pertaining to summary proceedings provide that: an accused has the right to give evidence, call witnesses and question both "prosecution" and "defence" witnesses; an accused appearing for summary trial in the Navy has the additional right to have an officer or fellow-rating assist in the presentation of his or her case and, if requested, act on behalf of the accused; and, in all jurisdictions within the Defence Force, an accused has the right to have a lawyer present during proceedings and has the right to consult a lawyer.

However, the RPs neither contain any mechanism by which an accused can instruct a lawyer to represent him or her during proceedings. Nor expressly preclude an accused from doing so. This being so, the current approach of the NZDF has been to allow a lawyer to attend summary proceedings if this is requested.

On the grounds that summary proceedings in the military jurisdictions are of an inquisitorial nature, counsel have not been permitted to ask questions of witnesses, make objections, or in any other way interject during proceedings. The lawyer's role has been limited to advising the accused during proceedings and/or requesting an adjournment of proceedings so that the lawyer may further instruct the accused. Therefore, an accused in such circumstances is not "fully" represented by his or her counsel.

In the Canadian context, the right to legal representation is seen as part of a bundle of rights under the s 7 right to "fundamental justice". It is not a right which is expressly guaranteed within a provision of the Charter, as is the case in the New Zealand context under s 24(c) BORA. In *Re Howard* the Federal Court of Appeal held that s 7 did not create an absolute right to counsel but that much will depend on the circumstances of the case. Accordingly, the Canadian Armed Forces (CAF) have chosen to maintain a system which prima facie excludes the right during summary proceedings, unless the trying officer thinks this would be contrary to the interests of justice. Consequently, the "Queen's Regulations and Orders" for the CAF state that while an accused has the right to be represented by legal counsel at a court-martial, this is not the case at a summary trial. Under art 108.3(8) Note C, the participation of counsel rests solely at the discretion of the trying officer.

The accused also has the right to be represented by an "assisting officer" throughout the CAF whereas, in New Zealand, only the Navy has an equivalent practice. Such representation should apply throughout all three Services, in the opinion of the author. Although this is not the same as legal representation, it does seem to go at least half way.

Section 5 BORA provides that reasonable and justifiable limits can be imposed on the rights and freedoms contained in the Act. Underlying the application of this provision is the question whether the restriction is a "limit" (*R v Oakes* (1986) 26 DLR 4th 200). If it is not, it is not capable of justification.

Canadian case law has drawn a distinction between "limits" and "exceptions". In *Attorney General of Quebec v Quebec Association of Protestant School Boards* [1984] 2 SCR 66, the rule of non-justifiability was set out. In that case, s 72 of the Charter of the French Language (Bill 101) restricted the teaching of English. The Supreme Court held that this restriction amounted to an "exception" to a provision of the Charter of Rights. The Court stated that a prescription of law cannot create an exception to a provision of the Charter of Rights, nor can it purport to amend any provision thereof: if a prescription collides directly with a provision of the Charter so as to negate it in whole, that prescription is not a "limit" capable of justification.

"to maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily ..."

In *Ford v Quebec (Attorney General)* [1984] 2 SCR 66 the Supreme Court considered the distinction between "limits" and "exclusions" in more detail. The Court held that a restriction that permits no exercise of a right or freedom in its area of potential exercise is an exclusion of the right or freedom and, consequently, is not justifiable. However, where a restriction permits a qualified exercise of a right or freedom, this only amounts to a limitation and, consequently, is capable of justification under s 1 of the Charter. The Court noted that this is an issue that goes to the proportionality test in *Oakes*. That is, if a restriction is an exception or amendment, it cannot possibly meet the proportionality test.

Applying the Canadian approach to the matter at hand, the author believes that the current practice of the NZDF falls within the category of an exception to the rights contained in s 24(c) rather than a limit. That is, given that s 24(c) guarantees the right of an accused to be actively represented by counsel and that current practices do not allow active representation, it cannot be said that the current practice is a restriction that permits a "qualified" exercise of the right concerned. Rather, it permits no exercise of the right in its area of potential exercise (summary proceedings). This being so, the restriction must be regarded as an exception to s 24(c) and, following the Canadian approach, it is a restriction that is not capable of justification under s 5.

POTENTIAL RESTRICTIONS

The final question posed is whether the NZDF can restrict the right of an accused to legal representation in an attempt to preserve the "simple" status of its disciplinary system.

There are two means by which limits can be imposed on the rights and freedoms contained within the BORA: the desired limits could be expressed either within the AFDA (to import the "protection" of s 4 BORA); or they could be set out within the Rules of Procedure or Defence Force Orders (Discipline) in a manner that is defensible under s 5.

As to the first option, it is essential that such limitations are capable of one interpretation only. This is due to the effect of s 6 BORA, which requires that whenever an enactment can be given a meaning consistent with the rights and freedoms in BORA, that meaning must be preferred. Therefore, even if a provision is designed to limit a right or freedom, but that provision is vague on any particular issue and can be interpreted in a manner which is more consistent with the BORA on that issue, the Courts are bound to give effect to the latter interpretation. This will be so, unless a restrictive interpretation can be saved within the ambit of s 5. Consequently, any limit imposed through an enactment must be very precise in nature and cover all bases.

The alternative of expressing limits within an instrument other than an enactment must be effected so that such limits are justifiable within the terms of s 5. They must be expressed clearly. Furthermore, as paraphrased by Professor Hogg in *Constitutional Law of Canada*, the substantive test for justifiability has four criteria. The limitation:

- must pursue an objective sufficiently important to justify limiting the right or freedom;
- must be rationally connected to the objective;
- must impair the right or freedom no more than is necessary to accomplish the objective; and
- must not have a disproportionately severe effect on the individual(s) to whom the limitation applies.

Sufficiently important objective

In its directions on Charter litigation, the Supreme Court of Canada notes that most cases before it have satisfied this requirement, and that it is relatively easy to prove that a limitation is sufficiently important. In the case at hand, the NZDF could argue that the objectives of limiting an accused's right to legal representation include: the maintenance of a disciplinary system which delivers swift justice by military commanders "at the coal face"; as a consequence of the latter, the maintenance of discipline within the Armed Forces; and, again as a consequence of the latter, the maintenance of operational effectiveness. Notably, it has been recognised by the Supreme Court of Canada in *R v Genereux* [1992] 1 SCR 259, 293 that:

> to maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily ...

