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COURT STRUCTURE

There are two fundamental reasons why the Employment Court should not survive.

- there is no analytical distinction between employee and contractor; if employment law were extended to cover the latter there would be no analytical distinction between contracts for services and for sale; and
- the current, largely party political, debate about the role and future of the Court itself illustrates the danger that specialist Courts cause politicians and public servants to believe that the Courts are a bureaucratic structure that they can re-order as the fancy takes them.

The question is, what to do with the workload? At present it seems destined for the District Court. Where there is a straight suit for damages under the jurisdictional limit, this may make sense. But much Employment Court work is of a nature that District Court Judges are not accustomed to. Its proper place is in the High Court.

This is just one more indication that a wholesale review of the current structure is required, something the Ministry of Justice constantly denies, while simultaneously working on altering almost every part of the structure. (This does not breach the stricture above as long as we are talking only of the details of a single chain of Courts of which a High Court of general jurisdiction is the centrepiece.)

Ninety per cent of the work of the District Court is criminal, the vast bulk summary. The recently increased jurisdiction of the District Court therefore leads to significant civil cases being heard by Judges not selected for their experience in dealing with such matters and who have gained little experience of dealing with them since.

The division between the District Courts' and the High Court's criminal jurisdiction also makes little sense.

It therefore seems that there are serious structural issues. These will not be affected by the introduction of lay magistrates, who merely nibble at the bottom of the summary pile. What is required is an extra layer of Judges and a redistribution of the numbers of Judges.

The solution that presents itself is as follows:

- Stipendiary Magistrates should sit in the District Courts to deal with the summary criminal matters;
- District Court Judges should deal only with trials on indictment and the civil jurisdiction. Civil cases would hence form a substantial part of their workload;
- All criminal cases should be dealt with in the District Courts, with High Court Judges presiding over trials for murder, rape, major drug dealing etc;
- The High Court could remain much as at present, the Court of Appeal likewise.

But the eye should turn to the way the Court of Appeal is operating. What appear to be procedural innovations may raise serious issues of principle.

The Practice Note of 4 November 1997 states:

> It is appropriate for a case to be heard by a Court of five Judges if it raises issues of importance, including any legal, social and general economic considerations; if there are conflicting decisions of lower Courts; or if the Court is to be asked to depart from its own earlier decision.

With respect, only the last appears a proper case for a five Judge Bench. Conflicting decisions in lower Courts are the stuff of appellate work. The *Auckland Gas* and *Hawkes Bay Power* tax cases provide current examples of two conflicting High Court decisions. It is unclear why there needs to be a Bench of more than three Judges to deal with this, especially as the case is likely to proceed to the Privy Council. And if the Court is subsequently asked to depart from an earlier decision involving important general economic considerations, a seven Judge Bench will be required.

Meanwhile, five Judge Benches pose two threats. The first is to the workflow. The throughput of the Court of Appeal has improved in recent years, perhaps at the expense of High Court sitting days. But it must be the case that reducing the number of five Judge Benches would improve the throughput.

The second threat is more subtle.

In the House of Lords or the Privy Council a five Judge Bench is normal. But both bodies have far more Judges to choose from. There are eleven Lords of Appeal in Ordinary and numerous other Lords of Appeal. A five Judge Bench therefore constitutes only a fraction of the Judges available.

This is most important. Theoretically at least, there could be two Appeal Committees sitting simultaneously. In the English Court of Appeal several Benches sit simultaneously as a matter of routine. The Judges must be conscious of the undesirability of a differently constituted Bench coming to a different answer to the same question. The Judges must therefore strive to apply precedent and pre-existing principle, to decide cases on narrow grounds and to put aside their own political and economic views.

In the United States and in Australia a different situation obtains. There, the highest Court consists of a single Bench. This is effectively what a five Judge Bench of our Court of Appeal emulates. Once the Court as a whole sits together it is liberated. It need no longer be bound by the fear of a differently constituted Bench. It can sit as a Grand Committee consciously to direct the nation and to change the law.

What looks like a procedural change turns out to embody a changed assumption about the role of the Courts, which has never been debated formally. The changes were obviously made in preparation for the ending of appeals to the Privy Council. But, for the reasons above, even a Final Court of Appeal should not sit as a whole. ❑

PARALLEL IMPORTATION RULES RELAXED

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explains the sudden changes and their effects

BUDGET NIGHT CHANGES

In a move long-foreshadowed but still sudden in its completion, the government moved urgently on the night of the Budget (14 May 1998) and passed the Copyright (Removal of Prohibition on Parallel Importing) Amendment Bill.

By way of explanation, parallel importing arises when there is an existing line of imports coming into New Zealand through a recognised distributor. When a third person creates a line of imports of one of those products, that line is said to be "parallel" to the first line.

It is important to appreciate that the goods are "genuine" in that they are made outside New Zealand by someone owning the rights there. However, because intellectual property rights are the product of domestic law and have a territorial effect restricted to New Zealand, when those "genuine" goods arrive in New Zealand, they are subject to New Zealand legislation. If the owner of the New Zealand rights does not approve, the previously genuine goods will infringe New Zealand rights, and can be embargoed.

It is this position in relation to copyright which the Budget-night legislation changes. Note that it does not change the previous position in relation to patents, trademarks, or designs. Accordingly, statements that the government has removed the prohibitions on parallel importing go a little too far.

HISTORY

The 1962 Copyright Act contained in s 10, under the heading "infringements by importation, sale and other dealings", the power to restrain parallel imports, in subs (2). That section can be analysed as follows:

(1) The copyright in a literary, dramatic, musical or artistic work is infringed by any person
(2) who without the licence of the owner of the copyright
(3) imports an article otherwise than for private and domestic use
(4) into New Zealand if, to his knowledge, the making of that article constituted an infringement of that copyright
(5) or would have constituted such an infringement if the article had been made in the place into which it is so imported.

It is point (5) which contains the crucial concept of a "notional making" that gives rise to the power to prohibit parallel imports.

The section was first judicially considered in New Zealand by Quilliam J in *J Albert & Sons v Fletcher Construction Co Ltd* [1974] 2 NZLR 107. That case was brought by a group of owners of musical copyright, against the distributor of a "Muzak" tape, brought into New Zealand for playing in various parts of a building. The tape was then sent back to the United States and erased. The owners of the copyright in New Zealand had not authorised the importation into New Zealand. The defendants did have a licence to transmit the material in New Zealand, but did not have a licence to import it. The question was, therefore, whether the importation was an act of infringement. Quilliam J held that the rights of importing and manufacturing were distinct rights which could be held by different parties. Although he found the section "troublesome", he held that importation by someone who did not have the manufacturing right in New Zealand was an infringement.

In 1984 the point came before Prichard J in *Barson Computers (NZ) Ltd v John Gilbert & Co Ltd* (1984) 4 IPR 533. This was a case involving the parallel importation into New Zealand of personal computers, and was an application for an interim injunction. As with the *Albert* case, there was an agreed statement of facts, which left the Court free to focus on the correct interpretation of s 10(2). Prichard J found that:

> If the provision has an enigmatic quality, this is due to the fact that, in postulating a hypothetical making, the subsection does not prescribe any of the circumstances of that hypothetical making except that it occurs in the place into which the article is imported ... In particular it does not specify the identity of the person who, hypothetically, makes the article in the place into which it is imported. (540)

If the notional maker were the importer, not having any rights in New Zealand, that making would be an infringement. On the other hand, if the notional maker were the actual maker of the goods, ie the copyright owner abroad, then the goods would not be an infringement and could be imported.

Prichard J was faced with the fact that the English Court of Appeal had, in *CBS UK Ltd v Charmdale Record Distributors Ltd* [1980] FSR 289 expressly rejected Quilliam J's approach in *Albert* and opted for the actual maker theory. Meanwhile, Australia had amended its legislation, expressly adopting the importer-as-maker theory.

Quilliam J, after careful analysis, opted for the "importer" theory and thus established the ability of the Copyright Act to restrain parallel importation. His conclusion was emphatically expressed:

> This much is clear: s 10(2) is intended to afford the owners of the New Zealand copyright protection against

> the importation of copies from overseas. That can only be because such importations will be injurious to the value of the copyright and to the interests of the copyright owner. If the importation of copies is permitted, the injury will occur irrespective of the source from which the importer obtains his supplies. I can see no reason to discriminate between copies made by the owner of the copyright and copies made by anyone else – the importation of either will adversely affect the value of the copyright in the country of importation.

Although some New Zealand merchants were surprised to find articles, genuinely made and purchased abroad, could be restrained at the suit of the New Zealand exclusive licensee of the copyright, their intellectual property advisers were not. There has followed a string of cases, culminating in *Halliday & Bailey v Hafele (NZ) Ltd* Robertson J, 5 March 1998, HC Auckland, M1797/97 involving door locks. Other examples include: *Tamiya Plastic Model Co v The Toy Warehouse* (1987) 2 TCLR 45 (toy cars); *Composite Developments (NZ) Ltd v Kebab Capital Ltd* (1996) 7 TCLR 186 (skis and snowboards) and *Remmington Arms Co Inc v Reloaders Supplies Ltd* 20 December 1996, HC Auckland, CP 384/95, Master Anne Gambrill (shotguns).

Halliday & Bailey was brought under s 35 Copyright Act 1994 which, significantly, maintained the effect of s 10(2) of the 1962 Act. A comprehensive review of the 1962 Act had been promised for many years. There were modest amendments in 1985, 1986, 1989 and 1990. Throughout the period, including up to the 1994 Act, the policy questions surrounding parallel importing were vigorously debated. In preparation for its Budget amendment, the Ministry of Commerce commissioned the NZIER to perform an economic analysis "Parallel Importing – A Theoretical and Empirical Investigation".

ECONOMIC ARGUMENTS

It is beyond the scope of this article to review the NZIER Report. In general it discussed the situation in relation to the innovator, a domestic distributor, an international distributor, a retailer and a consumer, in an attempt to analyse what it defined as "welfare" – the sum of the consumer surplus and the producer's surplus. It analysed three particular markets – those for motor vehicles, books and CDs. The motor vehicle market is interesting in that for the past ten years there has been a thriving market in secondhand imports, particularly from Japan. Although they could have prevented such imports, perhaps for economic and political reasons, for that period the motor vehicle manufacturers did not exercise their rights. The NZIER ballpark estimate is of a net gain to society, of some $590m.

In relation to books, the report concluded that the New Zealand consumers were paying more, on average, for books than in the United Kingdom, the United States or Australia. The report noted the growth of competition from the Internet, the collapse of the Net Book Agreement in the United Kingdom in 1995, and went on to assume that the price of books in New Zealand would fall by approximately $3 per book if parallel importing were permitted.

In relation to CDs, a price comparison showed that CDs were cheaper in New Zealand than comparable products in Australia and the United Kingdom, but significantly more expensive than the same product in Germany and some United States outlets. Overall, prices were expected to fall with the removal of prohibitions, with the availability of CDs unlikely to get any worse.

THE LEGISLATION

Doubtless encouraged by the NZIER conclusion that "the net impact of removing the parallel importing restriction is likely to be positive", the government proceeded to legislate. In introducing the Bill, the Hon Maurice Williamson said that removal will "further enhance the openness and competitiveness of the New Zealand economy". It would "allow New Zealand entrepreneurs to import directly from overseas markets, rather than having to purchase from an authorised distributor. This will give them access to the world's cheapest prices, and allow them to import a wider range of goods than is currently available" (1998) 568 PD 8626.

The Bill operated, in summary, by changing the definition of "infringing copy". Briefly, if the article in question was not an infringement when it was made, and where it was made, it is not an infringement when it is imported into New Zealand.

Because the relaxation of the parallel importing prohibition was thought by the government to result in a greater number of imports, and because that might cause a greater number of counterfeit goods to be imported, the amendment increases the penalties for importing counterfeit goods. The penalty for a first offence has been raised from $5000 to $10,000 for every infringing copy, with the limit raised from $50,000 to $150,000.

At the same time, the penalty for making an object designed to make infringing copies, or having such an object in one's possession, has been increased from $50,000 to $150,000.

Consequences

Most of the media comment following the enactment of the Bill has been to the effect that parallel importing *per sé* is now permitted.

That is not the case.

The amendment is only of the Copyright Act. That is, it does not affect the ability of trademark owners to prevent parallel importing, as before. There is a New Zealand precedent for the use of trademarks in parallel importing. In July 1989 Justice Fraser granted an interim injunction preventing the import of secondhand tires at the suit of the owner and registered user of the "Dunlop" and a "flying D device" See *South Pacific Tyres v David Craw Cars* 3 TCLR 155. See also *Colgate-Palmolive Ltd v Markwell Finance Ltd* [1989] RPC 497.

The tort of passing-off may also be used by a New Zealand trader to restrain parallel importing, particularly if the products being imported are of an inferior quality to those offered in New Zealand. See *Colgate-Palmolive*.

It may also be relevant where an importer purports to give guarantees or representations as to service which it cannot keep.

The Fair Trading Act 1986 may also be useful if an importer is foolish enough to give false or misleading representations as to any characteristic or quality of the goods, for example a warranty.

Although there have been no reported cases in New Zealand, technically the Patents Act can, in certain circumstances, be used to restrain parallel importation see B Brown *"Parallel Importation: A New Zealand Perspective"* (1989) 8 EIPR 274, 279.

Accordingly, it is not accurate to say that the government has now removed the prohibitions on parallel importing. However, it should be appreciated that the bulk of cases from

an economic point of view have involved the Copyright Act, and the government has probably achieved the desired economic result by this single amendment.

Two further points require mention. The first is that the amendment affects the definition of "infringing copy", and focuses on "an object". The use of the words "an object" implies a thing in three dimensions. It seems different from, and arguably a subset of, the more frequently used term "work" which appears throughout the Act. Consider the position of an imported disc containing software. If the empty disc is itself not an infringing copy, what is the position if it contains software? The making of the object is a distinct and different process from loading it with software. Or is the loaded disc a new object?

Consider also the labelling and packaging of products. Often that material contains works which are artistic, literary or a combination of both. Are they included within the definition of "object"? If not, and they remain merely literary works, the prohibition on importation may well remain. (eg *R A Bailey & Co Ltd v Boccaccio Pty Ltd* (1986) 6 IPR 279, where preventing importation of the labels prevented importation of the bottles.)

The second major consequence of the amendment has been the published reports of the United States government. The US trade representative, Charlene Barshefsky, is quoted as having ordered a review of New Zealand's intellectual property protection laws. The inference is that New Zealand has let the side down by weakening its IP laws. It is not possible, under US copyright law, to claim copyright protection for any of the articles which are featured in New Zealand cases, such as the door locks, skis, firearms and toy cars, referred to above. New Zealand law grants copyright protection for industrial drawings having purely utilitarian purposes, and regardless of their artistic merit. It treats articles made from those drawings as reproductions in three dimensions, and says that it is an infringement of the copyright in the drawings to copy the articles made from them. That is not the law in the United States.

As a result, New Zealand has had much wider copyright protection than the United States for a considerable period.

An analysis of the US provisions relating to parallel importing is beyond the scope of this article, but note that the US Supreme Court on 9 March 1998 restricted the position somewhat for copyright owners. In *Quality King Distributors Inc v L'Anza Research International Inc* 1998 US LEXIS 1606, 66 USLW 4188, the Supreme Court unanimously ruled that a copyright owner may not prevent the importation back into the United States of goods covered by US copyright law. That case resolved a dispute between the rights of an owner of a product lawfully made to sell the product without the authority of the copyright owner (s.109(a) of the US Copyright Act), and the power of the copyright owner to control the importation of works acquired outside the United States (s.602(a)).

Apart from maxims about glasshouses and stone throwing and the fact that not all parallel importation has been prohibited, the US ought to have been aware of the impending move, it having been reasonably foreshadowed (see, eg *Infotech Weekly* Sunday 5 April 1998).

CONCLUSION

The rapid introduction of the legislation doubtless will cause some economic casualties. There will, inevitably, be distributors who have invested time and money in distinguishing successful products from failures, and who have risked capital in arranging for distribution and service of those products. In some cases, the higher price charged in New Zealand for the goods will be a proper return to that distributor. If it cannot now protect itself against imports through the remaining protections such as the Trademarks Act for example, it may well suffer. Recent experience, however, should suggest two things. The first is that economic surgery, like other surgery, can be best if short and sharp. The other is that deregulation resulting in more products and greater price competition, has generally benefited the New Zealand consumer. In many ways, the parallel import provisions in relation to industrial articles was a protectionist relic. Consumers will probably welcome the change. ❑

LETTER

MR BIRKS AND THE PIANIST

There is an unkind proverb to the effect that only children and fools criticise an unfinished job that is still being worked on. The process by which a Law Commission Report comes into existence will normally include the identification of a tentatively preferred position which is then tested. One method of testing is by exposing ideas to public comment or peer review. Often as a result of assistance so obtained initial views will be rejected or substantially modified.

Mr Stuart Birks, in an article at p 166 of your May issue headed "Gender Analysis and Women's Access to Justice" tells us that "The Law Commission's Women's Access to Justice project is an application of 'gender analysis'". He asserts that "the project uncritically builds on a foundation of feminist thinking." He cites the Commission's Miscellaneous Papers 10 and 11. He does not disclose that Paper 10 states that "This paper has been prepared by the project team for the purposes of consultation". Nor does he mention that Paper 11 states that "This paper has been prepared by the project team for the purpose of raising issues and securing debate". His readers are not told that in each Paper the sentence just quoted is followed by the sentence, "It does not contain Law Commission policy nor does it necessarily reflect the views of the Law Commission".