Additionally, overseas jurisdictions have recognised that the objective of maintaining a disciplined Armed Force is a substantial concern in a free and democratic society. It is therefore submitted that this first element could be satisfied.

Rational connection

Under this criterion, the *Oakes* test requires that the limiting measures adopted must not be arbitrary, unfair or based on irrational considerations. In practice, the Canadian Courts have seldom found this requirement to be lacking, and express consideration of it has often been absent.

It seems reasonably easy to establish a rational link between restricting an accused's right to legal representation in certain circumstances and the objectives at hand (swift justice at the coal face, discipline and operational effectiveness). The very motive for restricting an accused's right to legal representation is to avoid the delays associated with counsel appearing in summary proceedings and to allow an offender to be disciplined immediately, when the effects of such measures have the most impact. By doing so, the limitations allow an offender to be brought quickly back into line so that order is restored within the Service. The Service could continue with its primary task of defending and the offender concerned could return to his or her primary task of soldiering.

To add practical substance to such submissions, the NZDF can point to the experiences of the Canadian Armed Forces (CAF). The CAF have found that the absence of legal counsel during proceedings helps to keep proceedings uncomplicated, which in turn avoids delays and ensures that discipline can be effectively administered worldwide or in remote areas of Canada. In contrast, the Australian Armed Forces have found that moving to an adversarial system has resulted in a cumbersome exercise of disciplinary proceedings which has in turn resulted in a general decline in discipline throughout the Services.

Furthermore in *Reference re s 94(2) Motor Vehicle Act*, Lamar J recognised that the justified limitations defence may come to the rescue of a violation for reasons of administrative expediency: citing, as an example, cases arising from the outbreak of war [1986] 23 CCC (3rd) 289, 313.

Least dramatic means

Again, this part of the test is prone to being applied in a relatively "flexible" fashion. The Supreme Court of Canada has noted that to apply it over-zealously would result in the serious fettering of the Government's power to make policy. This branch of the test has therefore undergone considerable refinement in Canada since it was first set down.

There is now much support in Canada for the weaker test set out by the Supreme Court in *R v Edwards Books and Arts Ltd* [1986] 2 SCR 713, 783. The Court held that any right should only be impaired "as little as is *reasonably* possible" [emphasis added]. The test seems to have shifted from "minimal" impairment to "reasonable" impairment. The mood of the judgment in *Irwin Toy Ltd v Quebec Attorney-General* [1989] 1 SCR 927 supports this and suggests that this flexible approach must be adopted for the Courts to remain within their judicial functions and sufficiently separate from the Government's political functions. The majority of the Supreme Court in *McKinney v University of Guelph* [1990] 3 SCR 229 built on this idea, stating that "those engaged in political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch".

In *Edwards Books*, La Forest J indicated that the determination of whether a limitation is "reasonable" must be based on practical considerations. The practical considerations in the military justice system would appear to be the maintenance of a flexible, portable and uncomplicated system of justice that can be administered by officers of the service in a variety of conditions. In this respect, it was stated by Mahoney CJ, in *Rutherford v R*, that "... its application [military law] is demonstrably justified in a free and democratic society if the morale and readiness of the armed forces require it and not otherwise" [1983] 4 CMAR 262, 268.

In the author's opinion this will be the most important and potentially difficult element to satisfy. Lee and Luey, in "Statutory Discretions and Powers – Making them Work through s 5 of the Bill of Rights" [1995] 1 HRLP 89, 105 point out that, even with a simple test of "reasonableness", there is a danger that it could lead the judiciary to look solely at the particular circumstances of any case. Uncertainty may then arise. Nevertheless, the author expects that the following potential limitations could meet the requirements of "reasonable impairment": first, limiting the right based on the severity of the matter; and/or, secondly, limiting the right based on the exigencies of the military.

In terms of the first limitation, it is submitted that any such limitation should be defined with reference to punishment rather than offence. By way of example, consider the situation where a soldier is to be disciplined for having dirty boots – what might be considered to be a "minor" offence. Having dirty boots could constitute an offence against a number of provisions of the AFDA, depending on the relevant circumstances: s 38(1) – disobeying a lawful command; s 39(b) – failure to comply with written orders; or s 73(1)(a) – conduct likely to prejudice service discipline. However, it is suggested that determining the severity of the matter with reference to the offence would not be satisfactory. It would be unwise to say that charges in relation to ss 38(1), 39 and 73(1)(b) should not give rise to the right to legal representation. Those offences cover a wide range of potentially serious situations, which is evident in the corresponding liability for conviction under each section.

Accordingly, the most appropriate method of defining "minor" matters is submitted to be on the basis of punishment. This could be effected by creating an additional column to the Fourth Schedule to the AFDA entitled "If the offender was not given the right to legal representation". The Fourth Schedule currently establishes two ranges of potential sentence, depending on whether or not an accused has been given the option to elect trial by court-martial. An additional column could include a more limited range of punishments to be imposed where an accused has not been allowed to exercise his or her right to legal representation.

It is submitted that this impairment is a reasonable one in light of the natural justice principles discussed in *Re Howard*. In that case the Court explained that determining whether or not the right to legal representation arises (in the context of natural justice) requires due regard to be had to the nature of the offence, the complexity of any defence and the gravity of the consequences. The limitation at hand has regard to the gravity of the consequences for an accused and should therefore pass the test of "reasonableness", so long as the additional column punishments are appropriate.

This could be combined with a "Remand to Court Martial" provision so that a disposing officer has the ability to remand the accused for trial by court-martial if the accused elects to exercise his or her rights under s 24(c) but the matter is not a "minor" one. By doing so, the status of summary proceedings as a means of delivering swift justice at the coal face could be preserved and the problems alluded to above could be avoided.

The second alternative proposed above (limiting the right to representation based on the exigencies of the Service) could be based on the premise that an accused's right to consult and instruct a lawyer can be withdrawn where this would compromise operational effectiveness. Following the approach of Lamar J in *Re s 94(2) Motor Vehicle Act*, it would seem that this alternative is justifiable while an accused is on "active service". Its sustainability at other times is much less clear however.