It is odd to speculate, as Mr Birks does, on the fate of the Commission's recommendations when neither those recommendations nor the reasoning to support them have yet been formulated. When the Law Commission publishes the Report for which "Women's Access to Justice" has been no more than a working title, then and only then will Mr Birks be free to criticise it to his heart's content. Mr Birks has not read the Report. The Report is still being written. For Mr Birks in relation to what is no more than work in progress to draw the conclusions that he has offered to your readers is to shoot the piano player before the performance has even started.

D F Dugdale
Law Commissioner

PROPERTY AND UNJUST ENRICHMENT

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ask Watts the problem with a new area of law?

In recent years the debate within mainstream restitutionary scholarship has been increasingly concerned with the conceptual relationship between the law of restitution, based on the principle of unjust enrichment, and the law of property. In an important article published recently in New Zealand, Professor Peter Birks, drawing on earlier work, sought to articulate his views on this issue ("Property and Unjust Enrichment: Categorical Truths" [1997] NZ Law Rev 623). In Professor Birks' view property rights are merely responses to (or arise from) the events of consent, wrongdoing, unjust enrichment or some other innominate event. As such, to treat property and unjust enrichment as opposing and exclusive categories is a "categorical error" (at 627). In his view, therefore, even in cases where the plaintiff may have retained property rights in the enrichment sought to be recovered, that recovery may properly be analysed in terms of the principle of unjust enrichment.

In an article published alongside Professor Birks', we sought to explore further the consequences of his views and to articulate a contrary account of the relationship between the law of property and the principle of unjust enrichment ("Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" [1997] NZ Law Rev 668). In short, in our view, property rights, once in existence, are themselves an event to which the law may respond. However, because of the absence within the common law of mechanisms to enforce property rights directly, the law's protection of property rights is necessarily mediated through other actions. Thus, while actions such as conversion, money had and received and, possibly, knowing receipt, ostensibly allege wrongdoing or unjust enrichment, they nevertheless respond to an infringement of the plaintiff's property rights. It thus follows, in our view, that much of what the dominant model of the law of restitution (as propounded by Goff and Jones, Birks, and Burrows) claims as a response to unjust enrichment is in fact a response to the plaintiff's property rights.

Peter Watts has now also added his voice to this debate ("Property and 'Unjust Enrichment': Cognate Conservators" [1998] NZ Law Rev 151). As we are sure Professor Birks would also agree, it is essential to the logical and consistent development of the law that matters of doctrine and theory are subjected to rigorous and thorough examination. It is in this spirit that the present paper is written. Our intention is to address Watts' central criticism of both our paper and that of Professor Birks in an attempt to further the debate and isolate the conceptual issues. Although, additionally, Watts raises a number of specific points about our paper, we do not think it necessary or productive to focus on these, as in large measure Watts' criticisms reflect a misunderstanding of the debate we entered into with Professor Birks. There seems, therefore, little utility in us re-stating our position, though there are one or two points which we feel could benefit from further elaboration. We will return to these briefly at the end of the paper.

In Watts' view, our debate with Professor Birks is founded upon an erroneous assumption. As he correctly notes, the assumption implicit in both papers (and indeed in virtually all recent restitutionary scholarship) is that the law of restitution can be explained in terms of a principle of unjust enrichment. In Watts' view, however, this "is a matter on which there is room for doubt" [1998] NZ Law Rev, 151, 152. Essentially, drawing on an earlier paper "Restitution – A Property Principle and A Services Principle" [1995] RLR 49, Watts argues that there are within the law of restitution two principles in play. The first is the "property principle", which provides that an "owner of property is not to be deprived of it ... except pursuant to a transfer freely and unqualifiedly assented to". (at 51) The second is the "services principle": "a person is entitled to reasonable reward for time and effort expended on another's behalf ..." (ibid). The implication for present purposes is that the question whether recovery should be seen as responding to unjust enrichment or property rights is, according to Watts, largely irrelevant. The recovery of property or its value, on this view, rests on the "property principle".

As an explanation of the law of restitution, the principle of unjust enrichment is undoubtedly problematic. The ongoing, sometimes heated, debates are testimony to this. While we see no need here to defend the principle of unjust enrichment, we do not believe that a coalition of the "property principle" and the "services principle" offers a superior or even a coherent alternative. In the limited space available to us, we make three points.

First, although apparently proffered as an explanation of recovery in the central cases of restitution, the property "principle" and the services "principle" appear to offer little more than a descriptive account of the circumstances in which restitutionary relief is presently permitted. In the case of the property "principle", for example, it identifies that the central cases of recovery of property or its value, which include conversion, mistake, duress and failure of consideration, all involve the restoration to the plaintiff of assets in which the plaintiff held property rights where there is a defect in the plaintiff's consent to the transfer. However, and this may explain why Watts' analysis appears to have

attracted little attention within the wider restitutionary debate, it does not offer anything in the way of an explanation or justification as to why the law acts to "conserve" [1998] NZ Law Rev 151, 152 the plaintiff's wealth in these cases or when this conservative principle is appropriately invoked.

Secondly, to the extent that it is possible to divine normative foundations for these conservative "principles", Watts seems to be suggesting that the law is responding to consent: the lack of consent by the plaintiff to the transfer of his property and the consent of the defendant to the receipt of the plaintiff's labour. When pitched at this very high level of abstraction, one can really only agree with this position. However, this level of abstraction means that these "principles" cannot operate at the level of a doctrinal justification for recovery in actual cases. It is necessary, therefore, to resort to less abstract principles for answers to the important questions, why the law acts to conserve the plaintiff's wealth where there is a defect in consent, and what is to count as consent for this purpose. In the case of the property "principle", for example, the explanation for the law's willingness to reverse the transfer is most likely to be found in the central incidents of the property right itself. Of these, one of the most important is that the holder of property rights has freedom from expropriation (non-consensual transfers). The property right itself, therefore, explains why a plaintiff should not be deprived of his property unless there is consent.

The need to look to other less abstract principles for doctrinal answers as to why and when consent is relevant has two important implications for the utility of Watts' "principles". First, if, as in the example given above, the law of property provides a sufficient justification of recovery, there is little point in attempting to move the explanation to a further level of abstraction. Secondly, once the need to have regard to less abstract principles is accepted the only utility of a principle of a higher level of abstraction would be as a unifying concept, identifying a common concern in a range of more specific principles. In the case of the property "principle", if limited to cases where title did not pass to the defendant it would clearly do this, though then it would be largely co-extensive with law of property. However, Watts extends the property "principle" to include cases involving mistake, duress and total failure of consideration. In these cases, as the Courts expressly acknowledge, the plaintiff is not, and cannot, rely on pre-existing property rights. If, therefore, in some cases the plaintiff does not have property rights it is difficult to see that "property" identifies a unifying normative principle.

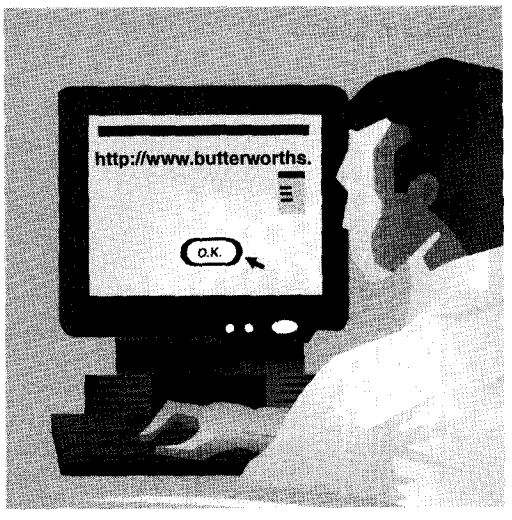
Thirdly, even if it is possible at an abstract level to say that the various specific causes of actions Watts seeks to explain, such as conversion, mistake, duress and failure of consideration, are responses to consent or its impairment, there remain important doctrinal and teleological differences in the way that these various causes of action rely on consent. Indeed, Watts acknowledges these functional differences in the observation that the distinction between an absence of consent and an impaired consent marks the boundary between what he terms tortious and non-tortious restitution [1995] RLR 49, 52. These differences make any assimilation of the causes of action into a single principle both unhelpful and potentially confusing. In the same way that the differences between the objectives of contractual and tortious damages precludes a direct and simplistic appeal to a "compensation principle", the differences in both what is meant by consent and how it functions in various legal doctrines precludes direct recourse to both a property and a services "principle".

Finally, and very briefly, we wish to clarify three specific points raised by Watts in respect of our paper. First, Watts suggests that the distinction we draw between no consent and impaired consent flounders on the case of the thief. In Watts' view, it cannot be said that the thief is not unjustly enriched [1998] RLR 151, 154. In a sense this is of course true, but it reflects a common misunderstanding of the import of the unjust enrichment formula. As the principle justifying restitution, "unjust enrichment" is a term of art. "Unjust" is not a synonym for unfairness. Rather, it is informed by, and limited to, a range of specific grounds of unjustness, such as mistake, duress and failure of consideration. Our point is that the case of the thief does not fall within any of the accepted instances of unjustness. Secondly, in his suggestion that, in the final analysis, there is little at stake between ourselves and Professor Birks (at 158), Watts misses the significance of the doctrinal and taxonomic distinctions. What is at stake is the issue of the event to which the law responds: unjust enrichment or an interference with property rights. In Birks' view, actions to protect property rights rest on a concern to reverse unjust enrichment: the event is necessarily unjust enrichment, and therefore the response, whatever it is called, is restitutionary in nature. On our view, the event is the plaintiff's property right, and thus the response, however mediated, is also based on the property right. Thirdly, Watts rejects our conclusion that where the plaintiff retains property rights in the asset sought to be recovered, the source of the recovery is the pre-existing property right, not unjust enrichment. In his view, this is a technical argument as it is the Court order that is the source of the restoration (at 161). Watts, however, falls into the error that Professor Birks warned of in his paper at 656-657. The Court order is remedial in only the weakest sense. The Court merely gives effect to a pre-existing right and thus the crucial question is as to the nature of that right. Our point was that where the plaintiff still has title, that right most obviously lies in the property right of which title is the manifestation. ❑

ONLINE OFFERINGS OF SECURITIES

Gordon Walker, The University of Canterbury

explores a new facet of cybertrade



Since 1 October 1997 it has been possible to make an online offering of securities in New Zealand via the Internet. This is because key definitions in s 2 Securities Act 1978 have been amended to include electronic communications. Online offerings of securities offer the prospect of cost savings for issuers: for a discussion of the costs associated with a public offering, see G Walker, "Case Study of an Initial Public Offering in New Zealand" in Walker, Fisse and Ramsay, eds, *Securities Regulation in Australia and New Zealand* (2nd ed, 1998), Ch 13. For example, issuers can dispense with large print runs of prospectuses thereby saving printing costs. This note considers how public and private offerings via the Internet might occur in New Zealand under existing legislation.

PRIMARY MARKET PUBLIC OFFERINGS

Since the initial online public offering in the USA by Spring Street Brewing in 1996, there has been considerable interest in the use of a Web site as a means whereby investors can download an issuer's offering documents: see J Coffee, "Brave New World: The Impact(s) of the Internet on Modern Securities Regulation" (1997) 52 *Business Lawyer* 1195. In the case of Spring Street, three salient advantages accrued to the issuer. First, Spring Street was able to dispense with the services of an investment banker (an underwriter in New Zealand). This represented a cost-saving in advice and underwriting fees to Spring Street although it seems unlikely that the company could have attracted the services of an investment banker in any event because the company was small and unproven. Second, Spring Street appears to have avoided the costs of printing and distributing a paper prospectus. Third, Spring Street was able to access 3,500 small investors at low cost via the Web. The type of investor and quantum of investment attracted in Spring Street confirms the standard view of underwriters as "reputational intermediaries". The flip side of this proposition, however, is that for an issuer like Spring Street, it is precisely this type of small investor and quantum of investment that is expected and desired.

In New Zealand, neither the Securities Act 1978 nor the Securities Commission (by way of any Policy Statement) make specific provision for electronic prospectuses. As mentioned, the ability to use an electronic prospectus (and other forms of electronic communication) arises from amendments to definitions in s 2 of the Act (see, for example, the definitions of "distribute", "document", "send" and "receive"). Until the Securities Commission promulgates guidelines on electronic prospectuses, issuers wishing to attract the costsavings of an online public offering would appear to proceed as follows: first, issuer creates a Web site containing the information permitted by s 3(6). This permits a statement made by or on behalf of an issuer to the effect that the issuer intends to make an offer of securities to the public for subscription and which contains certain factual statements. This information is substantially similar to that permitted in the United States by R 134 of the Securities Act 1933 (US).

The s 3(6) statement should include a statement to the effect that the offering is made only to New Zealand residents, that sales will not be made to non-residents by other means, and, that no sales will be made in other jurisdictions, in order to avoid extraterritoriality problems. (s 3(6)(g)) This suggestion follows Coffee's view that the Pennsylvanian solution for exempting Internet offerings pursuant to its Blue Sky law can be applied at the international level to avoid problems with, for example, Regulation S: see Coffee 1231-2. The alternative view (also canvassed by Coffee), is that the very nature of the Internet means that it is beyond the jurisdictional reach of offshore jurisdictions in which case the issue is moot.

Second, after a period of time, the issuer amends the Web site to include an investment statement containing the offer with a similar jurisdiction statement as discussed above: see the Ameritech Investment Statement, 13 March 1998, for the wording of an appropriate jurisdiction statement. Section 33 Securities Act 1978 is not infringed because that section provides that no offer shall be made to the public unless accompanied by an authorised advertisement that is an investment statement. Further, by this means, investors and prospective investors visiting the issuer's Web site can be notified that the prospectus is available in printed and electronic form and choose receipt of a prospectus in electronic form by e-mail if appropriate.

Section 54B(3) requires that a registered prospectus must be sent to a security holder or prospective investor upon

request. Section 2(1) defines "send" as including "send by electronic or other means that enables the recipient to readily store the matter in a permanent or legible form". Hence, a sending by e-mail would satisfy these requirements. The definition implies that an investor cannot simply access the Web site of the issuer in order to view or download the prospectus since there is no sending by the issuer to an investor. This can be avoided if, for example, a prospective investor enters into a dialogue with the Web site so that the prospectus is sent from the Web site to the investor. Providing for prospectus delivery by e-mail will better enable compliance with the request disclosure provisions of s 54B(3) which state that an issuer "shall send or cause to be sent" a copy of the registered prospectus "upon the request of a security holder or a prospective investor ...". Thus, if a formal request for a prospectus is subsequently received, the issuer can send the prospectus to the requester's e-mail address.

PRIVATE PLACEMENTS

By use of the Web, the investor reaches the issuer. Prima facie, this appears to imply that the Web can never be used for a private placement. Indeed, the use of e-mail with a list server seems the most logical means of harnessing the new technology for a private placement because the issuer can precisely target the private investor. Thus, an issuer wishing to reach habitual investors within the meaning of s 3(2)(a)(ii) might e-mail by list server readily identifiable habitual investors such as venture capital firms. However, one mistake in the selection process may result in the entire offer being tainted because an offer may be made to a member of the public: see s 3(5). Use of a customised Web site may provide a solution.

A private offering must fail if there is a general solicitation. Here, the New Zealand position is similar to that in the United States prior to 1996: Coffee 1219. Further, in New Zealand there is no contracting out of the Securities Act 1978: see s 4(2). The burden of proof is on the issuer who wishes to claim the benefit of s 3(2) (non-public offers): see *Securities Commission v Kiwi Co-operative Dairies* [1995] 3 NZLR 26 (CA). Thus, issuer must point to evidence that shows the offeree or investor is a member of the exclusionary class. Here the practice in the United States since 1996 is suggestive.

Notwithstanding an initial scepticism towards the Internet in private offerings, the SEC has recently relaxed its position in three no-action letters (the three no-action letters relate to IPOnet, Angel Network and Lamp Technologies: see Coffee 1219-1222). Taken together, these three no-action letters both establish the concept that a password-protected Web site does not amount to a "general solicitation" or "general advertising" in violation of R 502 (and hence of s 5(c) of the 1933 Act).

Of the three instances cited by Coffee, it is the fact-pattern surrounding the Lamp Technologies no-action letter that suggests a role for the Web in private offerings in New Zealand. In Lamp Technologies, potential offerees completed a questionnaire designed to allow the company to determine that each investor was an "accredited investor" with at least a $2 million investment portfolio. Once qualified, the investor would receive a password enabling access to the company's Web site.

Can an accreditation questionnaire be used as a filtering device on a Web site in New Zealand to enable a private placement within s 3(2) Securities Act 1978? The answer is a cautious affirmative because of the hurdles the statute imposes. First, s 3(6) – limited statement not an offer to the public – cannot be used to construct the initial statement on a Web site because that section only applies where the issuer intends to make an offer of securities to the public. Clearly, an issuer seeking to make a private placement via the Web does not intend to make a public offer.

Second, an issuer can avoid the reach of s 3(1)(a) and (b) – offers to the public include references to offering the securities to any section of the public however selected and offers of individual members of the public selected at random – by omitting any reference to the offering of securities. The third hurdle imposed by the Securities Act 1978 is s 3(1)(c) which states that an offer of securities to the public includes a reference to offering securities to a person where the person became known to the offeror as a result of any advertisement "that was intended or likely to result in the public seeking further information or advice about any investment opportunity or services".