This does create an undesirable dichotomy between peace and war. That is, there would be a separate outcome

continued on p 292

CAPITAL GAINS TAX ON PRIVATE LAND

Anthony Molloy QC

discusses how trusts can still be used to separate land developers' private investments from their business activity

INTRODUCTION

Land dealers, land developers, and builders all are assessable to income tax in the same way as persons conducting any other kind of business. Section BB 4(a) Income Tax Act catches "all profits or gains derived from any business".

In this context, "derived from" the business means "from the current operations of the business", and not merely "as a result of the fact that a business is being carried on": *Commissioner of Inland Revenue v City Motor Services Ltd* [1969] NZLR 1010, 1017.

Unlike other taxpayers, dealers, developers, and builders also can be taxed on what otherwise would be non-assessable gains on capital account. They can be assessed, in other words, simply "as a result of the fact that a business is being carried on". The provisions under which this can happen are paras (b), (c) and (d) of s CD 1(2). These can impose tax on any profits on the disposition, within ten years of acquisition, of land which had been purchased at a time when the taxpayer was:

- a "dealer" in land within s CD 1(2)(b) of the Income Tax Act 1994;
- a "developer" or a "subdivider" of land within s CD 1(2)(c) of that Act; or
- a "builder" within s CD 1(2)(d).

Subparagraph (i) of each paragraph says that the profits are taxable when the land had been acquired for the purpose of that business. This subparagraph is superfluous. Section BB 4(a) already caught the profit in those circumstances.

It is subpara (ii) which can do the real damage. It applies where the land had not been acquired for the purpose of the business of dealing, developing, or building. If you sell the land within ten years of the purchase on non-business account, the profit will be taxable anyway. The only exceptions are set out in s CD 1(3). One exception involves the provision of a residence for the taxpayer, or for the beneficiaries of a trust of which the taxpayer is trustee. The other exception centres on the provision of business premises for the taxpayer.

Put another way, and apart from those limited exceptions, the profit, on resale within ten years, of land bought while one was a dealer or developer or builder, will be assessable to income tax. It does not matter that it was bought as a private investment. It is not to the point that the transaction was completely outside the business. It does not matter that the property was bought without any purpose or intention of reselling it.

IS A TRUST THE ANSWER?

If this was as far as the legislation went, you naturally would think of advising a dealer, or developer, or builder client, who intended to buy land for a private investment, to arrange for the creation of a trust. Let the trust make the purchase. If the trust then sells within ten years, and if the trustee demonstrably had not been actuated by any intention to resell when the land was bought: then the trust may be able to sell it without falling foul of s CD 1(2).

That would be the first thought. And the drafters of the legislation thought that you would think of that. So they did not leave paras (b), (c) and (d) confined to cases in which the taxpayer was carrying on the business of dealing, developing or building at the time the land was acquired. The drafters extended those paras to apply where "any other person where the taxpayer and that other person are associated persons, carried on, at the time the land was acquired" that business of dealing, developing or building.

So, if you were to have set up the trust for your client dealer, developer or builder, and the trustee then was to have resold the land within ten years of having bought it, the effect of the legislation would be that the profits would be assessable to the trustee if the client and the trustee were to have been "associated" persons.

Who is "associated" with an individual?

Section OD 8(4) defines the persons who are associated for this purpose. If the dealer, developer or builder client is an individual, the only paragraph of s OD 8(4) which might apply is (c):

> Any 2 persons one of whom is the spouse or infant child of the other person, or is a trustee of a trust under which that spouse or infant child has benefited or is eligible to benefit.

So, in the circumstances we are considering, the association between the trust and your client dealer, will exist, and the profit will be taxed in the hands of the trust, if your client's spouse, or any infant child, either:

- already has had a benefit under the trust, or
- "is" eligible to benefit.

How not to prevent association

If the spouse or infant child already has had a benefit under the trust, there is nothing to be done. The trust is irretrievably tainted by the association with your developer, dealer or builder client. It will therefore either have to hang on to the land until the ten years have expired, or will have to pay tax on the profit.

On the other hand, if, as at the date of acquisition of the land, there is both a spouse and an infant child, neither of which has benefited yet, but either of which is eligible to benefit, the only courses are:

- do not use that trust to make the purchase, but set up a new one, or
- obtain a divorce, so that your client no longer has a spouse, and
- put the child up for adoption – possibly by the divorced spouse.

There are obvious domestic difficulties with the second and third "solutions". If the land is available to be purchased now, and the vendor will not wait, there are the further practical difficulties that:

- Family Proceedings Act 1980 s 39(2) requires proof of two years living apart before a divorce can be obtained.
- While an adoption order does indeed have the effect of deeming the child no longer to be the child of anyone but his new adoptive parents [Adoption Act 1955 s 16(2)(b)], this provision is deemed not to apply:

> for the purposes of any deed ... or affect any vested or contingent right of the adopted child ... where the adoption order is made after the date of the deed ... unless ... express provision is made [in the deed] to that effect. [Adoption Act 1955 s 16(2)(c).]

In almost 30 years of drafting and perusing trust deeds I have yet to see a deed with a provision like that. Since we are here talking about what might be done in the case of existing trust deeds, this provision is accordingly not likely to be a starter in many cases. But this analysis is not pure flippancy. There are clients who might consider suing were you to have advised without mentioning the divorce or adoption options.

In the late 1960s I gave an opinion to an overseas solicitor. The opinion outlined the then new trust-taxing regime which s 32 Land and Income Tax Amendment Act (No 2) 1968 had enacted. It pointed out that trusts created after 19 July 1968, when the intention to enact this measure had been announced, were called "specified trusts", and that they were not entitled to any deduction by way of what then was known as "special exemption" by way of a deduction of $100. That exemption continued only in the case of inter vivos trusts settled before that date, and in the case of trusts created by any Will.

A few days later the solicitor was back in my Chambers. He gave me instructions to settle, not an inter vivos trust, as I expected, but a will which embodied the trust provisions I recommended. It turned out that he had phoned a number of Auckland rest homes. As a result, he had a list of elderly patients who were at death's door, but still had sufficient lucidity to possess testamentary capacity. He arranged for one of them to make a deathbed will. All so that his client could save the tax on $100 per year!

How to prevent the "association"

So, if the existing trust will not do, and divorce and adoption will not serve, a new trust must be considered. If a new trust is to be created, there will be no one who "has benefited" for the purposes of s OD8(4)(c). The inclusion, in the class of eligible beneficiaries, of children who are adults at the date of acquisition of the land by the trust will not trigger an "association". The rubric to be avoided is that of the "spouse or infant child [who] is eligible to benefit".

Parliament chose to say "is eligible". It has not said "who may become eligible". You could provide in the deed that the trust was for such of any widow [or widower] [ie not the spouse] of the dealer, developer or builder, and his children who should have attained the age of majority, as the trustees from time to time should select. The trustee then would be free to distribute income to adult children; to distribute it to other relatives who are neither the spouse nor any infant child; to distribute it to charity, if there is appropriate provision; or to accumulate it. It could not be said of either the spouse or of any infant child of the settlor that he or she "is eligible". All that could be said would be that they "might become eligible" if they live so long.

An alternative approach

Another approach would be to provide that the trust was for such of any spouse or widow [or widower], and such of any children whenever born, of the dealer, developer or builder: as should be alive, say, ten years and one month from the date of the deed.

Assuming that the land then was to have been bought by the trustee more or less immediately, this would appear to entail that:

- if the land was to have been sold within the ten year period, there would have been no relevant "association" at any time during that period, and that
- if the land was to be sold after the ten years had expired, subpara (ii) of whichever of paras (b), (c) or (d) of s CD 1(2) otherwise might have applied, would be inapplicable in any event.

This second approach will not be suitable for further property which might be purchased in the future. Separate trusts will need to be created in respect of each purchase: to start the ten year delay in spouse and infant child benefits running in respect of that property.

Price of either approach

Each of these approaches has a price. The price will be that any income which has to be accumulated because it cannot be paid to or applied for the spouse or infant children, will be taxed at the 33 per cent trustees' income rate instead of at what might have been the lower marginal rates applicable had it been derived by those beneficiaries.

Individual client as a beneficiary

If either of these approaches is adopted, and the land is sold within ten years, "the taxpayer" for the purposes of any of the relevant paras of s CD 1(2) will be the trustee. As long as the beneficiaries cannot include the spouse or infant children of the dealer client, the interesting thing is that the trust could be for a class which included the client.

It is surprising to find that:

- If the dealer were to have bought the land, and were to have resold it within ten years, the dealer would have been assessable automatically, yet that:
- If the land is bought by a trustee for a class of which the dealer would be an eligible member, the trustee for that class will not be assessable automatically if the land is sold within ten years.

If the proceeds then were to have been distributed to the dealer in his capacity as beneficiary, they would not be income [assuming that the trust had purchased without any resale intent, and had not subdivided or done any of the other things which could trigger assessability]. Whereas, had the land been bought in the name of the dealer, rather than the trust, the proceeds would have been income.

While the difference is surprising, it does appear to be quite deliberate. Subparagraph OD 8(4)(b)(iv) uses a similar formula but expressly includes in the class of tainting beneficiaries a reference to the person in question, as well as to the spouse and infant children on that person. The omission of a similar reference in subpara (c) therefore appears to have been deliberate.

Third approach

On a different tack: you could create a trust which was for the benefit of companies the shares in which were held by or for the benefit of the spouse and children, including infants, of the dealer client.

Section OD 8(4)(c) refers to:

> Any 2 persons one of whom is the spouse or infant child of the other person, or is a trustee of a trust under which that spouse or infant child has benefited or is eligible to benefit.

Where the trust is one "under which" the only persons eligible to benefit are companies, this provision clearly cannot apply.

Long-established trusts

So far I have been considering the matter from the standpoint of trusts set up to head off the problem of association. But association can impact on trusts which exist already, and were not even created by the developer or the developer's spouse. For example where the developer's spouse is a beneficiary under a trust set up by the parents or grandparents of the spouse.

The trustees of the parental or grand parental trust will be trustees of a trust under which the spouse is eligible to benefit. Under para (c) of the definition of "associated person" in s OD 8(4), the trustees therefore will be associated with the developer. The result is that the spouse's parental or grand parental trust could become automatically assessable on the proceeds of resale of any land within ten years of acquisition.

Options then might include:

- applying to the High Court for a variation of the trust to exclude the spouse and infants in the way I have already discussed;
- use of the power of advancement to resettle the trust to exclude the spouse and infants;
- transferring the business of the developer to a trust for a class which includes the dealer client in the way I have already mentioned, but which does not include any spouse or infant child of the dealer; or
- transferring the developer's business to a company in an endeavour to break "association" between the dealing business and the spouse's parental or grand-parental trust.

The first three options are highly unlikely to appeal to the trustees of the parental or grand-parental trust for the benefit of the dealer's spouse. Why cut down the interests of the very person the parents or grandparents intended should be looked after?

The last option makes it appropriate to consider when "associated persons" problems can arise when the developer, is a company rather than an individual.

Persons "associated" with a company

Section OD 8(4)(b) is the point of reference. It establishes an association between a company and any other person who is not a company where any interest, broadly defined (both "voting interests" and "market value interests" as defined in s OB 1 are included), of 25 per cent or more is held by or among any or all of:

- that other person
- that person's spouse
- any infant child of that person
- the trustee of any trust under which the other person, the spouse, or an infant child is eligible to benefit.

Breaking "association" with company

So if you were to set up a company to which the business of your dealer client would be transferred, it would be possible to avoid the "association" only by creating a trust for the widow or widower [but not the spouse] and for adult children. The dealer would have to be cut out entirely, and left to rely on his salary and directors' fees.

That might be unacceptable in many cases.

Where it would be unacceptable, the dealer will not be able to isolate the dealing business from the private investments in land simply by transferring the dealing business to the company.

For all practical purposes, the "association" between the former dealer and the new company will be unbreakable.

Trust can help the break

If that "association" between the former dealer and the company is unbreakable for practical purposes, it becomes critical to ensure that there is no "association" between the former dealer and the proposed private investing.

Once the company has become the dealer, the private investing could be conducted, for example, by a trustee for a class including:

- the former dealer's widow or widower, but not the spouse, and for
- the adult children and grandchildren, but not the infant children; and for
- the former dealer.

As we have seen, s OD 8(4)(c) would not create an association between the former dealer and the trustee in those circumstances. If that was to have been done, the position would be that:

- the private dealing would be done by a trustee not "associated" with the former dealer
- the dealing would be done by a company which would be associated with the former dealer.