Section 3(1)(c) may be avoided by a combination of means. There must be no reference to an offering in the initial Web site statement. The mere absence of a reference to an offering may be insufficient, however, because of the extended meaning of "advertisement": see *Registrar of Companies v Culverden Retirement Village Ltd* (1995) 6 NZCLC 260,850. All that is necessary is that the advertisement is intended or likely to result in the public seeking further information or advice about the advertisement. However, the reference to the "public" suggests the further step required. The statement on the Web site must neither intend to or result in the public seeking further information or advice. This can be achieved by stating that investment information is available only to s 3(2) persons resident in New Zealand (hence the statement does not intend to result in the public seeking further information or advice) and requiring that such persons fill out an accreditation questionnaire prior to the issuance of a password enabling them to access a private placement memorandum (hence the statement should not result in the public seeking further information or advice since the public is specifically warned off completing the accreditation questionnaire). In this way, compliance with s 3(1)(c) may be ensured.

The fourth requirement is that issuer must ensure compliance with s 3(2). Here, the evidentiary onus is on the issuer who seeks to rely on the section: *Securities Commission v Kiwi Co-operative Dairies* [1995] 3 NZLR 26. The evidentiary onus is met by pointing to the accreditation questionnaire answered by the prospective investor. Thus, in order to qualify as a s 3(2) person, the visitor to the Web site must complete an accreditation questionnaire designed to provide the issuer with compelling evidence that any offeree accessing the Web site is a s 3(2) person. Once the questionnaire has been satisfactorily completed, a password is issued. The issuer now has evidence that the person gaining access to the site is, for example, an habitual investor. If the offering is subsequently challenged as a public offering without an investment statement or registered prospectus, the issuer has the burden of proof to show that all offerees are s 3(2) persons. The compliance system created by the questionnaire should be sufficient to enable the issuer to meet that burden. No question of contracting out of the Securities Act arises. Indeed, intelligent use of the questionnaire is the means by which the issuer seeks to fully comply with the provisions of the Act. ❑

LAW COMMISSION REPORTS

D F Dugdale, Law Commissioner

summarises the Law Commission's two latest papers

APPORTIONMENT OF CIVIL LIABILITY

If my house collapses because my builder blundered and my architect failed to supervise properly and I choose to sue only the architect (because the builder is my buddy or my brother-in-law or for any other reason) there is, as the law now stands, no basis on which the architect can seek from the builder a contribution comparable to that which may be awarded among joint tort feasors. A 1978 United Kingdom statute remedied this by creating a right to contribution whatever the basis of civil liability. The Contracts and Commercial Law Reform Committee in a 1983 paper recommended a like measure for New Zealand. Such a statute is again advocated by the Law Commission in its new report *Apportionment of Civil Liability* (NZLC R47).

Experience of the existing law as to contribution among joint tort feasors demonstrates that practical issues in the application of such a broad general rule as is proposed can arise where one defendant has compromised the claim against him, or there has been a judgment against a defendant or the claim against a defendant is time barred either by statute or by contractual provisions or a defendant can invoke an exclusion clause. The Commission's draft legislation lays down clear rules applicable to each of these circumstances.

The Commission's report also repeats the 1983 recommendation that reduction of a plaintiff's claim to take account of contributory fault should apply whatever the basis of the claim. Had that proposal been promptly acted on answers would have been provided to questions that in the event needed to be judicially determined in such cases as *Day v Mead* [1987] 2 NZLR 443 and *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30. Those decisions support the approach adopted in the 1983 paper and the new report, but the decisions have not escaped criticism and the matter needs to be put on a proper statutory footing.

It is not uncommonly found that the share of one or more wrongdoers is uncollectible. The negligent builder for example may by the time the defects in the foundation are discovered have disappeared. The draft legislation lays down rules regulating the incidence of uncollectible shares. The Commission's Preliminary Paper (NZLC PP 19) recommended that where the plaintiff's fault had contributed to the loss uncollectible shares should be apportioned among not only the surviving defendants but also the plaintiff. The report abandons this preliminary view.

The legal liability of each wrongdoer is solidary, that is each wrongdoer is liable for the whole of the loss. The lapse of time between publication of the Commission's Preliminary Paper in 1992 and the final report resulted from the need to consider and take into account Australian response to a proposal by Professor J L R Davis in a report commissioned by the federal and New South Wales Attorney-Generals that such solidary liability be replaced by proportionate liability, that is that each wrongdoer should only ever be liable for his share of the total loss. This proposal has obvious attractions for such "deep pockets" as local authorities and professional firms who as the law stands although perhaps the least culpable of any of the wrongdoers may find themselves saddled with liability for the whole loss because the other wrongdoers have vanished or are not worth pursuing. The Commission does not favour the abandonment of solidary liability and there seems insufficient likelihood that the Davis view will prevail in Australia to justify altering or further delaying the Commission's proposals on some sort of basis of trans-Tasman solidarity.

The Report does however consider the plight of the deep pockets and various ways in which their position might be improved without corrupting the general law as to apportionment of civil liability. Five matters are referred to. It is pointed out that professional firms could be permitted to incorporate with limited liability and that present bans on such incorporation are not imposed on the professions but have been adopted by the professions themselves. They "have their origin" the report says "in the genteel distaste for limiting liability that marked the early years of joint stock companies". There is a cruel suggestion that auditors to the extent that they are undiscriminating in their preparedness to act for dodgy clients are the authors of many of their own misfortunes. There is reference to such legislation capping liability as the (New South Wales) Professional Standards Act 1994 (discussed by Whally at [1997] NZLJ 374). It is observed that because it is uncertain that the New Zealand Courts will retreat from the broad base of auditor liability to strangers expressed in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 in favour of the more circumscribed

approach adopted by the Australian High Court in *Esanda Finance Corp Ltd v Peat Marwick Hungerford* (1997) 188 CLR 241 there is a strong case for a statutory reformulation of auditor liability. The basis in judicial determinations of local authority liability for negligent supervision of building and like activity is recalled, with the possibility being floated that there is room for a statutory revisiting of that topic likewise.

The Commission believes that enactment of its draft statute would bring a long overdue improvement to the law. It also believes its proposals to be uncontroversial and generally accepted. There may be room for argument that in the context of the dispute between solidary and proportionate liability the Commission ought to have gone further but that should not stand in the way of the adoption of the reforms that the Commission does propose.

SOME INSURANCE LAW PROBLEMS

In May 1997 the Law Commission wrote to insurance industry organisations and to interested practitioners and academic lawyers asking whether any and if so what areas of insurance law in their view required legislative attention. The Commission has now published its report (*Some Insurance Law Problems* (NZLCR 46)) setting out its recommendations on the topics so identified.

There is general agreement that the law as to non-disclosure needs attention. The existing law which requires the *insured* to determine the matters that would influence the judgment of a prudent underwriter and which effectively deprives the insured of all redress if he gets it wrong cannot seriously be supported.

The real challenge is devising a replacement provision. The proposal by the English Law Commission (not adopted) required disclosure of facts which a reasonable man in the position of the applicant for insurance would disclose to his insurers, not the brightest of bright lines. The 1984 Australian statute except in the case of fraudulent non-disclosure defines the obligation in terms of what a reasonable person in the circumstances could be expected to know and replaces cancellation *ab initio* with a damages claim. But what is fraudulent non-disclosure and how do you assess damages? In Canada most provinces and territories permit avoidance of fire and vehicle cover on the ground of non-disclosure only if there is fraud.

In the view of the New Zealand Commission instead of the insured being under a duty to disclose it should be left to the insurers (who are the experts and know what is relevant to their decisions) to ask questions they choose. Subject to a time lag to allow the insurer to give immediate cover while allowing time to pose questions the right to cancel retrospectively will be available only in contracts of reinsurance, if the failure to disclose is blameworthy or if a specific question expressly put by the insurer is answered in a way that is substantially incorrect.

The Insurance Law Reform Act 1977 s 9 prevents insurers from avoiding liability on the ground of breaches of contractual time-bars unless the delay has prejudiced the insurer. In *Sinclair Horder O'Malley & Co v National Insurance Co of NZ Ltd* [1995] 2 NZLR 257 the Court of Appeal surprised the industry and the profession by applying s 9 to a clause in a claims made policy the function of which was not to regulate claims procedure but to define the period during which the liability for claims against the insured was within the risk accepted by the insurer. This was to move the goal posts unfairly to insurers, and the report proposes an addition to s 9 to the effect that s 9 is not to apply to provisions of claims made policies defining the risk.

The policy underlying s 11 Insurance Law Reform Act 1977 is that a policy exclusion designed to protect the insurer where there exists a circumstance which has increased the risk should not be able to be invoked where the increase in risk is not in fact causative of the loss. The usual example given is the invocation of a provision excluding liability while a vehicle is being used in an unsafe condition where a vehicle with bald tyres is struck from behind while stationary at traffic lights, a situation in which the state of the tyres can have had no causative consequence.

The difficulty with s 11 as it has been interpreted is that it prevents insurers reflecting in the terms on which they are prepared to contract the fact that in certain circumstances loss is statistically more probable. An insurer may want to reflect the fact that loss is more likely if a vehicle or equipment is used commercially than privately (because the use is likely to be more extensive) by charging a higher premium for commercial than for private use. The policy may provide for a higher uninsured excess where the driver is under a certain age. But s 11 has been applied by the Courts (notably by the Court of Appeal in *New Zealand Insurance Co Ltd v Harris* [1990] 1 NZLR 10) in a way that takes no account of such statistical considerations. The owner of machinery insured only in respect of private use has been held to be entitled by virtue of s 11 to indemnity even where the loss has occurred during commercial use. The report proposes rewording that would deal (not entirely elegantly) with this problem.

The Fires Prevention (Metropolis) Act 1774 s 83 though carefully preserved by the Imperial Laws Application Act 1988 is not in fact needed and the report recommends (as did the Commission's 1994 report *A New Property Law Act* (NZLCR 29)) that it no longer apply in New Zealand.

The effect of Part III of the Law Reform Act 1936 is that a claimant has a charge on moneys payable under liability cover in priority to other creditors of an insured. There is provision for such a claimant to sue the insurer direct.

Part III badly needs modernising. For the charge to come into existence "on the happening of the event giving rise to the claim" as the present legislation provides has inherent difficulties in the case of a claims made policy which may not even exist on the happening of such event. There are Limitation Act problems. There is no neat procedure as in the corresponding English statute enabling the third party claimant to have access to the necessary information about the insurance cover. As the law now stands if there are a number of claimants and the amount of cover is inadequate it is a case of first in first served. The Commission's recommendation sorts out these problems. ❑

RCD: HENRY VIII CLAUSES AND RETROSPECTIVE VALIDATION

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questions the retrospective validations of invalid regulations

In "RCD and the Rule of Law" [1997] NZLJ 397 the writer discussed the breaches of the rule of law which have arisen from actions taken by government in its haste to legalise the use of Rabbit Calicivirus Disease (RCD) for the control of feral rabbits in New Zealand. These actions included the making of the Biosecurity (Rabbit Calicivirus) Regulations 1997 and the simultaneous introduction of the Biosecurity (Rabbit Calicivirus) Amendment Bill. Since then, the Regulations Review Committee has strongly condemned these regulations, stating that they were not validly made and should be revoked. The Cabinet papers referred to in the Committee's Report are now available and give good insight into the advice given to Cabinet at that time. Unfortunately the negative report of the Regulations Review Committee did not prevent a government body, the Pesticides Board, from proceeding to grant an experimental use permit as if the validity of the regulations was not in question – nor did it stand in the way of the retrospective validation of those regulations by the Amendment Act.

The end result has been the retrospective validation of regulations which were not validly made and could never have been validly made under the empowering section – regulations which Cabinet had good reason to believe at the outset would be unlikely to withstand a legal challenge on these issues. Although retrospective validation of a legal provision is acceptable if it is needed to correct errors which had not been foreseen and therefore to protect those who acted in good faith of the validity of the provision, it should not be used as a companion to regulations to enable government to achieve what it is not legally entitled to achieve, especially where government has had a good warning that the regulations were unlikely to be valid.

It is also unfortunate that the Amendment Act was passed just one working day before a conference organised by the New Zealand Association of Scientists (and sponsored by the Royal Society of New Zealand) met to discuss the many issues surrounding the use of RCD, and to find a way forward for New Zealand. The conference had a large number of speakers representing the spectrum of interests and viewpoints, including several leading scientists from New Zealand and overseas. It would have provided a rare opportunity for government advisers to attend and tap this combined expertise in order to be able to provide more informed advice to the Select Committee considering the Amendment Bill. In the event, the opportunity was lost.

(The damage perceived to have been done to the standing of science in New Zealand through its effective sidelining by the government's handling of the RCD issue was discussed at the conference. These concerns are certainly consistent with those expressed about the future of New Zealand science in *Nature*, 29 January 1998.)

THE PROCESS

About two weeks after the illegal importation and release of the virus was first reported, and while it was still present in only limited areas of the South Island, the Minister for Biosecurity announced that regulations would be passed so that the use of RCD would no longer be illegal under s 21 of the Animals Act 1967. The reasons given for this were that (1) RCD was now widely distributed in New Zealand; (2) it would be desirable to promote responsible, safe, and effective use of the virus; and (3) there needed to be a good flow of information and people would not be forthcoming with information if they felt they were under legal threat. To discourage legal challenge a Bill was introduced to validate the regulations retrospectively. However, this fact was not made public until the regulations had been made.

Matters considered by Cabinet

Cabinet received several letters and reports from the Office of the Minister for Biosecurity with respect to the proposed Regulations and Amendment Act.

The letter (undated) proposing the regulations noted that the subject of the proposal (to make regulations) was considered to be straightforward, and those invited to make submissions had already made submissions to the Deputy Director-General in the original inquiry (under s 21 Animals Act).

Unfortunately, what did not appear to be appreciated was that the decision being made by Cabinet involved complexities not faced by the Deputy Director-General, as it involved consideration not only of biological control (rabbit-to-rabbit infection), but also the use of biocides, including the hazardous methods of home manufacture being used by farmers (ie using kitchen blenders). This activity resulted in exposures to the disease never before experienced or studied, for nowhere else in the world has RCD been used as a biocide, nor has the kitchen-blender method of manufacture been used. No independent scientists were asked to make submissions with respect to the regulations, although a number had made submissions to

the original inquiry – where it should be remembered the Deputy Director-General declined the application.

The report to Cabinet (undated) outlining responses to the outbreak of RCD noted that the spread of the disease was in the South Island only, through the spreading by farmers of home-made biocide mixtures, and although there appeared to be very little evidence of epidemic spread it was considered to be no longer technically feasible to eradicate RCD from New Zealand. It also noted that farmers would not cease spreading the disease, and were unlikely to cede control of its use to other agencies.

There were a range of options open to Cabinet, from attempts to totally eradicate the virus to removing all barriers to farmers spreading the virus in whichever way they wanted. So although it was urgent that a decision be made about the use of RCD, the decision about which option should be chosen required input from a variety of interested parties. Without the decision-making criteria imposed by the Hazardous Substances and New Organisms Act 1996, or those used by the Deputy Director-General under the Animals Act to constrain it, Cabinet chose the latter extreme.

The report to Cabinet also noted that MAF did not intend to bring prosecutions against anyone for possession of RCD (under s 21(4)(b) Animals Act). (Confirmed by Director-General; see [1997] NZLJ 398.) Instead the need to provide information to improve the effectiveness of the home-made biocide preparations was advised.

There did not appear to be any real understanding of the extent of other laws which could apply to this activity, probably because of the non-enforcement stance taken with respect to s 21(4)(b) Animals Act. This is evident from the almost blanket approval given (*NZ Gazette* 4-12-97) for the use, manufacture and sale of RCD with respect to the control of wild rabbits, under ss 52 and 53 Biosecurity Act (as amended in 1997 to enable controls to be placed on the use of unwanted organisms). Leaving aside the drafting error in s 52(c) [no "or"], and the issue of whether the power in s 53 to permit individual persons can be used to give permission generally, the permissions actually given are confusing. Why give a general permission to sell RCD when the Pesticides Act 1979 forbids the sale, or even gift, of kitchen-blender biocides, as these can never meet the requirements for registration under the Act? The advice from the Rural Futures Trust on MAF's website (7-11-97) to "pass on" the virus material confirms this misunderstanding. Also it appears that s 8 of the new Agricultural Compounds and Veterinary Medicines Act 1997 prohibits both the use and the sale of these virus preparations.

Why give general permission to multiply or cause the multiplication of RCD – which would include the farm manufacture of biocide preparations – when scientists undertaking similar functions, with less risky raw materials, must do so under strict safety precautions including the use of a biological safety cabinet (Australia/New Zealand Standard AS/NZ 2243.3)? It would be incongruous if the Health and Safety in Employment Act 1992 allowed different safety standards for farmers. In spite of this, MAF's website (7-11-97) contained instructions on how to make the kitchen-blender biocide, how to apply it to oat and carrot baits, and how to make a virus solution to spray directly onto pasture. There was no mention of the health hazards arising from aerosols – airborne particles containing RCD or other diseases. A strong message arising from the RCD Conference was that the manufacture and use of biocide preparations must cease for reasons of safety as well as efficacy. As a result, the advice on farm-made virus preparations was removed from MAF's website. Unfortunately it is clear from the commentary of the Select Committee considering the Amendment Bill that it wanted this activity to continue.

The letter to Cabinet (undated) proposing the regulations noted that the regulations were likely to be challenged in Court, that the Regulations Review Committee would probably wish to examine them also, but that officials believed that the regulations should survive legal challenge.

Both the letter proposing the regulations, and the letter (16/9) proposing the Bill noted the issue of appropriateness of using regulations to amend primary legislation (ie the use of Henry VIII clauses), and conceded this to be "generally regarded as constitutionally irregular". However no information was provided about the views of the Courts on these matters, or of the views of the Regulations Review Committee, as set out in previous Committee reports.

In addition, these letters noted the existence of the Court of Appeal precedent with respect to the requirements for "consultation" (in *Air New Zealand Ltd v Wellington International Airport* [1993] 1 NZLR 671), but did not set out the actual requirements. It was anticipated also that there would be concerns about predetermination.

On 16 September, one day before the closing date for submissions on the regulation, the Acting Minister for Biosecurity made a late request to have a validation Bill considered by the relevant Cabinet Committee. He stated:

> The Bill is to confirm and validate the Biosecurity (Rabbit Calicivirus) Regulations which will become effective on 25 September 1997. A validation Bill is considered necessary because of the effect of the regulations and the haste with which they are to be brought into being. It is important that this paper is considered by the Committee this week so that the Bill can be introduced on September 25.

An earlier report to Cabinet had conceded that "genuine consultation will involve some delay", but attention had been given only to the minimum time-period which might be legally acceptable for receiving submissions. There is nothing in the reports to Cabinet giving advice on how to take account of, or to reconcile the range of views which would be received from interested persons on solutions to the problem, and about how to assess the additional risks not already considered by the Deputy Director-General in the original application.

Even though there were assurances that the Solicitor-General, Ministry of Justice and Parliamentary Counsel Office had been consulted, it is unclear how much of their advice appears in the Ministry Reports. Nevertheless, Cabinet must have appreciated that the regulations it finally made would have been extremely vulnerable to a finding of ultra vires in an action for judicial review, as well as a negative report from the Regulations Review Committee.

Although Cabinet could not prevent the latter, it could always provide a major disincentive for anyone to seek the former. It did this by introducing, at the same time as the making of the regulations, an Amendment Bill which would retrospectively validate those regulations. The Cabinet papers make it very clear that the purpose of the retrospective validation clause was to reduce the risk of legal challenge in order to protect those acting in good faith on the legality of the regulations. But surely every regulation is potentially vulnerable to challenge, yet regulations are not generally accompanied at the outset by the protection of retrospective

validation. It is hard to escape the conclusion that Cabinet knew that the regulations probably could not be made under the Biosecurity Act, and that the consultation provided would never meet the requirements set down by the Court of Appeal in *Wellington International Airport*.

The empowering section and the regulation made under it

The relevant empowering section for making the regulation is s 165(w) and (x) Biosecurity Act. This, and the regulation, are set out in [1997] NZJL 400 and 401.

REGULATIONS REVIEW COMMITTEE

As the minister had predicted in his proposal to Cabinet, the Regulations Review Committee decided to examine the regulations and proceeded to conduct a fuller examination in early November. As a result of these examinations, it decided that the regulations breached four of the nine grounds under which regulations could be reviewed under SO 197(2). The Committee stated (1998 AJHR I.16E, pp 15-16):

> Not only are these substantive breaches, but doubt about the validity of the regulations appears to have been recognised by the introduction of the validating legislation.
>
> We have taken the serious step of recommending that the regulations be revoked because in our view, they fail to comply with the most important grounds under which we examine regulations. In our view this matter [the legalisation of RCD] ought to have been dealt with by way of primary legislation, not by making regulations.

The four grounds which the Committee considered to have been breached were:

SO 197(2)(a): The regulations are not in accordance with the objects and intentions of the statute under which they are made;

SO 197(2)(c): The regulations appear to make some unusual or unexpected use of the powers conferred by the statute under which they are made;

SO 197(2)(f): The regulations contain matters more appropriate for parliamentary enactment; and

SO 197(2)(h): The regulations are not made in compliance with particular notice and consultation procedures prescribed by statute.

It is clear from the views of the Committee which follow that it considered that the regulations were not only constitutionally irregular, but that they were also ultra vires, both substantively and procedurally.

Were the regulations authorised by the empowering legislation?

The Regulations Review Committee considered that the regulations were not appropriately made under the authority of s 165(w) and (x) Biosecurity Act. They could not be made under s 165(w) as they were not savings or transitional provisions, and did not relate to the coming into force of the Act. They could not be made under s 165(x) as the words "providing for such matters as may be contemplated by or necessary for giving full effect to [the Biosecurity] Act and for its administration" authorised subsidiary and incidental matters, but could not be used to extend the scope or general operation of the Act. Nor could it include matters that would more appropriately be dealt with by parliamentary enactment. The Committee noted:

> In our view s 165(x) does not authorise the regulations as they are a significant change and have the unusual effect of amending primary legislation which is not the empowering Act. The regulations could never be described as merely incidental or subsidiary. (p 8)

The regulations, which were made under the Biosecurity Act, were intended to amend primary legislation, the Animals Act. Provisions that authorise regulations which amend primary legislation are often referred to as "Henry VIII clauses", and are generally viewed as undesirable.

Previous Regulations Review Committees had considered such clauses and made recommendations about when they should and should not be used (1986-87 AJHR I.16A, para 4; also 1990 AJHR I.16, para 6.6; 1991-93 AJHR I.16H, paras 95-97; and 1995 AJHR I.16C, p 22). It must therefore have been of real concern to the current Committee that those recommendations were not heeded, especially when Cabinet was aware that the Committee would be interested in the matter. The Committee made its concerns very clear in its report. It concluded:

> We are concerned that this type of regulation-making power [ie a Henry VIII clause] has been used to make these regulations. In our view a regulation-making power which allows regulations to override primary legislation should be drafted in the most specific and limited terms.
>
> Regulations made under the authority of such a provision must at all times be consistent with, and in support of, the provisions of the empowering Act. We conclude that the regulations cannot appropriately be made under s 165(w) or 165(x). The regulations are therefore not in accordance with the object and intentions of the statute and are an unusual and unexpected use of the powers under which they are made. (p 9)

Consultation

The Committee considered the legal principles defining the meaning of "consultation", as set out in *Wellington International Airport* (noted in [1997] NZLJ 400), and concluded that the consultation process used in making the regulations was inadequate. It considered that the time frame for making submissions (five working days) was too short, especially as organisations would wish to consult with their members before making a submission, and as only two working days plus a weekend were available for consideration of the submission there was "an overall impression that the making of the regulations was a foregone conclusion". (p 13) The Committee considered the process was one of "notification rather than the genuine exchange of views contemplated by a consultation process". (p 13)

The Committee also believed that a full draft of the regulations should have been provided, especially given the technical and unusual nature of the regulations, and the fact that the substance of the regulations was only one clause (pp 13-14) [This may have at least avoided the fundamental drafting error described in (1997) NZLJ 400)].

It concluded with concerns about predetermination:

> Having examined the Cabinet Legislation Committee paper, we believe this is evidence of predetermination. The proposal to introduce the Bill is dated prior to the

closing date for submissions on the proposal to make the regulations. The paper states:

> The Bill validates the Biosecurity (Rabbit Calicivirus) Regulations 1997 from the date of their promulgation.

It is clear to us that even at the time this paper was written, the regulations were not only going to be promulgated, but were going to be subsequently validated because of inadequacies in the process by which they were created. (p 14) [See also 1986 AJHR I.16A, para 9; and 1991-93 AJHR I.16H, para 35 for previous considerations of "consultation"].

The validating legislation

The fact that legislation which purported retrospectively to validate the regulations had been introduced at the same time as the regulations was of considerable concern to the Committee. It stated:

> We are deeply concerned that regulations could be made outside the purposes of the empowering provision and in contravention of consultation requirements, and then almost immediately be sought to be validated by Parliament. In our view this is not an appropriate use of power to make delegated legislation. The proposal to remove rabbit calicivirus from the offence provisions in the Animals Act 1967 should have been addressed by primary legislation. (p 15)

The Government had 90 days (ie until 22 May) to reply to this report. However, the retention of the retrospective validation clause in the Amendment Act, when general retrospective provisions (in s 2) make this unnecessary, tends to indicate that the Government has not accepted the views of the Committee as to the validity of the regulations. This is unfortunate given the need for the Regulations Review Committee to function as a credible constitutional safeguard. Also, a government agency, the Pesticides Board chose to disregard this view of the Regulations Review Committee and granted an experimental use permit (to manufacture and sell RCD preparations) to a medical research company just after the Committee's report was published and brought to the Board's attention. It might appear that in treating the regulations as valid, the Board was merely obeying the law as it currently stood. However the constitutionally correct decision would have been to delay the experimental use permit until the Amendment Act was passed, because the Board may have been liable to the research company if the Amendment Act had not been passed and a Court had found the regulation to be ultra vires.

THE AMENDMENT ACT

The Amendment Act consists of only four sections, but these contain three separate retrospective legalisations. The two provisions in s 2 remove RCD from both the Third Schedule and the savings provision (s 169) of the Biosecurity Act. These would have been sufficient to protect any person who had acted in good faith in the belief that the regulations were valid. It would seem to be unnecessary therefore retrospectively to validate the regulations also, but this was done anyway (s 3(1)).

The Primary Production Committee which considered the Bill was aware of the recommendations of the Regulations Review Committee that the regulations be revoked and the matter be dealt with by primary legislation. These recommendations were consistent with what government intended in the Amendment Bill so there was no necessity for the Regulations Review Committee to recommend the use of s 6(1) Regulations (Disallowance Act) 1989. The Primary Production Committee also received advice from the Crown Law Office that the regulations were effective in making the spread of RCD legal under the Animals Act (Commentary to the Bill). However, the fact that the Regulations Review Committee had clearly disagreed with this advice, and therefore would not wish the regulations to be validated retrospectively if this could be avoided, does not appear to have been understood by the Primary Production Committee. In these circumstances, the view of the Regulations Review Committee should be accommodated if possible, and the solution in this case would have been to revoke the regulation but not to validate it retrospectively and to rely instead on the retrospective legalisation in s 2.

The Regulations Review Committee considered that primary legislation should have been used at the outset, and did not consider that this would have resulted in unacceptable delay. However, if legislation had been introduced in September, instead of the regulations, would it have been passed? At that time the disease was present only in parts of the South Island and it was not spreading well naturally. As government's recent defeat in the House on another matter illustrates, a majority vote cannot always be expected from a Parliament headed by a coalition government. If there had been a report from Australia of a suspected infection of another species, or a case of suspected prey-switching such as the recent report about the yellow-eyed penguins in New Zealand such a Bill could well have been lost.

In order for the passage of such a Bill to have been quite certain, it was probably necessary that RCD was spread through both islands, that responsible agencies such as regional councils were involved, and that a source of professionally made product was available. All this required the legalisation of RCD, and the regulation provided that "legality".

CONCLUSION

Twenty years ago, Sir Geoffrey Palmer, in his forthright analysis of the powers of government, "Unbridled Power" (OUP) warned against the dangers which flowed from the rapid passing of legislation. He added that "unfortunately neither governments nor their leaders seem embarrassed by the methods to which they resort to pass legislation". (p 94) In light of this, maybe we should not be surprised at the methods used by government to ensure the legalisation of RCD. Accordingly, we should not be surprised when law is suspended, other laws are ignored, doubtful regulations come complete with their own retrospective validation legislation, insufficient regard is given to the views of the Regulations Review Committee, and an important body such as the Royal Society is openly snubbed. But we should expect better. Professor Walter Clark, in his address at the end of the RCD Conference explained why it matters:

> Any review of the legal aspects [relating to the introduction of RCD] leads inevitably to the conclusion that the rule of law must prevail if men and societies are to be free, and to be delivered from error. Those who exercise power in New Zealand need to eschew ill-founded arguments of necessity, and to promote real democracy, which is the antithesis of that which we have seen. ❑

LITIGATION

edited by
Andrew Beck

CIVIL CLAIMS FOR SEXUAL ABUSE

END OF A SHORT ERA?

Civil claims for damages in respect of child sexual abuse are something of a phenomenon of the nineties. The emergence of this type of claim has no doubt been prompted by increasing understanding of the psychological nature of the damage resulting from such abuse, and the barriers to recognition of damage by plaintiffs. As might be expected, the law has never been tailored to cater for claims of this nature, and pioneering plaintiffs have encountered a number of difficulties. Until recently the New Zealand Courts had made some contribution to the developing jurisprudence in this field. In light of the latest decisions from the Court of Appeal, however, the question must be asked whether such proceedings remain a reality in practice at all.

DEVELOPMENT OF THE CLAIM

It has been argued that the law needs to develop an appropriate response to the needs of such plaintiffs, and that it is unsatisfactory to treat these claims as simply another instance of assault or battery. Particularly when it comes to limitation issues, it is necessary to accept that child sexual abuse claims require special treatment: see eg Annette Marfording, "Access to justice for survivors of child sexual abuse" (1997) 5 Torts LJ 221; Leanne Bunney, "Limitation of Actions: Effect on Child Sexual Abuse Survivors in Queensland" (1998) 18 Queensland Lawyer 128. Some of the problems are also addressed by Rosemary Tobin, "Civil Actions for Sexual Abuse in New Zealand" [1997] Tort Law Review 190.

As far as the New Zealand Courts are concerned, the response has not been promising. The most enlightened approach has been demonstrated by Cooke P in *T v H* [1995] 3 NZLR 37 (CA), where His Honour noted the ground-breaking statements made by the Supreme Court of Canada in *K M v H M* (1992) 96 DLR (4th) 289. Following that line, he was able to conclude that sexual abuse cases required to be dealt with as a sui generis category, and that the Court ought to shoulder the responsibility of filling a gap where there is no law. He stated that (p 43):

> In these circumstances, in my opinion, no insuperable obstacle arises or need be conjured up to prevent the Courts from holding that a cause of action accrues when the victim has been relieved from the continuing psychological injury sufficiently to enable her to understand the effect that it has had on her life or to feel safe and free to pursue a complaint. That is to say, actionable damage should be treated as not having been suffered until the victim has emerged from the effects of the abuse so far as to be able to make a claim based on it. Once the cause of action has accrued, the victim may sue on all the damage that has occurred previously, as in cases of delayed discoverability.

The other members of the Court, however, distanced themselves from this approach, and held that the question before the Court had to be decided within the existing legal framework.

The unwillingness of the Courts to recognise the sui generis nature of sexual abuse claims means that a number of existing concepts have to be stretched in order to provide at least some accommodation for these claims. The two areas on which attention comes to be focused are the discoverability of damage, and extension of the limitation period by reason of a disability. Before examining these matters, however, it is necessary to consider a further issue: the availability of a remedy.

REMOVAL OF THE EXEMPLARY DAMAGES REMEDY

In most cases, claims for compensatory damages for sexual abuse will be precluded by the Accident Rehabilitation and Compensation Insurance Act 1992. This is because any damage is principally psychological, and one of the few instances in which mental suffering is specifically covered by the Act is where it is the outcome of a sexual abuse offence (s 8(3)).

The main way in which plaintiffs sought to overcome this limitation was by bringing claims for exemplary damages, which were not barred by the accident compensation scheme. These claims enjoyed some success, as illustrated by *A v M* [1991] 3 NZLR 228 ($20,000); *H v R* [1996] 1 NZLR 299 ($20,000) and *B v R* (1996) 10 PRNZ 73 ($35,000).

Since the Court of Appeal decision in *Daniels v Thompson* unreported, 12 February 1998, CA 86/96, the scope for exemplary damages claims arising out of sexual abuse has been considerably curtailed. In that case, the Court of Appeal decided that it was not permissible to claim exemplary damages in situations where there had already been, or would be, a criminal prosecution in relation to the same conduct. The right to bring a claim is effectively limited to those situations where there has not been, and is unlikely to be, a criminal prosecution.

In *Ellison v L* (1997) 11 PRNZ 401, the Court of Appeal expressed the very firm opinion that exemplary damages are limited to serious and exceptional cases, and should be confined to a "modest penalty". As a serious or exceptional case would almost inevitably require a criminal prosecution, the Court of Appeal has all but closed this particular door to bringing a claim for sexual abuse.

The only remaining avenues are claims for compensatory damages where the damage occurred before 1 April 1974, when the first accident compensation scheme came into force, and claims for mental suffering which are not covered by the current Act. Claims of the first type must already be scarce, and claims of the second type would appear to be virtually non-existent.

In those cases which may nevertheless come before the Courts, there are a number of preliminary barriers to potential success.

DISCOVERABILITY

One of the difficulties facing a plaintiff is the fact that assault and battery are torts actionable per se, which means that the cause of action accrues without any proof of damage. By their very nature, claims for sexual abuse are only brought many years after the offending conduct. Where a claim is framed in assault or battery, therefore, limitation becomes an immediate issue.

A possible way around this difficulty has been to plead a breach of fiduciary duty. As the majority of sexual abuse cases involve close relatives, this has been seen as a cause of action offering some potential. In *Daniels v Thompson*, however, the Court of Appeal has confirmed that equity will follow the law in such cases, and there will be no benefit from a limitation point of view in expressing the claim differently. In any event, it appears that damage is not an element of a cause of action based on a breach of fiduciary duty, and the plaintiff is therefore no further ahead.

The only way to success in assault claims is for the plaintiff to establish that there was no recognition of the lack of true consent until comparatively recently. Although this is something of a gloss on the requirement of lack of consent, it has been accepted by the Courts as a way of postponing the limitation period: see *S v G* [1995] 3 NZLR 681 (CA), 687.

While this approach has provided the Courts with a measure of flexibility in assault cases, it becomes difficult to establish the requirement once the plaintiff has reached adulthood. The plaintiff in *H v R* [1996] 1 NZLR 299 succeeded on the basis that he had been, as a result of a "borderline personality disorder", incapable of understanding and acknowledging his problems. It is, however, all too easy to give in to the counter argument that the plaintiff must have known earlier that there was no true consent: see *M v C* unreported, Master Venning, 19 December 1997, HC Dunedin CP 19/97.