"Associations" which will not trigger liability

Reverting, then, to s CD 1(2): paras (b), (c) and (d) can apply to the proceeds of the non-dealing property which is sold by the trustees within ten years of its acquisition if any person "associated" with the trustees was a dealer. The dealer is the company.

The company will be associated with the former dealer. But that will not matter, because it will not be the former dealer who is selling within ten years. The company will be associated with the family trust which owns its shares or voting rights. But that will not matter, because it will not be that trust which is selling within ten years. The company will not be associated with the family trust which is selling the land within ten years because that is not the trust which owns the requisite voting or market value interests in the company.

There are no secondary association provisions in the legislation to create any association between the two trusts.

Prior generation trusts

We can now return to the case of the trust created by the grandparents or parents of the spouse of the former dealer. The options for restricting the benefits under that trust in order to avoid its being associated with the former dealer were unacceptable for the reasons considered earlier. The final option was the transferring of the developer's business to a company in an endeavour to break "association" between the dealing business and the spouse's parental or grand-parental trust.

The former developer is pretty certain to be "associated" with the company for the reasons I have given. Unless the former developer wants to surrender control to his adult children, and then stay right out of the management of the new company, the "association" may be unbreakable.

The trust created by the developer's parents-in-law, or by the grandparents of the developer's spouse, is highly likely to include, as eligible beneficiaries, the developer's spouse and infant children. If it does, that trust will be "associated" with the former developer. But that trust created by the spouse's side of the family still will not be associated with the company which has taken over the business from the developer. The fact that each of the company and that trust is "associated" with the former developer does not make them "associated" with each other.

The result therefore should be that, when the spousal family trust sells any land within ten years of having acquired it, it will not be "associated" with the company which has become the dealer.

TIMING

So trusts and companies can break "associations" and can avoid s CD 1(2)(b), (c) or (d) applying if private account land should have been sold within ten years.

A new trust can be created even after the private account land has already been acquired land. It is essential only that the creation of any new company or trust precedes the resale of the land. Paras (b), (c) and (d) tax profits solely where:

- the person who has sold that land within ten years of acquisition had been carrying on the dealing business "at the time the land was acquired", or where
- any other person carried on such a business "at the time when the land was acquired".

provided, in the second case, that "the taxpayer [vendor] and that other person are associated persons".

That is, the crucial factor is that they are associated at the time of resale, and not merely that they were associated at the time the private account land was acquired. ❑

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continued from p 288

depending on whether or not an accused is on active service, whereas it is desirable to have one system at all times.

There is one further problem that might arise: where the accused is on active service and, strictly speaking, the exercise of the right to legal representation would not compromise operational effectiveness but exercising the right may well be impracticable. For example: where an accused is not on active service (within the meaning of s 5 AFDA) and he or she is at sea, with the next port of call being many days or even weeks away. This could equally apply to situations where service members are overseas, or in remote areas, but not on "active service". In this respect, it is suggested that a compromise is achievable. Namely, where such situations arise, an accused could be provided with a communications link to a solicitor in New Zealand (notably, this is the practice of the Canadian Armed Forces in providing access to a lawyer where a detainee is in a remote or inaccessible area). This would give effect to an accused's right to consult with a lawyer in order to prepare a defence. While it would not amount to "active" representation during proceedings, it could nevertheless give practical substance to the right if an accused was permitted to seek adjournments during proceedings in order to consult with his or her counsel. Alternatively, proceedings could be delayed until the accused is transferred ashore or to a more practicable location. This is the current practice of the Canadian Armed Forces where an accused at sea has requested legal representation and his or her trying officer has approved the request.

To add further weight to the sustainability of either or both potential limits, the author suggests that the existing right for Naval personnel to be represented by an assisting officer should be extended to all Services.

Proportionate effect

The final requirement of the substantive test in *Oakes* is that the limitation must not have a disproportionately severe effect on the individual. In practical terms, this will require care to be taken when determining what range of punishments to include in the Fourth Column to the Fourth Schedule of the Armed Forces Discipline Act and determining what amounts to circumstances where it is "impracticable" to exercise the right to legal representation.

CONCLUSION

In summary, the substantive rights of an accused to legal advice and representation during proceedings include the right to consult a lawyer for advice on any aspect of proceedings (including the preparation of a defence), the right to active representation by legal counsel of one's choice and the right to be informed of these rights (where the interests of justice so require). Given that the NZDF does not allow an accused to be fully represented in such proceedings, and that this position is not sustainable under s 5 BORA, the current practice of the NZDF is in breach of the BORA.

However, there are means by which the right could be limited, within s 5 BORA, while maintaining the administrative efficiency of summary proceedings in the military justice system. The potential exists to achieve a sustainable compromise between the aims of the Bill of Rights Act and the practical considerations of an organisation whose tasks, and the environment in which it performs those tasks, demands simplicity and flexibility. As with anything however, and especially in light of the fact that s 5 requires limitations to be "prescribed", the necessary steps must be taken to formulate and implement the means to achieve that compromise. ❑

RAISING FINANCE FOR SMALL BUSINESS

Gordon R Walker, The University of Canterbury; Sonia Francis, Ernst & Young, and Mark Fox, Lincoln University

examine the law and practice of finance for small to medium enterprises

In a previous article, Fox and Walker examined the availability of venture capital and other finance for SMEs (small and medium sized enterprises) in New Zealand: see Fox and Walker, "Sources of Funding for Small and Medium-Sized Companies in New Zealand" [1994] NZLJ 421. Since 1994 there have been some major changes in the availability of capital and support for SMEs. As SMEs often require advice on sources of financing and support, it is timely to re-examine the subject.

In the first section we look at general trends in financing for SMEs. We then look at changes in the Business Development Board grant scheme. Next we discuss the private raising of capital utilising the exclusionary and exempt transactions provisions of the Securities Act 1978. We then consider the Over-the-Counter (OTC) market offered by ShareMart and the so-called "grey market" operated alongside the New Zealand Stock Exchange (NZSE).

General trends

A research report published in 1996 by the Ministry of Commerce reached three main conclusions with regard to trends in the financing of small and medium sized businesses: Austin, Fox and Hamilton, *A Study of Small and Medium Sized Business Financing in New Zealand* (Ministry of Commerce, 1996). First, economic growth over the last few years has led to increased availability of capital for small and medium sized enterprises. Second, there has been considerable innovation and adaptation by suppliers of capital in general and trading banks in particular. Third, management competence did not appear to be a major problem in preventing firms from gaining finance.

BUSINESS DEVELOPMENT SCHEME

Businesses are increasingly seeking external expert advice and assistance. Such businesses are a prime beneficiary of the revised Business Development Board Grant Scheme introduced in December, 1995. The costs of external advice, such as that provided by lawyers and accountants, can be defrayed by an increased number of businesses because of the relaxation of eligibility criteria and increased flexibility in accessing grant moneys.

Before the Business Development Board Grant Scheme was introduced, eligibility criteria excluded many SMEs needing advice due to requirements as to duration of trading time and employment numbers. The revised scheme, known as the Business Development Programme (BDP), has two main aims: first, to provide assistance to a business that is appropriate and tailored to individual business needs, and, second, to provide assistance to build on the strengths and skills of a business in order to facilitate better business performance.

The BDP Grant Scheme is available to businesses which are New Zealand residents for tax purposes, employ fewer than 50 employees and have an export orientation. On account of CER, activities directed at Australia are excluded from eligibility. Also, government departments are not eligible. However, assistance is available for local authorities to help them investigate projects outside their normal scope of activities. In particular, the majority of small to medium sized tourism businesses in New Zealand selling to overseas markets are well placed for eligibility under the scheme.

The BDP Grant Scheme offers assistance dollar-for-dollar to a maximum contribution of $50,000 for all time to any one applicant. An applicant can make any number of applications against this $50,000 maximum but approvals are subject to a maximum of $20,000 in any one July/June year. The annual maximum for the innovation/research and development component is $10,000.

The introduction of a preliminary Business Appraisal/Capability Assessment performed either by the Regional Business Development Board or a Registered Assessor provides a platform for identifying the strength of a business and its potential market opportunities. It also assists in highlighting perceived weaknesses and/or threats that need to be minimised. The focus of the appraisal is on eight business capabilities:

- business planning
- marketing
- operations management
- financial and information systems
- organisation and human resource management
- product design; research and development management
- quality
- environmental management

A grant may be obtained for the appraisal process. This process provides a recommended course of action, which may attract further grants under three main headings:

Innovation/R&D

This grant is for product or service development that is new to the region or introduces new technology into an existing product or service. Assistance can be provided for market assessments, financial analysis, research and development, feasibility studies, intellectual property protection, accessing technology, regulatory requirements and distribution.

Strategy element

This grant is for existing businesses. Assistance can be provided for business planning, marketing strategy, operations management, financial and information systems, organisation and human resource management, product or service design, research and development management, quality and environmental management.

Implementation element

This grant is provided for export ready businesses. Assistance is provided for market research or exploration into new overseas markets, trade fair participation, promotion/advertising in new overseas markets and intellectual property protection in overseas markets.

The flexibility in how BDP grants can be accessed means that assistance can now be tailored to the needs of an individual business. For example, a small niche market tourism operator whose principal marketing activity is attendance at an annual trade fair in the United States can access grant moneys under the Implementation Strategy to a maximum of $7,500 per annum. Under the revised scheme the business can choose to solely access grant funds for this activity. The maximum grant assistance available would allow for participation in six annual trade fairs.

The preliminary business appraisal capability assessment provides an excellent place to start building a relationship between client and adviser. The process helps the client focus on the current and desired position of the business. The consultative nature of the process ensures that a mutual agreement is reached on a recommended course of action for further expert and grant assistance.

The appraisal process acts as a "symptom sorter" and invariably identifies warranted action in areas of the business that have been masked by other activities. For example, a large entertainment venue wanting to attract international events sought assistance for improving the delivery of services. The appraisal process identified that the organisation's business objectives were not aligned with activities and infrastructure issues were contributing to the non-delivery of services. The mutually agreed recommended course of action was to undertake a review of operations. The organisation subsequently applied under the Strategy Element for assistance to develop an operations management strategy.

The BDP Grant Scheme provides a means for SME operators to continue a relationship with business advisers once the appraisal process has been completed. For example, a small niche tourism company utilising funds from the BDP Grant Scheme for strategic advice has built a long term relationship with Ernst & Young as advisers. The company was inundated with requests for its service from new overseas markets and business opportunities in existing overseas markets. The owner was unsure how to deal with the new market developments while trying to manage existing operations and sought assistance under the BDP Grant Scheme. The appraisal process allowed the company to identify the current and desired position for the business. The mutually agreed course of action was to prepare a business plan followed by a marketing strategy so that they were both aligned to the owner's vision for the company. An application for assistance under the Strategy Element for business planning was made. The completed business plan provided a one to three year horizon for the company and was used to restructure business activities, vet new opportunities, divest non-profitable operations, seek additional funding, and, as a guide for the development of marketing strategies.

The company made a further application for assistance under the Strategy Element to develop a marketing plan. The completed marketing plan was aligned to the vision, goals and objectives of the company and detailed a twelve month implementation plan. A key recommendation was to improve the company's profile with overseas operators and increase its marketing activities through participation in trade fairs. The company has since submitted a further application under the Implementation Element for assistance to participate in a trade fair later this year.

Private capital raising – the Securities Act

While BDP grants are helpful to SMEs, a business may require further moneys for growth. Assuming bank debt and further equity from existing shareholders are unavailable, what sources of finance can be accessed? In countries with strong capitalist cultures, the obvious action at this point is to seek venture capital. In the United States, for example, there is a well-established, highly professional, venture capital industry: see *The Economist*, 25 January 1997, 19. In New Zealand, there is one government-sponsored fund, The Greenstone Fund, and a variety of "dating" agencies and brokers of venture capital. The Canterbury Development Corporation is a dating agency which issues a directory enabling venture capital seekers to make contact with providers: the e-mail address is cdc@cdc.org.nz. These and other sources of initial funding are reviewed in the literature: see Fox and Walker, op cit, and Austin, Fox and Hamilton, op cit. As to brokers, private and public merchant and investment bankers sometimes source funds for venture capitalists for fee. In addition, there is now one listed company which specialises in investments in unlisted companies, Direct Capital Partners Ltd. In all such contexts, a successful match or investment requires avoiding the "offer to the public" provisions of the Securities Act 1978 (the Act).