Where the plaintiff is able to plead a cause of action in negligence, the prospects are better. The Court of Appeal has accepted that the reasonable discoverability of damage approach which has been adopted in property cases applies equally to bodily injury cases: *S v G* [1995] 3 NZLR 681. In many situations it may be possible to establish that the plaintiff was unaware of psychological damage, or more importantly, the link between the conduct and the damage. The plaintiff may lose out, however, where there has been recognition of some damage but not all of the damage: see *S v G* at 687.

Although *S v G* was pleaded, inter alia, in negligence, the defendant in that case was a medical practitioner who, together with the plaintiff, was a member of a community. The Courts do not appear to have considered whether a claim could be brought in negligence against a relative. In principle, there is nothing against this (following the general approach to alternative claims expressed in *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506). It would, however, seem rather absurd if a technical pleading point like this could make all the difference between being statute-barred and being able to bring a claim 20 or 30 years later on.

Another option which does not appear to have been directly addressed is framing the claim as one of intentional infliction of emotional harm on the basis of *Wilkinson v Downton* [1897] 2 QB 57. Of course *Wilkinson v Downton* was designed to cover a situation not actionable in trespass to the person, but the cause of action so created clearly requires damage as one of its elements. The discoverability principle would therefore be applicable.

If the *Wilkinson v Downton* cause of action is applied generally, it might be a useful vehicle for sexual abuse claims, avoiding the disadvantages of a tort actionable per se. This only serves to emphasise the unfairness of denying plaintiffs a remedy because of the application of archaic limitation rules.

DISABILITY

The other way in which the Courts have been able to overcome the strict limitation barrier is by a liberal interpretation of disability. The scheme of the Limitation Act is to postpone the commencement of the limitation period while the plaintiff is under a disability by virtue of infancy or unsoundness of mind.

In *T v H*, Hardie Boys J said (at 49):

> ... I have no doubt that one who from established psychiatric or psychological causes is unable to bring him or herself to initiate proceedings is to that extent of unsound mind and so under a disability while that condition lasts.

Tipping J went further, and stated that two things have to be established (at 61):

> ... first, that the alleged unsoundness pertains to a part or facet of the mind relevant to and sufficiently inhibiting the capacity to sue; and second that the alleged unsoundness results from a demonstrable and recognised mental illness or disability rather than being just an inability to face up to the process of suing. In short the plaintiff must show that he or she was relevantly disabled by unsoundness of mind.

In *D v A-G* (1997) 11 PRNZ 118, an application for leave to proceed was granted to an applicant in his forties who had been diagnosed as suffering from post-traumatic stress disorder. However, in *P v T* [1998] 1 NZLR 257, the Court of Appeal upheld the refusal of leave by the High Court because there was no evidence of post-traumatic stress disorder or its effects on the applicant.

It is of some interest that the Court of Appeal approved the formulation of Tipping J in *T v H*. The difficulty with this formulation is that it lays stress on a clinical "disorder" rather than a psychological explanation. This has the effect of negating to some degree the liberal approach to unsoundness of mind which has been accepted as a starting point. Once again, it points to the need for a proper understanding of the cause of action rather than an approach based on ad hoc developments.

APPLICATION FOR LEAVE

Even if a plaintiff is able to overcome the substantial limitation hurdles, it will frequently be necessary to apply for leave to proceed. By their very nature, sexual abuse claims are almost never brought expeditiously and an application under s 4(7) of the Limitation Act is to be expected.

In such situations, one may have thought there would be a strong bias in favour of leave, given the public policy considerations involved. This was strongly expressed by the Supreme Court of Canada in *K M v H M* (at 302):

> While there are instances where the public interest is served by granting repose to certain classes of defendants, for example, the costs of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions.

The same considerations must apply in claims for sexual abuse.

New Zealand Courts have, however, tended to be conservative. Although a generous treatment of applicants may be seen in *H v R* and *D v A-G*, the respondents were given the benefit of any doubt in *H v H* [1997] 2 NZLR 700, *P v T*, *M v C* and *S v G*. The conclusion to be drawn seems to be that, even if a victim is finally able to face up to the trauma of suing, it is not likely to be an easy run.

CONCLUSION

In the current climate, victims of sexual abuse are unlikely to enjoy much success pursuing civil actions in New Zealand. The combination of the accident compensation scheme and the attitude of the Courts towards exemplary damages make such claims inherently unsustainable.

Leaving those barriers aside, however, it is clear that the law is ill-equipped to deal with claims of this nature. The rules of limitation have not been designed to cope with the demands of these claims, and unprincipled categorisation of torts contributes to the problems facing plaintiffs. A rethinking of how to achieve justice for victims is clearly required.

PREROGATIVE WRITS

In the February NZLJ I referred to the new rules in Part VII of the High Court Rules dealing with the old prerogative writs. At that time I had not appreciated the effect of R 19 of the High Court Amendment Rules 1997, which does in fact revoke the former RR 630 and 631. The construction difficulties referred to therefore do not arise.

There are, however, a number of problems with the new rules. One of these concerns their application. The old rules were phrased in a way which permitted the Court to grant particular relief in respect of certain applications, such as mandamus, prohibition and certiorari. The new rules have retained these names as headings, but are phrased in terms of applicability to certain situations. For example, R 626 applies when an application is made to review a determination of an inferior Court or tribunal. While this was intended to retain the remedy of certiorari, the rule as expressed overlaps with an application for review under the Judicature Amendment Act 1972.

Not only does this contain the potential for confusion; it is also relevant to the question of undertakings. The old R 630 expressly provided that undertakings were not required in applications for review under the Judicature Amendment Act 1972. This has been replaced by R 627B which requires undertakings in all applications under Part VII. Although the intention is apparently to exclude applications for review, the rewording of the rules in Part VII has created scope for argument and potential confusion.

All this is not aided by the retention of R 628, which continues to refer to the need for a backing sheet, long since abandoned in the High Court Rules. A comprehensive revision of both Part VII and the Judicature Amendment Act 1972 is long overdue.

RECENT CASES

SERVICE OF STATUTORY DEMANDS

In order to be effective, the statutory demand procedure needs to be a streamlined process which is not snagged on technical hitches. It has to be recognised that there are significant issues both for the creditor and for the debtor company. If the Courts adopt an approach which is too technical, this is likely to let debtors escape for no good reason, or to operate oppressively to their prejudice. As the consequences for the debtor are already severe, however, it is important that the Court process should not contribute to further oppression.

A problem relating to service arose in *Livi Investments Ltd v Butler Gilpat Ltd* unreported, Master Kennedy-Grant, 24 March 1998, HC Auckland M1853/97. A statutory demand was served requiring payment at the creditor's solicitors. The debtor company applied for an order setting the demand aside, and served this application at the solicitors' office.

The Court held that there was no basis for assuming that service could be effected on the solicitors, and that there had not been proper service of the application. As the methods of service on companies are laid down in the Companies Act 1993, it was not possible to cure the defect under the High Court Rules. The Master disagreed with *Timbalok NZ Ltd v Sky-Hi Roofing Ltd* (1996) 10 PRNZ 271, where a regularising order had been made.

While it is true that the Companies Act does lay down mandatory requirements for service on companies, that is not the end of the matter. One of the permitted methods of service is as directed by the Court. There does not appear to be any reason why the Court could not retrospectively have authorised service at the office of the solicitors.

The net consequences of upholding a claim of improper service are that the debtor might have to apply for an injunction to prevent the filing of an

application for liquidation. That would be an expensive and drastic step which does not appear to be justified, especially where the creditor has had ample notice of the application within time. It is suggested that, in such circumstances, the Court should search for a better way of doing things.

The Master did make a suggestion that the legislation should be amended to require that the demand itself should specify where payment should be made, as well as an address for service of any application to set it aside. This is a useful comment, which it would be sensible to follow. In the interim, however, it would be unfortunate if too rigid an approach were to be adopted to such matters.

DISPOSAL OF ASSETS TO AVOID JUDGMENT

A practice which has become quite common, particularly in relation to orders made by the Employment Tribunal, is for a judgment debtor to dispose of its business assets to another "phoenix" company, and to carry on trading. The judgment creditor is then left with the prospect of liquidating the company in order to try and salvage something. In most cases, of course, this is a futile exercise because nothing has been left behind, and the judgment creditor will be left out of pocket.

One of the few rays of hope for creditors finding themselves in this position was the judgment of Richard Southwell QC in *Creasey v Breachwood Motors Ltd* [1993] BCLC 480. In that case the English High Court permitted the substitution of the new company as a defendant in proceedings against the judgment debtor. This was done pursuant to Order 15 R 7, the equivalent of our High Court R 101 (District Courts R 98).

That was naturally a very satisfactory position for the judgment creditor, who ended up with a proceeding against the asset-rich company. As far as principle is concerned, however, *Creasey* was difficult to justify as being in line with the purpose for which the particular rule was designed.

That particular avenue has now been closed by the English Court of Appeal decision in *Ord v Belhaven Pubs Ltd* a judgment delivered on 13 February 1998. Hobhouse LJ held that the reasoning in *Creasey* could not be sustained. It was a wrong adoption of the principle of piercing the corporate veil, and a misuse of the power of substitution. This conclusion appears to be correct, and it is likely that it would be followed by a New Zealand Court.

The question remains, of course, as to what a judgment creditor is able to do in such circumstances. The answer, in most cases, is probably very little. If the creditor has advance warning, it may apply for a charging order to protect its position pending judgment. In most cases, events have already progressed past this point.

Where the assets of a company are substantial, there may be a case for having transactions at an undervalue set aside. Where the company has only a small asset base, however, this is not a satisfactory option. The best course of action may be to pursue the directors under s 301 of the Companies Act 1993 for breaching their duties to the company, which may result in a greater pool of assets in the liquidation. A claim for disposition of property with the intent to defraud creditors may also be a possibility, with the added advantage of creating a direct liability between the creditor and the directors.

There may still be a case for ignoring the separate personality of the new company, but this would have to be done by liquidating both companies under s 271 of the Companies Act 1993, or in a fresh proceeding against that company and the persons behind it.

LEGAL AID FOR BANKRUPTCY MATTERS

In *Gray v Legal Services Board* unreported, Potter J, 2 March 1998, HC Auckland HC165/97, a bankrupt was required to attend a public examination by the Official Assignee prior to being discharged. She applied for legal aid to cover representation at that hearing. The High Court upheld a refusal of legal aid by the District Committee and Legal Aid Review Authority.

The Court held that a public examination is an inquisitorial information-gathering process, which is not a "civil proceeding" for the purposes of the Legal Services Act 1991. There was accordingly no jurisdiction to grant legal aid. In addition, the Court expressed the view that a bankruptcy petition is not a "proceeding" because the procedure on such a petition is different from that in conventional proceedings.

It is suggested that this view is wrong. Although "civil proceedings" are not defined in the Legal Services Act, it is clear that anything regarded by the High Court as a civil proceeding would qualify (and it may be noted that s 19(4) of the Legal Services Act clearly describes electoral petitions as proceedings). An examination by the Official Assignee under s 266 of the Companies Act 1993 has been held to fall within the definition of "civil proceeding", justifying the enforcement of a witness summons: *Re Bill Poole Contractors Ltd (in liq), ex parte the Official Assignee* (1997) 11 PRNZ 358. The High Court has also held that legal aid is available for a coroner's inquest (*Burns v Legal Services Board* (1994) 8 PRNZ 94) and communications with the Human Rights Committee (*Tangiora v Wellington District Legal Services Committee* (1996) 10 PRNZ 100).

Under the High Court Rules, a proceeding is any application to the Court for the exercise of its civil jurisdiction. A public examination under s 109 of the Insolvency Act 1967 is conducted by the Court, and requires a decision by the Court. This is the exercise of a civil jurisdiction at the instance of the Official Assignee. Should there be any doubt, however, it is suggested that the interpretation must be in favour of permitting legal aid. To deprive a citizen of the possibility of legal aid for representation in Court is a serious step. Had this been the intention of the legislature, one would have expected a specific exclusion in s 19.

That is a fortiori the case with a bankruptcy petition. It is only a historical accident that bankruptcy matters are commenced differently from other proceedings; that position has subsequently been altered in relation to company liquidations. More importantly, however, it cannot be right to allow the availability of legal aid to be determined by a technicality of procedure. A bankruptcy petition is a matter of enormous significance to the individual concerned, and it would be extremely unfortunate if legal aid were now to be considered unavailable for all bankruptcy related matters.

As a matter of principle, legal aid applications should be determined by the merits of the particular case rather than by blanket jurisdictional interpretations. ❑

UPDATES ON YOUR MATERIALS

STUDENT COMPANION

edited by
Richard Scragg

COMMERCIAL LAW

Richard Scragg

Personal Property Securities

ICI New Zealand Ltd v Agnew [1998] 2 NZLR 129 (CA).

There was no provision for registration of retention of title (Romalpa) clauses under s 102(2) Companies Act 1955. Such clauses are effective without registration. It is, however, possible for a "complex" clause to amount to a "charge" in which case it becomes registrable under s 102(2): *Re Bond Worth Ltd* [1980] Ch 228.

ICI supplied pellets to the buyer to enable the buyer to produce plastic jars and bottles. The contract contained a retention of title clause. The manufacturing process did not involve the "mixing" of goods but a change in the character of the pellets. The buyer went into receivership and then liquidation. ICI claimed to recover, under the contract, not only unused stock – over which there was no contest – but also finished containers manufactured from the pellets. The High Court held that the retention of title clause amounted to a charge which, as it had not been registered, was void against the receivers and the liquidator. ICI appealed.

The judgment of the Court of Appeal was delivered by Henry J. The Court dismissed the appeal. The pellets used to produce the containers lost their identity in the manufacturing process. It was not relevant that the process could be reversed to reconstitute the pellets. As a matter of construction, the contract provided that the ownership remained with the seller whilst the original identity of the pellets remained intact but terminated when the identity was lost in the manufacturing process. The contract did not attempt to vest all manufactured product in the seller, only such proportion of it as in value equated to current indebtedness. On a proper construction, this amounted to a floating charge.

Prior to the determination in this case, John de Lacy in an article entitled "Retention of Title Clauses and Claims against Processed Goods: a Contrast in Approaches" (1998) 16 Company and Securities Law Journal 59, noted a fundamental difference of approach taken by the Courts in England and those in New Zealand to the issue of transfer of title in situations involving the processing of goods. The author compares *Chaigley Farms Ltd v Crawford, Kaye & Grayshire Ltd* [1996] BCC 957 with *Re Weddel Ltd* (1996) 5 NZBLC 104,055. He concludes that, in New Zealand, any manufacturing process that does not involve the addition of extraneous material to the end product will not cause title to be transferred from seller to buyer. The position in England is different. Had *Re Weddel Ltd* been decided there, the Court would have deemed title to pass from seller to buyer as soon as there was a change in the character of the goods, the retention of title clause notwithstanding. Although *ICI New Zealand Ltd v Agnew* goes against de Lacy's argument, there may be a distinct difference in approach emerging between the two jurisdictions with the English Courts more inclined to be reluctant "to uphold proprietary interests in an area which is perceived best suited for security interest classification".

This case will be the subject of an article in the July issue of NZLJ.

VIN Numbers

The rule *nemo dat quod non habet* has traditionally been at the heart of many disputes involving private sales of motor vehicles. The regime under the Motor Vehicle Securities Act 1989 has provided a means of ameliorating the problems with such sales. When a system of Vehicle Identification Numbers (VINs) was introduced into New Zealand in 1993, it was obvious that VINs should be used as a principal means of identifying vehicles for the purposes of registering and searching security interests under the Motor Vehicle Securities Act 1989. Each VIN is unique, unlike a chassis number, and is therefore provides a superior method of vehicle identification. Each VIN is recorded in the Land Transport Safety Authority's computer and owner and vehicle identity are combined with periodic vehicle inspection.

From the 1996/97 Financial Review of Vehicle Testing New Zealand Ltd (VTNZ), a Report of Parliament's Transport and Environment Committee, it appears that the VIN system may not be foolproof and, moreover, may itself give rise to *nemo dat* problems. The Report finds a loophole which enables the allocation of VINs to vehicles which have false documentation. In the year under review, VTNZ's revenue from VIN inspections increased, resulting from a rise in the number of imported Japanese vehicles. This led the Committee to become interested in VTNZ's inspection process. Under this process VTNZ must verify a vehicle's identification data before applying a VIN but the verification is dependent on information supplied to VTNZ. It appears that VTNZ does not challenge a vehicle's documentation and this means that a deliberate misrepresentation of a vehicle's origin, age or model number could pass undetected, although VTNZ investigates where a vehicle obviously does not match its documentation. The Committee proposes that VTNZ should not simply rely on information supplied to it but should verify a vehicle's documentation for itself. If the VIN system is to function effectively, numbers should not be allocated until VTNZ can be certain of the history of each vehicle under consideration. For things to be otherwise

only undermines the purpose of the system which should stand as a safeguard against the problems of *nemo dat quod non habet.*

TORTS

Rosemary Tobin

Personal Injury

The definition of personal injury in the accident compensation legislation excludes the mental injury of a secondary victim. In *Palmer v Danes Shotover Rafts Ltd*, High Court, Invercargill, CP 10/97, 18 March 1998, Panckhurst J, Mr Palmer was such a victim. He sustained serious mental injuries when he witnessed his wife's death in a rafting accident. As a result, he brought an action seeking both compensatory and exemplary damages for the injury he sustained. The defendants sought to have the action struck out.

Master Venning followed *Kingi v Partridge* (unreported, High Court, Rotorua, CP 16/93, 2 August 1993, Thorp J) and struck out the claim for compensatory damages. The plaintiff sought a review of the Master's decision. Panckhurst J allowed this application, observing as he did so that should leave be sought to appeal against his decision, he would be inclined to consider the application for leave without a further hearing.