Section 33 prohibits the making of an "offer to the public" in the absence of a registered prospectus or an authorised advertisement that refers to a registered prospectus. Section 37A(c) at present demands that application forms for securities must be distributed in or with a registered prospectus relating to the security. The requirement is that all investors receive the registered prospectus before subscribing for the securities. The Securities Amendment Act 1996 (effective no later than 1 October 1997) requires that a registered prospectus need only be provided on request but an investment statement must be received prior to allotment. The rationale is that adequate disclosure leads to informed (but not risk-less), investment choices.

Section 3 attempts to explicate the term, "offer to the public". Section 3(2) excludes offers made to: relatives or close business associates of the issuer; persons whose principal business is the investment of money or who habitually invest money in the course of their business; persons selected otherwise than as a member of the public; underwriters and sub-underwriters, and, takeover offers: see Walker, "New Zealand" in Walker, ed, *International Securities Regulation: Pacific Rim* (New York: Oceana, 1996); Fitzsimons, "The Public Offering of Securities in New Zealand" in Walker, Ramsay and Fisse, eds, *Securities Regulation in Australia* *and New Zealand* (Auckland: OUP, 1997). A commercial actor might wish to attract the exclusion provisions of s 3(2), when seeking moneys for a project, in order to avoid compliance and other costs associated with the preparation of a registered prospectus.

Issuance costs for initial public offerings (IPOs) are not insignificant: see, generally, Anderson, Beard and Born, *Initial Public Offerings* (Kluwer, 1995); Fox and Walker, "Total Costs of Initial Public Offerings on the NZSE" (1995) 6 ICCLR 106. Two types of costs are incurred in IPOs. First, the direct costs of the issue. These include: accounting fees, brokerage and commission; legal fees; financial advisory fees; prospectus printing costs; public relations, and, marketing. A large proportion of these costs are compliance costs – the cost of complying with the Act. This is sometimes called the net regulatory burden. A second cost is underpricing. Suppose that the issue price of a share is $1 but that the opening price on listing is $1.20. The issue price of the share was underpriced by 20 per cent because the price discovery mechanism of the aftermarket (the secondary market), has shown that a share which cost $1 to the subscriber has been valued by the market at $1.20. Adding direct costs and underpricing costs produces the total costs of an IPO. Such data can provide a useful benchmark for those advising on IPOs. Direct costs have implications for policy makers because they indicate the cost of compliance with the securities regulation regime. The Fox and Walker (1995) study referred to above found average direct costs of 4.29 per cent of funds raised and total costs of around 15 per cent but these results should be interpreted with caution since the sample size was small.

Why should compliance costs concern the commercial actor? Suppose, for example, that a commercial actor wishes to raise $1 million, and that this is available from five high-net-worth individuals who could be described as close business associates or habitual investors. Suppose, further, that total costs in producing a registered prospectus amount to $100,000. Clearly, the commercial actor would seek to avoid the prospectus provisions in order to dispense with costs of $100,000. The same consideration would weigh with potential investors: $100,000 in compliance costs is $100,000 less into the transaction and this may be critical. This is a troubling cost of capital problem applicable to small raisings. What is required is an exemption for investments above, say, $250,000 where the investor is a "sophisticated investor" or has taken independent professional advice. The policy of the Act is fulfilled where the investor can protect his or her own interests.

If the s 3(2) exclusion provisions are unavailable, the commercial actor might wish to attract the provisions of the Securities Act relating to exempt offerings: see ss 5 and 6. Three of the principal exemptions are discussed below.

First, the most general exemption is that contained in s 5(5) which gives the NZSC a discretionary power to exempt *any* offeror from the obligation to issue a prospectus. For example, the Canterbury Development Corporation and other similar bodies have been granted an exemption pursuant to the Securities Act (Local Authority and Other Venture Capital Schemes) Exemption Notice 1994 (SR 1994/68). For overseas issuers the three significant exemption notices of general application are: the Securities Act (Australian Issuers) Exemption Notice 1994; the Securities Act (Overseas Companies) Exemption Notice 1995, and, the Securities Act (Overseas Listed Issuers) Exemption Notice 1995: see Walker, op cit, and, Walker and Fox, "Globalisation: An Analytical Framework" (1996) 3 (2) *Indiana J of Global Leg Stud*, 375, 406 ff.

Second, under s 7(1)(a), offers of securities made only to persons outside New Zealand are exempt from the prospectus provisions. This section is particularly useful for private transactions requiring off-shore participation. For example, suppose an entrepreneur wishes to establish a wasabi growing operation. Japanese participation will be critical since the principal market for wasabi is Japan and access to a Japanese distribution network is best obtained via Japanese residents. Next, s 7(1)(b) exempts offers to persons outside New Zealand and persons in New Zealand who in all the circumstances can properly be regarded as having been selected otherwise than as members of the public. The latter limb of s 7(1)(b) is identical to s 3(2)(a)(iii) and relevant case law will apply: see *Securities Commission v Kiwi Co-operative Dairies* (1995) 7 NZCLC 260,829 (CA) and *Society of Lloyd's Members' Agency Ltd v Hyslop* [1993] NZLR 135 (CA). When considering the application of s 7(1), be alert to the notice and filing requirements of s 7(2).

Third, s 6(1) exempts previously allotted securities. Where s 6(1) applies the terms implied in s 6A attach to the offer. There are two exceptions. First, the exemption does not apply if the security was originally allotted with a view to its being offered for sale to the public in New Zealand – see s 6(2) – and, here, a deeming provision applies: see s 6(5) and *Barclays New Zealand Ltd v Gillies* (1990) 5 NZCLC 66,659 (HC). Second, s 6(3) applies to equity securities and is designed to attract the prospectus provisions of the Act where a holder or offeror of securities, not being the original allotter, offers the security for sale to the public in New Zealand and the original allotter advises, encourages or knowingly assists in connection with the offer or sale. Section 6(4) then goes on to create three safe harbours from s 6(3): see s 6(4)(a)-(c). These are: offers in accordance with preemptive rights under a company's constitution; sales of less than $200,000 in a twelve month period, and, offers to no more than six members of the public.