Panckhurst J's decision is surprisingly short. His Honour focused on s 14(1) of the Accident Rehabilitation and Compensation Insurance Act 1992, and decided that the natural and ordinary meaning of s 14(1) did not extend to a secondary victim of an accident. Instead it was the clear intent of the section to prevent persons who suffered a "personal injury covered by this Act" from also bringing proceedings for damages. This meant that Mrs Palmer herself, through her personal representatives, could not have pursued an action.

In addition, His Honour did not accept that Mr Palmer's action was one which arose directly or indirectly out of a personal injury which was covered by the legislation. That interpretation, he noted, involved reading the references to "suffered by any person" in the section as not relating back to the direct or indirect injury of the same person. Similarly, he was not attracted to the argument that the use of the words "whether by that person or any other person" confirmed that the intended operation of the section extended to a secondary victim. The words were instead apposite to cover the situation where proceedings were brought by the personal representative rather than by the primary victim.

The interpretation of s 14 that it does not bar proceedings brought by a secondary victim was one which the "prominent persons" report *Accident Compensation 1995* accepted as a possibility. The report raised this and other issues, offered potential solutions, and then left the matter open for discussion. Discussion will certainly proceed rather faster if the Court of Appeal upholds Panckhurst J and allows the action to proceed to trial. Personal injury actions could once again feature in New Zealand Courts.

INTELLECTUAL PROPERTY

Susy Frankel

Copyright

Telecom v Colour Pages Ltd (14 August 1997, HC, Wellington, CP 142/97).

This application for an interlocutory injunction raised some interesting issues concerning what in copyright law amounts to an "original literary work". The facts involved the alleged copying by Colour Pages of the Yellow Pages of Telecom's telephone directories. Colour Pages had used, and had plans to use again, Telecom's Yellow Pages to establish its own Colour Pages' telephone directories. It was these "planned" uses of its Yellow Pages which Telecom sought to prevent by an injunction.

How Telecom compiled its directories and the use Colour Pages made of those directories is fully set out in the case. Colour Pages had purchased Telecom's Yellow Pages and a set of Telecom's business search disks (a Yellow Pages product). This purchase was documented in correspondence between the parties, including Colour Pages statement that "it is not Colour Pages" intention to breach copyright.

The interlocutory injunction was not granted because McGechan J considered damages would be an adequate remedy. As this was an application for an interlocutory injunction the applicant was required to argue that there was a serious question to be tried. In this context McGechan J considered the meaning of "original literary work". Colour Pages argued Telecom's Yellow Pages were not protected by copyright because they were not original. In essence the dispute between the parties was whether extensive labour, known as "sweat of the brow", was enough to establish originality, or if something more creative is required. English authority supports the approach that "sweat of the brow" is adequate to establish originality and the requirement of something extra is supported by United States authority. McGechan J reached the limited conclusion that the position in New Zealand was not definitively settled and could not be settled in an interlocutory proceeding of this nature.

The telephone directory has been the subject of some much discussed North American copyright cases, which involve an analysis of what amounts to an original literary work. (See *Feist Publications v Rural Telephone Services Co* F113 L Ed 2d 358 and *BellSouth Advertising & Publishing Corp v Donnelly Information Publishing Inc* (1996) 33 ITR 587 and *TeleDirect Publication Inc v American Business Information Inc* (1996) 35 ITR 121.)

Trade marks

Cussons (NZ) Pty Ltd v Unilever plc (PC No 35 of 1997, 20 November 1997) concerned the trade mark RADIANT. Unilever had registered this trade mark in New Zealand in 1947, but had never used it. However, it maintained the registration. In 1988 Cussons acquired rights to use RADIANT in Australia. In 1995 it wanted to launch its Australian RADIANT products in New Zealand, but discovered Unilever's registration. On 12 July 1995 Cussons wrote to Unilever seeking to purchase their registered RADIANT mark. Not long after Unilever received Cusson's letter, Unilever made a new application to register RADIANT as a mark associated with its existing registration of RADIANT. This application was filed on 21 July 1995. After reaching no agreement with Unilever, Cussons one year later, in July 1996, applied to have Unilever's 50-year old RADIANT registration removed on the grounds of non-use under s 35(1) of the Trade Marks Act 1953. That section provides "... a registered trade mark may be taken off the register ... on the ground[s] ... a continuous period of five years or longer [has] elapsed during which ... there was no bona fide use thereof ...". As the mark, which was registered in 1947, had not been used for 50 years it was vulnerable to removal. But what about the new registration of RADIANT?

The Privy Council upheld the Court of Appeal's judgment in favour of Unilever, in particular its findings:

(a) it is possible to obtain a duplicate registration for a trade mark; and
(b) s 35(1) of the Trade Marks Act 1953 should be interpreted so that the non-use of one registered mark cannot attach to another registration, even of an identical mark.

The PC considered that a duplicate registration could be made. Nothing in the Act prevented it and the wording of s 32, which allows for registration of associated marks, supports the making of duplicate registrations.

The PC considered whether the five year period of non-use of a registered mark, required for removal, under s 35(1), must be shown for both the 1947 and the new registration, or whether the non-use of the 1947 registration could be relied on to show non-use of the new registration. The PC upheld the CA finding that as s 35(1) refers to "a registered trade mark" each registration had to be considered separately. As the new registration of RADIANT was not a registered mark, which had not been used for five years from registration, it could not be removed under s 35(1).

The WTO and patents

India-Patent Protection for Pharmaceutical and Agricultural Chemical Products Report of the World Trade Organisation Dispute Settlement Panel (WT/DS 50-year/R, 5 September 1997) and Report of the Appellate Body (WT/DS 50/AB/R). These reports can be found on line at:

http://www.wto.org

The WTO Dispute Settlement Body considered its first intellectual property dispute late last year. The complaint was brought by the US against India. The US argued that India had not complied with its obligations under the Trade Related Intellectual Property Rights Agreement ("TRIPS"), in particular, that India had failed to provide adequate protection for pharmaceutical and agricultural-chemical products. The first instance Dispute Panel found India in breach of its obligations and the Appellate Body upheld this finding. The Reports of the Dispute Settlement Panel and the Appellate Body are lengthy and complicated, but they make interesting comments about how TRIPS should be interpreted. The Appellate Body considered that it was important to consider the "legitimate expectations" of the parties, but that it should be presumed that those legitimate expectations were reflected in the language of the TRIPS Agreement and that it was not legitimate to look outside the actual words used in the Agreement. In addition, the Appellate Body stated "... we do not agree ... that the legitimate expectations of members and private right holders concerning conditions of competition must always be taken into account in interpreting the TRIPS Agreement".

EVIDENCE

Bernard Robertson

Forensic science

In *R v Dennis John Adams (No 2)*, 16 October 1997, the English Court of Appeal considered for a third time the presentation of DNA evidence. Detailed discussion of the previous two judgments will be found at [1997] NZLJ 210 and 247. There has been no such discussion in the New Zealand Court of Appeal so far.

The Court suggested that "perhaps" juries will apply the DNA evidence to the population of the UK and consider how many people are not excluded by the DNA evidence as being the source of the mark. They would then consider whether the defendant was one of those people and go on to ask themselves whether the defendant was the perpetrator by considering the other evidence in the case.

This seems unusual in that it instructs juries in what order to consider items of evidence. The Court also suggested that if the DNA evidence were not accepted by the jury that would be the end of the case. That should be read as referring only to the facts of that case, since the prosecution is not usually required to prove any particular sub-issue or item of evidence to any particular standard (*R v Thomas* [1972] NZLR 34 (CA) esp Turner J).

The central issue was the use of Bayes Theorem to combine items of "non-scientific evidence". This was discussed more fully at [1998] NZLJ 131. In essence, the Court repeated the views of the previous Benches (who had not heard argument on the point) that juries should not be instructed in detail on the use of Bayes Theorem. However, the Court failed to give any directions on how such evidence is to be combined with scientific evidence.

Meanwhile, in the USA the FBI announced that in future it would give a positive identification, in other words say that "this sample came from this person", in the manner of a fingerprint examiner, whenever the likelihood ratio exceeded 260 billion. This would mean that there was a 1 in 1000 chance or less that there was another person in the USA with the same DNA profile.

LAND LAW

Julia Pedley

Legislation: Overseas Investment

Legislation amending the Overseas Investment Act 1973 was passed on 24 March and received assent on 27 March. The Overseas Investment Amendment Act 1998, which is expected to come into force mid-year, makes a number of changes to the Overseas Investment Act 1973, implementing some key policy initiatives relating to overseas investment announced by the Coalition Government in December 1996.

One of the most significant changes is the introduction of an open market requirement, whereby farm land, (which is now also defined in the Act), or an estate or interest in farm land in New Zealand or securities or rights or interests in securities involving farm land or an estate or interest in farm land in New Zealand, must first have been offered on the open market to New Zealanders (persons who are not overseas persons), before it can be sold to an overseas investor. This open market requirement may however be waived at the discretion of both the Minister of Lands and the responsible Minister, (currently the Treasurer).

The Act establishes different consent criteria to be applied, depending upon whether the overseas investment concerns farm land. Where the application concerns farm land, the test is higher in that before granting consent to an overseas investment, the Minister and the Minister of Lands must consider whether the investment will, or is likely to, result in substantial and identifiable benefit to New Zealand or any part of New Zealand.

Also of significance is the reduction in the area of foreshore land requiring approval as overseas investors wishing to purchase foreshore land must now obtain consent when the land is 0.2 hectares, (lowered from 0.4 hectares). Other changes relate to matters of definition and clarification, including that for the purposes of the Act a person is not ordinarily resident in New Zealand if that person is not entitled (under the Immigration Act 1987), to be in here indefinitely.

Legislation: Maori Land

The recently enacted Maori Reserved Land Amendment Act (No 2) 1998, results in yet further changes being made to compensation provisions for lessees of Maori reserved lands following the move to market rentals (See LAND LAW, *Student Companion*, [1998] NZLJ 135). Under the controversial Maori Reserved Land Amendment Act 1997, where the lessee elected to have compensation determined by the Land Valuation Tribunal, the Tribunal had to determine the market value of the lessee's interest as at 1 January 1998 as if the 1997 Amendment Act had not been enacted, and the market value as at 1 January 2001. Under such a determination, a "before" and "after" value would be ascertained. The compensation payable would be the difference between the market value at 1 January 1998 and the market value at 1 January 2001.

Many lessees, however, considered that the 1997 Act did not make it entirely clear that the 1 January 1998 valuation was to be made as if the 1997 amendments had not been enacted. Concerns were also expressed about the three year time gap between the two valuation dates. These latest amendments, which came into force on 16 March, are therefore a statutory attempt to allay these concerns. The amendments provide that, where the lessee elects to have compensation determined by the Land Valuation Tribunal, the Tribunal will determine both the estimated and actual values of the lessee's interest in the lease as at 1 January 2001. This determination will be made (a) on the basis of what the market value would have been, as at 1 January 2001, if both the 1997 and 1998 amending legislation had not been proposed or enacted, and (b) on the basis of what the market value is as at 1 January 2001, in the light of the enactment of the 1997 and 1998 legislation. The amount of compensation payable to a lessee under this elected valuation will be the difference between (a) and (b).

BANKING LAW

Lynne Taylor

Guarantees

Wilkinson v ASB Bank Ltd (1998) 6 NZBLC 102,427

This decision of the full Court of Appeal, is notable for ten general observations concerning the circumstances in which a guarantee may be set aside because of a creditor's actual or constructive knowledge of undue influence or misrepresentation on the part of a principal debtor.

The point in issue was whether the respondent bank had taken reasonable steps to allay a suspicion that the principal debtor had exerted undue influence on his wife – the guarantor. The Court of Appeal noted that in order for a bank to show that it had taken reasonable steps the prudent course was for it to insist that the guarantor be given advice by an independent solicitor and to obtain a certificate from that solicitor that the effect and implications of the guarantee had been explained to the guarantor and that the guarantor appeared to have understood the explanation. In the present case the bank had complied with the suggested prudent course.

The Court of Appeal stated that, save in a number of exceptional circumstances, a bank was entitled to rely on a solicitor's certificate. The first exception was when an outside observer, knowing what the bank knew, would have concluded that the solicitor was incapable of giving independent advice. The Court later noted that it cannot be assumed that a solicitor is incapable of independently advising a guarantor merely because he or she has had past dealings with the principal debtor. A further exceptional circumstance would arise, said the Court, when the substance of a transaction or a term of a security or guarantee was so disadvantageous that no solicitor could properly advise execution. In these circumstances the prudent course was for a bank to obtain a certificate from an independent solicitor to the effect that this had been pointed out to the guarantor. In the present case neither of the above described exceptional circumstances were found to exist and the respondent bank was able to rely on its solicitor's certificate to allay the suspicion of undue influence.

McKay v National Australia Bank Ltd [1998] 1 VR 173

The decision of the Supreme Court of Victoria in this case is a salutary reminder that if a guarantee is not in the form of a deed then a creditor must supply consideration in order to be able to enforce it. The appellant guarantors executed a guarantee at the request of the respondent bank in order to increase the amount of security held by the respondent for the principal debtor's outstanding account. The respondent could not point to any advances made to the principal debtor as a result of the guarantee and it did not seek to establish that it had refrained from taking action against the principal debtor at the express or implied request of the appellants.

Argument centred on whether the respondent bank had supplied the other form of the consideration expressed for the giving of the guarantee, namely, the provision of banking accommodation to the principal debtor. At first instance it had been held that the respondent bank, in allowing the principal debtor's account to remain in debit, had provided banking accommodation. The Supreme Court of Victoria disagreed. Winneke P held that the ordinary meaning of the phrase suggested the provision of credit or making of advances and that it did not encompass the continued suffering by a bank of an unpaid debt in an unclosed account. Ormiston JA stated that continued acquiescence in an existing state of affairs did not amount to the provision of banking accommodation. Consequently, the guarantee was unenforceable for want of consideration.

Madden v UDC Finance Ltd (1998) 6 NZBLC 102,403

The appellants guaranteed an advance made by the respondent to the principal debtor. The advance was to be repaid in 36 consecutive monthly instalments. At the time the security documents and supporting guarantee were signed the date of the advance remained uncertain and thus the dates for the first and subsequent repayments were left blank – it being agreed that these dates would be inserted by the solicitors acting in the transaction when the date of the advance became known. This was duly done. The Privy Council rejected an argument that the insertion of the date was a material variation to the guarantee which rendered it unenforceable because the variation was not evidenced in writing as required by s 2 of the Contracts Enforcement Act 1956. The Privy Council described the insertion of the date as a matter of pure form rather than of substance and which in no way altered the written agreement between the parties.

The appellants also argued that their liability was discharged because they were deprived of a right to seek a contribution from a co-guarantor. The Privy Council rejected this argument because of the existence of a clause in the guarantee which ousted the application of matters which would ordinarily operate to discharge a guarantor. ❑

MEDIATION AND LAWYERS – A LIKELY MARRIAGE?

ALTERNATIVE DISPUTE RESOLUTION

edited by
Carol Powell

Paul Hutcheson
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In teaching mediation at university to adult students for the past three years I have observed the high numbers of solicitors eager to learn the beguiling ways of mediation. Historically in New Zealand and overseas this field has developed to create an alternative to traditional legal methods. When classes have also comprised non-lawyers who express disquiet at what they see as the encroachment by their legally qualified brethren, my professed mediating abilities have been called upon. Are we to see a turf battle develop?

Lawyers may certainly feel mediation is a legitimate domain into which they can develop their interests. Their familiarity in dealing with complex issues and a proximity to the negotiation process by which many files are settled, may be seen from a lawyer's perspective as a good preparation for a mediator. Counsel are often involved directly in the mediation process, although their role seems to be rarely properly defined. Many jurisdictions in the United States require attorneys to advise clients of the availability of mediation. A review is at present under way in New Zealand into the place of mediation in the High Court. Inevitably it seems lawyers will be integrally involved with mediation.

This spectre – whether as solicitors acting as the third party facilitator or as counsel for a party – is considered anathema by many within the mediation community. Lawyers are accused of being incapable of abandoning positional bargaining, and of epitomising the adversarial process, for which mediation is an alternative. Non-lawyer detractors fear the introduction into mediation of an emphasis on the "legalities".

In the private sphere particularly there is this fear that mediation could develop into a preserve of lawyers. Many private mediators inevitably struggle when they do not have well-developed links with the legal profession (which is the major source of referral). The term "private" is used here to make a distinction from the statutory-related mediation such as the Employment Tribunal, Tenancy Services, etc. At New Zealand's present stage of developing mediation it would be unfortunate if the field became overly represented by any one particular influence, whether by regulation or market realities. There is a continuing need for a range of options.

The reality is that mediators present a spectrum of styles from which to select, ranging from a process through to a substantive focus. A process approach tends to emphasise that, with assistance from the mediator, parties work through the issues themselves, whereas a substantive mediator becomes more directly involved. Commentators would generally agree that the process orientation is a more successful way of mediating. Most aspiring mediators invariably classify themselves as operating at this end of the spectrum. A generalisation based upon observing those learning in this area would be that lawyers tend to be more comfortable with the substantive approach. This is characterised by the mediator working by way of a defined structure, proffering opinions and recommendations.

Some kinds of disputes may require particular knowledge on the part of a mediator (whether of legal or other nature). However, the orthodox view is that it is more important that a mediator be an expert in assisting the negotiation process rather than someone who can give advice on substantive issues. Indeed there are ethical difficulties for the mediator/lawyer, as legal advice cannot be given by a solicitor who is acting as a mediator.