The exemption in s 6(4)(c) may well extend beyond a mere six members of the public since the exemption applies to an offer "by the holder of the security". Suppose on Day One there are five allottees. The five allottees are each holders of the security and can arguably each make offers to six members of the public. Further, and again arguably, s 6(6) cannot apply since this deeming provision (view to acceptance by six persons deemed where more than six persons acquire securities within twelve months of the offer), only applies "to securities of the same class offered to the public for subscription *by the holder*". Thus, six acceptances from one holder are exempt, and also, therefore, six acceptances from each of five holders.

Section 6(4) thus raises the possibility of hybrid private offerings in a two-step process. First, attract s 3(2) and allot securities to, say, five habitual investors. In the case of Maori, the allotment might be to members of the *iwi* who fall within the definition of relative as contained in Part O of the Income Tax Act 1994 (NZ) since connection by blood relationship goes to the fourth degree and, significantly, includes a trustee for a relative. Second, attract the safe harbour of s 6(4)(c) since the five habitual investors (or relatives), are now holders of previously allotted securities who can arguably each make offers to six members of the public.

The secondary market

Secondary markets permit trading in existing issues. A secondary market exists where a stock has already been sold to the public and is traded between current and new owners. The proceeds from the sale of stock in the secondary market do not go to the issuing company but to the owner of the security. In New Zealand, the secondary market is principally regulated by the Securities Amendment Act 1988: see Shreves, "Secondary Market Regulation in New Zealand" in Walker and Fisse, eds, *Securities Regulation in Australia and New Zealand* (Auckland: OUP, 1994), 504-533.

The secondary equity markets in New Zealand may be broken down into two categories – the organised exchange of the NZSE and over-the-counter (OTC) markets. Securities traded on the NZSE are sold on an auction basis with investors placing buy and sell orders through brokers and the NZSE matching up these orders.

Listing on the NZSE attracts costs flowing from the Listing Agreement between the parties. Lower costs, however, are a feature of the OTC markets. If the listing of a company on a secondary market is perceived as important for liquidity, then the market operated by ShareMart and the "grey market" sanctioned by the NZSE may provide a cheaper alternative to listing on the NZSE.

ShareMart

ShareMart NZ was launched in May 1994 as an alternative to the NZSE. ShareMart does not threaten the dominant position of the NZSE, with only twenty-four companies being registered. It provides an attractive alternative for smaller companies seeking liquidity as the cost of listing on the NZSE can be prohibitive to them.

ShareMart is a subsidiary of Registry Managers (New Zealand), the largest registration company in New Zealand. Registry Managers dominates share registry work, handling over 85 per cent of New Zealand's listed companies. There are a number of criteria that a company must meet in order to list with ShareMart. Companies must:

- use the share registry facilities of Registry Managers
- ensure that at least 10 per cent of the company is held by at least 100 shareholders
- supply a copy of the constitution to Registry Managers.

These requirements are far less onerous than those of the NZSE and as such are attractive to smaller companies who wish to increase their share liquidity.

ShareMart companies are not required to provide any information other than annual reports to shareholders. Here, compliance is governed by the Financial Reporting Act 1993 with regard to financial statements and the Companies Act 1993 with regard to the annual report: see, Walker and Fox, "A Sharemarket for Unlisted Public Companies in New Zealand" (1995) 13 C&SLJ, 72. This lack of information requirements is seen as an attractive quality for ShareMart listing and is a selling point for Registry Managers: see, Birss, "Christchurch Companies Interested in Listing, ShareMart says", *The Press*, June 4, 1994.

Lack of information could deter many small investors who may be looking to diversify their portfolios. In an attempt to overcome this concern Registry Managers has acted to give investors greater access to information on ShareMart and the companies registered on it. Information on ShareMart can be gained via the Internet (http://www.globalregister.co.nz/sharem.htm) including daily stock price information from the previous trading day. Furthermore, some companies have information stored at this website, allowing investors to make informed decisions on investment.

ShareMart has been trading for over two years in New Zealand. In that time the number of companies registered has increased from two to twenty-four, however, in terms of financial size ShareMart is modest compared to the NZSE. Gaynor comments, "in the [first] 16 months since establishment only $NZ10.3 million worth of shares and units have been traded, far less than a quiet day on the Stock Exchange": see, Gaynor, "Little Sharemart at the Crossroads – Charisma and Customers Needed", *The National Business Review*, 13 October 1995, 63.

In an attempt to deal with liquidity problems Registry Managers has implemented two initiatives. The first is the requirement that companies have at least 100 shareholders holding 10 per cent of the companies stock. In effect, this requirement dilutes the share base of the company and should lead to greater trading of the shares. The second initiative relates to the system installed for the buying and selling of shares. Investors have phone access to ShareMart through a toll-free number which provides them with immediate bid and offer quotes. ShareMart will match buy and sell orders within a 5 per cent range for quantity and 2 per cent range on price. If a match cannot be made immediately then the order remains with ShareMart for 30 days. Such a system allows for more frequent trading and endeavours to reduce the bid-ask spreads on the shares.

The grey market

More recently a true OTC market has been established in New Zealand to compete with ShareMart. This is the grey market sanctioned by the NZSE. The notable difference is that brokers set up the markets for these shares rather than the NZSE. Thus, this is a true OTC market. As of 28 August 1996 there were 32 securities listed on this OTC market, many of which are also traded on ShareMart.

The "grey market" was sanctioned by the NZSE so that brokers could use their screens to post a notice of interest in stocks that were unlisted. In September 1995, the grey market was extended to allow bidding in stock as well (some stock can be widely traded on these markets – Sky City which was trading almost $NZ1 million a day in share value in late 1995). This market is an OTC market in the loosest sense. Subsequent to trading in Sky City, the grey market has been somewhat subdued and other OTC markets have emerged in New Zealand to enhance the grey market function. The best example is the OTC market, ShareMart.

CONCLUSION

There are thus more sources of finance now available than two or three years ago: see Austin, Fox and Hamilton, op cit. The Business Development Board grant programme is now much more flexible. The revised programme should be closely examined by professional advisers. In addition, this article suggests that there may be more scope under the exclusionary and exempt transactions provisions of the Securities Act 1978 for private capital raising than previously realised. Finally, the availability of OTC markets (ShareMart and the "grey market") now provide a partial and cheaper answer to the question of secondary market liquidity for those companies who do not wish to incur the costs associated with listing on the NZSE. ❑