I remember a particularly valuable lesson from my formative days of learning mediation in workplace disputes. While initially reluctant to actively involve trade union officials in mediations over negotiating personal grievances, I grew, over ten years, to understand there was value in doing so. From their experience and understanding of the workplace, they knew what was a "good bargain" as opposed to an individual employee who invariably had intensified feelings of right on their side. Similarly lawyers can offer a wealth of experience to negotiations. My personal preference as a private mediator now when working through both the premediation discussions and in the process itself, is to follow a strategy of inclusiveness. To involve those necessary in the mediation inevitably seems to reap a satisfactory process and outcome. Therefore, where it is appropriate, as a mediator I have developed strategies of involving legal counsel.

To identify what mediation can offer that is different from the traditional options, it is sometimes necessary to use jargon. Hence, the line of the mediator-marketeer is that mediation empowers the participants. Because parties are centrally involved rather than losing control of the decision-making process, mediation is ultimately more effective. Therefore, the less the mediator influences the outcome and the greater the involvement of the parties, the more successful the mediation will be – regardless of the shackles with which mediators may be encumbered through their professional association.

To summarise my view on the issues of lawyers, control and empowerment, a brief personal impression. I am regularly asked if the fact that I am blind is a disadvantage. While I am convinced my visual disability has never been a problem in my 75 mediations which range from commercial to community disputes, I certainly do believe that being legally qualified and work-experienced as a social worker has disadvantaged me. As someone with professional experience, when mediating I often feel that I know the answers to the dilemmas faced by the parties. In our working careers we are accustomed to listening to and solving problems for people. The most effective mediators (whether we are to be condemned by our legal training or not) are actually best positioned to assist the parties in a real meaningful way if we do NOT know the answers. A mediator's energy is for unlocking the problems. The parties themselves are then the most appropriate people to find the solutions. ❑

CASENOTE

The Arbitration Act 1996 has now been in force for nearly a year and counsel need to take special care with the transitional provisions. In some cases for example an arbitration may be governed by the 1908 Act but any appeal of an award made would fall under the 1996 Act. This is of particular significance because the right to appeal under the 1996 Act is substantially different from the right under the previous legislation.

This was the situation in *Camatos Holdings Ltd v Neil Civil Engineering (1992) Ltd* (HC, 27 May 1998; Giles J, Auckland, HC189/89), which was an appeal from an arbitrator's award.

In that case the parties had entered into a construction contract on the NZS 3910:1987 general conditions with amendments. On 26 September 1996 the respondent elected arbitration to determine differences which had arisen between the parties relating to responsibility for and consequences of delayed completion of the contract works. An arbitrator was nominated who was not qualified in law. He accepted the appointment in accordance with his own standard terms and conditions, cl 5 of which provided:

> The Arbitrator shall finally decide the differences, including all questions of law involved.

After points of claim and defence had been exchanged the Arbitrator identified certain legal issues which were to be determined prior to the substantive hearing. These related to (i) the enforceability of a clause which appeared to be a penalty clause in addition to a liquidated damages clause, and (ii) whether the appellant was entitled to claim its actual losses arising from the delay in addition to the liquidated damages provided for in the contract.

The Arbitrator made a preliminary indication of his views following a preliminary hearing and later confirmed those views in his final award following a full hearing. He held that the clause in question was a penalty clause and should be struck out. He went on to hold that the developer (appellant) was confined to the recovery of liquidated damages specified in the contract for the relevant period of delay and that the appellant could not recover its actual losses if they were in excess of the amount quantified as liquidated damages. Those determinations were appealed.

Leave to appeal was granted by consent but at the substantive hearing of the appeal the respondent took the point that the parties had agreed that the Arbitrator would decide all differences between them, including all questions of law and that accordingly the Court had no jurisdiction on appeal. While His Honour Giles J took the view that the time for taking this point was at the application for leave he nonetheless expressed his views on the issue, notwithstanding anything that he said is obiter.

It was acknowledged by both counsel that at the time the arbitration proceedings were commenced (26 September 1996) the 1996 Act was not in force but that the 1996 Act governed the Award, which was issued after the new Act was in force.

Counsel for the respondent argued that while arbitration had only been elected in general terms, the parties had agreed that the Arbitrator would have the power to determine questions of law and that the two issues before the Court were questions of law which arose from the pleadings and were identified by the Arbitrator in the course of the arbitration. As such the questions fell into the exclusive jurisdiction of the Arbitrator and there was nothing for the Court to review.

Counsel for the appellant made two submissions (i) that the "specific referral of law" principle only applied where the issue actually submitted to the Arbitrator was the legal question challenged. Contending that while the issues had been the subject of preliminary questions, they nonetheless were questions formulated "in the course of determining the question submitted for decision"; and (ii) that cl 5 of the Second Schedule to the Arbitration Act 1996 applied, which provides:

5. Appeals on questions of law –
   (1) Notwithstanding anything in arts 5 or 34 of the First Schedule, any party may appeal to the High Court on any question of law arising out of an award –
      (a) If the parties have so agreed before the making of that award; or
      (b) With the consent of every other party given after the making of that award; or
      (c) With the leave of the High Court.
   (2) The High Court shall not grant leave under subcl (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.
   (3) The High Court may grant leave under subcl (1)(c) on such conditions as it sees fit.

Counsel submitted that because the parties had not specifically opted out of the provision, it was available and further that leave had been granted by consent.

Giles J considered, in particular, the decision in *Barnes v Minister of Inland Revenue* (CA 207/97, 28 April 1998). He also discussed in some detail the Law Commission notes in its 1988 Preliminary Paper no 7 on Arbitration and subsequent reports where discussion is contained on the UNCITRAL model (which is incorporated as the First Schedule in the 1996 Act) and in particular the lack of any right to appeal. In the Commission's published report

"Arbitration" in 1991 the Commission concluded that a departure from the UNCITRAL model was appropriate and this was eventually enacted as cl 5 of the Second Schedule of the 1996 Act, thereby ensuring that the Court retains jurisdiction.

Giles J concluded that the 1996 Act confers a right on the parties to agree that there be no right of appeal by specifically excluding the operation of cl 5 of the Second Schedule.

> If that is done, then no question of law at all can be reviewed by this Court. But, unless that right is exercised, an appeal on point of law remains available if:
>
> (a) The parties have expressly so agreed.
>
> (b) After publication of the award the parties consent.
>
> (c) The Court grants leave.
>
> In my view, the conferring of a discretionary power to grant leave to appeal, may in fact, extend the Court's jurisdiction in arbitration.

Giles J went on to say:

> It is the role and function of the Courts to determine the law and, in my view, it requires clear words for parties to be denied an opportunity to test the correctness of a legal finding made by an arbitrator, especially a non-legally qualified arbitrator. That is the reason why the expansive approach to "error of law on the face of the record" developed and, in my view, it is the justification for cl 5, Schedule 2.
>
> The doctrine of specific referral of law no longer prevails. If cl 5 applies, the parties may invoke it. If the point of law is substantial then leave can be given. Inconsequential errors – those that have no effect on the outcome – are unlikely to be entertained. If the question involved is a legal question submitted to a legally qualified arbitrator, that may be a factor in the discretion but the specific referral rule must yield to cl 5 and the overall justice of the case.

The Judge held that the appellant was entitled to pursue appeal on the point of law.

Upon reviewing the questions for review Giles J confirmed the substantial body of law dealing with the concept of liquidated damages and the concept of penalty damages. He found that:

> the parties [had] deliberately identified two completely separate kinds of damage said to be recoverable under the contract in certain circumstances.
>
> ... They settled upon $4,300 as liquidated damages, and then quite separately incorporated a penalty provision which, in circumstances where there is a liquidated damages agreement, cannot be treated as a liquidated damages provision. The clause amounts to nothing more than a private fine for delay. Its only purpose in terrorem. It cannot be described as a genuine attempt to pre-estimate damages.

The Judge rejected counsel's argument that *Turner v Superannuation and Mutual Savings Ltd* [1987] 1 NZLR 218 established the principle that even where there was a liquidated damages provision a party could sue for greater losses and found for the respondent on both questions.

Counsel: A E Hinton for appellant (Peter E Newfield)
L R Symons for respondent (Chamberlains) ❑

BOOK REVIEW

Mediation Principles, Process, Practice Boulle, Jones & Goldblatt NZ ed Butterworths, 1998

This text is hot off the press this month. It could be termed a "lawyer mediator" book in its approach and structure and indeed it is acknowledged in the Preface that it has a legal focus. The book is divided into three sections: Principles, process and practice – as the book's title suggests.

The first section of the book is aimed at a practitioner who deals with clients in dispute providing discussion and theory on mediation as a process, the different ways in which mediation is practised, what disputes are suitable for mediation, what other processes are available and lastly the selection of a mediation and preparation for a dispute. It is not really a section for an experienced mediator

The Principles section has a rather elaborate discussion of the difficulties of defining mediation and then moves on to consider the features of mediation distinguishing between those features which are "core", such as there being a third party assisting in a decision making process, from those which are secondary, such as assisting parties to clarify and identify their needs and interests, and variable features being the extent to which the process is voluntarily entered into and the qualification, expertise and skill of the mediator.

This is followed by theoretical discussion on issues such as where mediation can be used, whether mediators should be neutral and whether the process should be voluntary.

The authors have suggested four models of mediation: settlement mediation, facilitative mediation, therapeutic mediation and evaluative mediation, indicating that each quite different approach has advantages in certain types of disputes and disadvantages in others. They propose that mediators from different backgrounds may practice using one or two of these models rather than others. They particularly differentiate between barrister mediators, those with a counselling background and others. They submit that several of the models used rely on other factors such as the status of the mediator (eg barrister in settlement mediation) or knowledge of the subject matter of the dispute, rather than expertise in the process and skills of mediation itself.

There is some discussion of conflict and negotiation theory and where mediation sits in the justice system. Mediation is contrasted with a number of other dispute resolution processes such as conciliation, negotiation, arbitration facilitation and litigation and factors which influence the suitability of a dispute to the mediation process are raised.

This is followed by a practical guide on when and how to select the process and how to go about choosing a mediator and setting up a mediation.

The second section deals with the mediation process. It describes the stages of mediation and some variations on the process. It devotes a chapter to the functions of a mediator, the parties, their lawyers and third parties involved in the process. Eleven possible mediator functions are discussed: developing trust and confidence, establishing a framework for cooperative decision-making, analysing the con-

flict and designing appropriate interventions, promoting constructive communication, facilitating negotiation and problem-solving, educating the parties, empowering the parties, imposing pressure to settle, promoting reality, advising and evaluating and terminating the mediation. These are discussed in general terms and there are no skill-building exercises included.

There is a chapter devoted to mediator skills and techniques which contains some useful discussion of techniques and when they can be useful coupled with examples of implementation of those techniques.

The third part of the book deals with the practice of mediation. It contains a comprehensive section on the diversity of mediation practice in New Zealand, areas of mediation practice, including information about some of the mediation initiatives such as cool schools, mediation weeks and restorative justice.

The quality, standards and accountability section discusses mediator training, the accreditation schemes run by AMINZ and LEADR and standards and guidelines. It also looks at some of the unresolved issues such as mediator liability and fiduciary obligations.

There is in depth consideration of legal issues such as mediation clauses – content and enforceability, privilege and confidentiality and a more general discussion of mediation trends.

The text is one which is likely to find its way on to the shelves of most lawyers who are involved in mediation practice, particularly those who tend to act for a party in a mediation rather than as mediator. The focus of the book is analytical rather than practical. It will clearly be very useful as a guiding text on the issues associated with mediation and its practice. ❑

COOL SCHOOLS – PEER MEDIATION

The *Cool Schools* programme has been quietly infiltrating New Zealand schools, at both primary and secondary levels, at the rate of ten each month. To date over 900 schools throughout the country participate in this peer mediation system which was developed by Yvonne Duncan of the Foundation for Peace Studies. A number of the schools which have adopted the programme have shown a marked increase in the atmosphere of the school as the programme has developed.

The essence of the programme is to reduce violence in schools by teaching students, at all levels, appropriate conflict resolution skills. Students are helped to develop life long conflict management skills. Students themselves act as mediators when their peers are involved in a conflict and want to find a resolution.

The training involve teachers and students learning how to act as third party mediators. This concept of "whole staff training" is aimed at ensuring that staff and students understand and support the programme.

The programme teaches the same mediator skills that are used by mediators in the commercial world, such as active listening, the use of open and closed questions, recognising different ways of dealing with conflict, understanding how mediation works and learning how to remain calm when put under pressure. Up to 10,000 peer mediators are active in *Cool Schools* today, which is ten peer mediators in the school system for every one mediator in the commercial workforce.

The implications of this system are very positive. With the growth of the development of these skills at an early time in life it is hoped that the students will take these skills with them into life and will use them when dealing with personal conflict as well as in the work place.

From a lawyer's point of view, the attitude of clients to disputes is also likely to change and the level of client knowledge and understanding of the mediation process will increase. With this the legal profession may well find increased client pressure to find alternatives to the adversarial system based on the client desire to resolve disputes using the concepts with which they are familiar, as well as the current desire to obtain a commercial result that is practical and time and cost effective. ❑

WHAT'S HAPPENING

June 9
AMINZ Breakfast Seminar
When is the Act not the Act

June 24-27
LEADR four day workshop
Basic Mediation training
Wellington

July 2
Mediation Training Centre
Introduction to Mediation
35 hour workshop

July 14
AMINZ Breakfast Seminar
The Effect of Time on Disputes and the Resolutions

July 25 and 26
AMINZ AGM and Annual Conference

August 11
AMINZ Breakfast Seminar
Cultural Aspects of Dispute Resolution

September 8
AMINZ Breakfast Seminar
Overview of a Recent Case

October 1
Mediation Training Centre
Introduction to Mediation
35 hour workshop

October 2-4
6th International ADR Conference
Christchurch

October 13
AMINZ Breakfast Seminar
Developments within the Institute

October 28-31
LEADR four day workshop
Basic Mediation training
Auckland

November 10
AMINZ Breakfast Seminar
ADR – What Fees to Charge

AN INTERNATIONAL CRIMINAL COURT

Felicity Wong, Russell McVeagh, Wellington

reviews the history and progress

The idea for a permanent international criminal Court has been around since the Nuremburg and Tokyo trials. Although the 1948 Genocide Convention envisaged a permanent Court, the cold war left the idea languishing in the International Law Commission in Geneva. During our term on the Security Council, New Zealand was actively involved in establishing the two ad hoc tribunals. One in response to mass killings, wide-spread and systematic rape and "ethnic cleansing" in Yugoslavia, and the other in response to a clear case of genocide in Rwanda.

These tribunals gave the idea impetus. There had also been suggestions about trying war crimes in Viet Nam, or Saddam Hussein for aggression and more recently, proposals to establish ad hoc tribunals to try Pol Pot and war criminals in Chechnya, Burundi and Zaire/Congo.

Against this background Professor James Crawford (Australia) of the International Law Commission, completed a draft statute for a permanent International Criminal Court in 1994. At the United Nations, strong support from the President of Trinidad and Tobago, Canada, Australia and New Zealand (the CANZ group), Italy (led By Emma Bonino's Trans-national Radical Party), and the Nordics among others resulted in the idea taking hold, though not without opposition. A UN ad hoc committee was set up in 1995 to consider the ILC's draft. Initially, the UK, US and Japan were among those against the idea for different reasons, cost, history, and concerns – on the part of those with a global military presence – about how their forces might become subject to the Court's jurisdiction. Much of the debate was political in nature accompanied by procedural wrangling.

Further pressure led to a "Prepcom" being set up to meet during 1996 and 1997, ably chaired by Adrian Bos, the Legal Adviser to the Netherlands Foreign Ministry. The final Prepcom meeting concluded last month and a Diplomatic Conference is scheduled for June/July this year in Rome where if negotiations successfully end the statute is expected to be finalised and opened for signature by governments.

New Zealand played an important role in bringing the idea towards reality. But real credit needs to go to global NGO groups such as Amnesty International and Human Rights Watch, coordinated by an umbrella organisation "the Coalition for an International Criminal Court" convened by William Pace. Pace coordinates more than 300 NGOs taking part in the project.

NGOs tirelessly lobbied governments in support of the project on the basis that impunity is a major reason why crimes against humanity and war crimes (in times of armed conflict) are committed. One notable advocate was the still sprightly American Jewish lawyer, Ben Frerencz, outspoken in promoting a permanent Court since being the youngest allied prosecutor at the Nuremberg trials all those years ago.

In January members of the bureau of the Prepcom met in the Netherlands and pulled the Prepcom's work together into a 155 page consolidated draft text called the "Zutphen" text. The Prepcom process considered all aspects of the ILC's draft Statute in detail and delegations further shaped the concept with refinements and policy options on important questions. The draft text now on the table, and the experience of the Yugoslav and Rwanda tribunals (and their case law) together reflect a gradual convergence of common law and civil law. The international community is engaged in elaborating a criminal system which blends the major legal systems of the world, coined "tribunal law".

SCOPE AND JURISDICTION

Early debate concerned the scope or jurisdiction of the Court. At one end of the spectrum, the Caribbean countries wanted an international criminal Court which would use global resources to combat cross border crime such as drug trafficking, money laundering, and corruption. Such crimes are committed on a large scale, often by groups with more resources than those of small island states. But these crimes are better dealt with by enhancing cooperation between existing national law enforcement agencies than by establishing a new internationally based mechanism. A consensus was forged that the new Court would have jurisdiction only over the most serious international crimes.

These crimes were largely agreed to be genocide (in accordance with the Genocide Convention); crimes against humanity (over which the Nuremburg and Tokyo tribunals had jurisdiction), and war crimes (in accordance with the scheme set out in the 1908 Hague Rules and the 1949 Geneva Conventions). Crimes against humanity include murder; extermination; enslavement; torture; rape; persecution on political, racial, national, ethnic, cultural or religious grounds; disappearances and inhumane acts when committed on a wide-spread scale.

It is still undecided whether aggression will constitute a crime within the Court's jurisdiction. Germany leads efforts to establish personal responsibility for acts committed by a political or military leader of one state embarking on an aggressive war against another state. Others have doubted this approach given that aggression is difficult to define and involves questions such as territorial claims.

For its part, although New Zealand has supported terrorism being within the scope of the Court this has been a

lone view among western delegations and it seems less likely terrorism will fall within the Court's jurisdiction. We also support the inclusion of a crime against the Safety of UN Personnel on the grounds that this type of attack against UN forces and personnel acting on behalf of the United Nations goes to the heart of the ability and effectiveness of the United Nations to act as a collective agency responsible for global peace and security.

In the original ILC scheme the Court would have had "inherent jurisdiction" (or automatic jurisdiction) only over genocide. For other crimes there would be an "opt-in" mechanism: when a state become party to the ICC statute it would have to make a declaration concerning the crimes in respect of which it accepted the Court's jurisdiction. An alternative approach was to allow state parties to "opt-out" of accepting the Court's jurisdiction over particular crimes depending on the legal obligations that state was prepared to accept under international law. New Zealand supported the Court having "inherent jurisdiction" over all the core crimes of the Statute in order to limit the scope for states to ratify the convention but obstruct the Court's practical application in the fine print.

THE ICC AND MUNICIPAL COURTS

Linked to the question of the scope of the Court's jurisdiction, a principle of "complementarity" was establishing to reflect the idea that the Court should "complement" national criminal justice systems, not duplicate them. Under this scheme, a case would not be admissible where it was already being investigated or prosecuted by a state, unless that state was unwilling or unable genuinely to carry out the investigation or prosecution. Similarly a case will not be admissible where there has already been an investigation and a decision taken not to prosecute; where the person has already been acquitted; or where the case is not sufficiently grave to justify further action by the Court. Although the Court will have no jurisdiction where military forces are subject to compliance with national laws and military discipline, it might take action where the prior proceedings were designed to shield an individual or where delays or lack of independence or impartiality exists in the proceedings. A partial or total collapse of the national legal system would also be grounds for engaging the Court.

The permanent members of the Security Council have been concerned to see a relationship between the Security Council and the Court which reflected their special status and unfettered responsibility for situations endangering global peace and security. France even proposed that the Security Council should first filter all cases before they got to the Court, (with a possible veto over matters coming before the Court). Compromises are being considered to provide an appropriate relationship recognising the Security Council's role under the UN Charter but not subordinating the new judicial body to the existing political one.

The draft Statute provides for a trigger mechanism to begin an investigation or prosecution. One of the very contentious issues is whether a complaint from a state is required before the Court can take up a case. New Zealand has supported an open regime whereby the prosecutor could begin an investigation on the basis of information obtained from any source, eg from Governments, United Nations organs, NGOs or victims. States have been historically reluctant to make complaints against other states even in the case of genocide or war crimes because of political concerns about the relationship with that state or region concerned.

Given that many crimes against humanity have been committed by or with the complicity of the authorities of the state concerned, New Zealand has also supported the right of the prosecutor to conduct on-site investigations without explicitly having to seek the prior consent of that host state.

INTERNATIONAL CRIMES

New Zealand has taken a special interest in the definition of "war crimes", partly because of our support for the International Committee of the Red Cross (ICRC) and the work it has done over the decades to establish international rules and law obliging combatants in times of armed conflict to minimum standards, partly to support women's groups' concerns to see rape and sexual violence given a special profile, but also because of the question of nuclear weapons.

We have consistently supported law which is no less than that established in the 1977 Additional Protocols to the Geneva Conventions to which some 148 states have become party (though none of the nuclear weapon states are party). As most of the modern world's conflicts take place inside traditional state boundaries, and in recent times have resulted from the break up of a single state such as Yugoslavia, New Zealand has consistently seen the Court's ability to act in situations of internal conflict as crucial to its effectiveness and relevancy in a modern world, despite opposition from countries such as Turkey, India, China, Algeria, Sudan and others which prefer the Court have no role in internal conflicts like the ones they experience.

New Zealand proposed new language concerning crimes of sexual violence, making specific mention of enforced prostitution (eg Korean "comfort women"), and sexual slavery together with a generic prohibition on the use of weapons which cause unnecessary suffering or which are inherently indiscriminate (such as anti-personnel landmines and nuclear weapons). This is highly contentious, and there will need to be a balance struck between the importance of establishing a Court which the major powers recognise and support and efforts to advance the ban on weapons better achieved in arms control and disarmament forums.

THE WAY AHEAD

For the duration of the negotiations a group of "like-minded states" has been meeting and formulating positions. Initially the focus was procedural in getting the idea of the Court onto the international negotiating table. Now the "like-minded" aims are: to have a successful Rome Conference with the prompt creation of an independent and effective Court; a Court which is not subordinated to the Security Council; with inherent jurisdiction over the crimes of genocide, crimes against humanity and war crimes (including internal armed conflict); an independent prosecutor with an ex officio role; questions of jurisdiction and admissibility ultimately to be determined by the Court; and an obligation to cooperate with the Court.

New Zealand, in concert with its CANZ partners, has been an active supporter of an effective Court from the beginning and it is encouraging that UK policy has shifted now to support the "like-minded" with the US Administration also behind the concept now. New Zealanders often watch conflicts in horror and wonder what can be done to bring offenders to account. This Court will not offer all the answers but it could be one more tool which the international community can bring to bear on situations of appalling suffering. ❑

ECONOMIC RIGHTS AS CIVIL RIGHTS

Hamish Hancock, Crown Counsel

***builds on his discussion of Thomas J's judgment in* Waitakere**

If one accepts that judicial restraint is appropriate in respect of the decisions of elected representatives then the *Wednesbury* test, even in its strict formulation, is a workable rule to achieve that result.

Clearly the test has well recognised exceptions and the Court also retains the ability to review more intensively in certain areas such as those concerning basic civil rights.

Accordingly, the most principled approach to whether the *Waitakere* plaintiffs should have a remedy is to inquire whether the effect of the council's rating decision was so extreme as to impinge on their basic economic rights relating to the ownership of their homes.

While the plaintiffs' cases in *McKenzie, Woolworths* and *Waitakere* were not put on this somewhat original basis, the implications of such decisions on at least some of the recipient's economic well-being and continued ability to enjoy ownership of their properties or continue their business operations merit greater attention than they have received so far.

These economic rights – as a category of civil rights – are often difficult to define. Obviously they do not exist in a vacuum and must compete with compromise or yield to numerous other competing interests in society. Nevertheless, as a branch of civil rights they may have been somewhat neglected. They enjoy a close parallel with the rights arising out of the fiduciary duty owed by a local authority to its citizens – discussed by Thomas J in *Waitakere* at pp 408 to 411. This duty recognises that a local authority must act fairly towards even individuals and minorities in its funding decisions, irrespective that the decision-maker enjoys majority electoral backing.

They also involve elements of proportionality. At an extreme end of the scale an oppressive and discriminatory rating imposition might be seen as going beyond taxation and becoming confiscatory. For example the circumstances in *McKenzie* would support such a submission.

Thomas J in describing his unease at the plaintiffs' position in *Waitakere* refers to their grievance in terms bearing constitutional and civil rights overtones; terms such as Magna Carta, Bill of Rights, tyranny by the majority, petty tyrannies, partisan or purely political ends and minority groups (pp 417-418). Similar recognition to such fundamental rights has been given in other jurisdictions, but they have also suffered extensive periods in the wilderness. The following paragraphs are but a brief overview on a topic which deserves far more extensive treatment that is possible here.

A United States perspective entitled "Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered" in 103 Harv L Rev 1363 (1990), explains why economic liberties have been neglected by their Supreme Court over the last 50 years and puts a case for the revival of judicial protection of such rights (p 1363):

> The ubiquity of this hostility and prejudice [against the protection of economic liberties] seems largely due to a convergence of opinion of two traditionally opposed schools of Constitutional interpretation. On the left of the political spectrum lie New Deal liberals, who support government intervention in the market place and oppose judicial activism invalidating such legislation. ... Though this group advocates judicial scrutiny of legislative action that encroaches on "personal rights" it is content to entrust protection of economic rights to the legislature. On the other side of the spectrum lie judicial conservatives who do not favour activism of any kind .... Thus on economic matters both groups favour judicial passivity.

The Harvard paper traces the roots of economic due process back to the beginning of American jurisprudence, in the 17th and 18th century belief in the existence of immutable "natural law", and in the view of the American Constitution as a guarantor of such absolute principles of justice as "property rights". (p 1364)

The framers of the Constitution saw the protection of property rights as the cornerstone of just government. The fourteenth amendment to the Constitution which originally grew out of a desire to protect former slaves after the American Civil War was also concerned about protecting the economic and personal liberties of all citizens and to prohibit discriminatory treatment of citizens in economic matters (p 1369).

The paper answers those critics of economic due process who argue that the judicial protection of personal rights is appropriate while protection of economic liberties is not because the latter are significantly different and less important, by saying:

> the Court itself has repudiated this division of rights. In *Lynch v Household Finance Corp* [405 US 538 (1972)] the Court stated that "the dichotomy between personal liberties and property rights is a false one ...". The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right .... The Court declared that "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other". Citing Locke, John Adams and Blackstone, the Court concluded that "rights in property are basic civil rights". (1375-1376)

The writer is unaware of any New Zealand or English litigation in which the above analysis has been undertaken,

let alone approved or rejected. The paper concludes that the Supreme Court must:

> abandon the lasting hostility and prejudice against economic rights originally engendered by the exigencies of the Depression and based on outdated notions of economic and social thought. Judges are not free to choose which constitutional provisions they wish to enforce.

The Court should do this by substantively analysing the congruence between legislative means and legislative ends:

> True "rational" review of legislative enactments in the economic and social spheres is necessary to make the Constitution's guarantee of equal protection a reality for groups subject to governmental "economic" discrimination (1383-1384).

Jowell and Lester in *Beyond Wednesbury* advocate reliance on independent principles of justice appropriate in all other areas of the common law rather than a vague test of unreasonableness (p 382). They illustrate this point by reference to *Hall v Shoreham UDC* [1964] 1 All ER 1, where planning permission was granted to develop a site subject to the condition that the applicant must himself construct an access road effectively to be dedicated to public use. The condition was in all respects faithful to the statutory purpose but fell because it offended the right of the plaintiff not to be subjected to the burden of dedicating his land to public use without compensation (pp 370-371).

> The authors conclude from *Hall v Shoreham UDC*:
> In effect the decision upheld a basic civil right (to be fairly compensated for property taken) independent of statutory purpose .... It is the judicial review of these abuses that call for substantive principles of administrative law derived from standards of administrative propriety and the basic rights and liberties of the individual and of citizenship.

Michael Taggart in "Expropriation, Public Purpose and the Constitution" explores the constitutional principle that private property can only be taken for public purposes, with particular reference to New Zealand, England and the United States: Forsyth & Hare (eds), *The Golden Metwand & The Crooked Cord: Administrative Law Essays in honour of Sir William Wade QC* (Clarendon Press, Oxford 1997). Taggart concludes:

> Taken together, this body of law – drawn as it is from various jurisdictions, contexts and times – points to a constitutional principle that private property should only be taken for public purposes. It is one of what Lord Reid once described as the "fundamental principles" secreted in the law of statutory interpretation. As a protection against arbitrary dispossession, the principle can be traced back to Magna Carta. As we have seen, in the United States it found its way into the Bill of Rights and early on became established as a constitutional limitation upon legislative competence to expropriate land. In the rest of the common law world the principle has found expression in administrative law doctrine and the law and techniques of statutory interpretation. Notwithstanding the "apples and oranges" problem of comparing the efficacy of constitutional protection of property in the United States with the less grand interpretative techniques employed by Commonwealth Courts, the latter's case law illustrates a remark by Bernard Schwartz and Sir William Wade in their groundbreaking comparative study of Anglo-American administrative over a quarter of a century ago: "[t]he creative work that British Judges can do is ... not greatly impaired by their constitutional subservience [to Parliament]". The leitmotifs in Sir William Wade's work – resisting arbitrariness and preserving individual liberty – can be seen at play in this area.

***There is a clear parallel between protection of the property rights of the Maori ethnic minority against the elected representatives of a majority, and the position of the individual and minority ratepayers' economic interests in* Waitakere**

An argument is currently available that s 21 New Zealand Bill of Rights Act 1990 already provides a general guarantee of property rights. Section 21 reads:

> Everyone has the right to be secure against unreasonable search and seizure whether of the person, property, or correspondence or otherwise.

This thesis is developed and then rejected by Andrew Butler in [1996] NZLJ 58 in his article entitled, "The Scope of s 21 of the New Zealand Bill of Rights Act 1990. Does it provide a general guarantee of property rights?" He concludes that while the state of current case law might favour such a role for s 21, there is good reason for that provision not to have such a broad function. Instead s 21 should be confined to breaches of privacy committed by law enforcement agencies. In the footnote to his article Mr Butler refers to a vast literature on the need to recognise (or not recognise as the case may be) the right to property as an aspect of individual liberty (Footnote 1, p 64).

The writer agrees with Butler that the Bill of Rights as currently worded does not protect general property rights or economic interests. However the explicit protection of such interests is not unknown to New Zealand constitutional law.

S Elias QC (now Elias J) stated in her article "The Treaty of Waitangi and Separation of Powers in New Zealand" in Gray and McLintock's, *Courts and Policy*, (Brookers, 1995) at pp 208-209:

> First it should be noted that by the Treaty the Crown confirms and guarantees existing rights of property. In this respect the Treaty is declaratory of rights according to native custom and recognised at common law. ... The Treaty is not simply declaratory ... it imposes an additional obligation upon the Crown to guarantee the rights recognised ... in *New Zealand Maori Council v Attorney-General* (the SOE case) the duty was described as one to protect to the fullest extent reasonably practicable.

There is a clear parallel between protection of the property rights of the Maori ethnic minority against the elected representatives of a majority which "may tend to be indifferent or neglectful of [their] legitimate interests", to use Thomas J's words, and the position of the individual and minority ratepayers' economic interests in *Waitakere*. In the context of judicial review the Courts have accorded a rigorous examination into decisions affecting rights arising from the Treaty. The question is, should certain economic rights of the general population – and if so which – be also accorded the status of fundamental human civil and political rights?

A philosophical basis for such rights is available from a number of sources. Thomas J's discussion of the concerns of the *Waitakere* plaintiffs describes the important rights involved in a constitutional context, whilst Kerr J's judgment at first instance describes the damage to the plaintiffs' interests at a more personal level. The *Woolworths* case involved extreme hardship and discrimination against the economic interests of a small group of mainly suburban businesses.

Protection of property rights and other economic interests of a person have been recognised in England since the Magna Carta, Bill of Rights of 1688 and in decisions by the Courts. In *Entick v Carrington* (1765) 19 State Tr 1029 at 1060, Pratt CJ said:

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole.

The United States has a similar tradition. The law of France and other European countries specifically protect individual property rights against the state. The President of the Law Commission, Justice Baragwanath in his paper to the AIC Administrative Law Conference in 1997 said (p 12):

> While property values and many others are as a general rule enforceable at private law and therefore, in the absence of necessity to the contrary, should be available against those exercising public functions in the same manner as against other citizens, New Zealand law compares badly with that of France and other European states in protecting against the state property rights and the value of individual autonomy they protect.

Comparing the New Zealand position with that in France and other European countries, His Honour quoted from the Law Commission's report (NZLC R37), *Crown Liability and Judicial Immunity*:

> 35 French law has, by contrast, developed principles of liability for losses caused by a far wider range of governmental activity. As a basic principle, the state is liable for acts of the executive which cause loss, although some public services (such as assessment of taxation) only incur liability where loss is caused as a result of "gross" fault. The civil code requires public burdens to be borne equally:
>
> ...
>
> 36 Further, the state can be held liable for loss caused by legislation if the harm is found to be sufficiently serious, and if the legislation does not explicitly ban indemnification of those who suffer as a result of it. The harm must also be limited to an individual or a small number of people: those affected by general social or economic policies cannot recover.

CONCLUSION

Justice Thomas's unease at the position of the *Waitakere* plaintiffs and his proposed solution is more than just an "interesting question". The large number of judicial review challenges to council rating decisions, until the Court of Appeal *Woolworths* decision and the enactment of Part VIIA of the Local Government Amendment Act 1997, allow an inference that elected councils are indeed at times neglectful or indifferent to the "legitimate interests of an individual or a minority".

However, the solution is not simply to lower the threshold for judicial intervention to a level equivalent to allowing substantive review of the merits. Despite its shortcomings *Wednesbury*, by imposing a clear and extreme test, has the merit of clarity. Litigants know in advance that, absent a legal or procedural error on the part of elected representatives, the prospects of a successful review on the merits are low. Obviously litigants need to be alert to the exceptions to the rule. Indeed, this paper suggests that certain further rights – economic and property rights – might also deserve exceptional treatment. At present human rights cases are the main exceptions where a less restricted test is used. In addition, the possibility of judicial intervention for substantive unfairness has been clearly signalled and its role is likely to be developed on a case-by-case basis. These exceptions – unsurprising and widely accepted as they are – seem to be an insufficient reason to abandon the underlying strict test for judicial intervention on substantive matters.

Property or economic rights as an aspect of civil rights and freedoms have received little attention from the legislature and the Courts, despite the considerable activity in recent years in other human rights areas

Perhaps a better approach, and one which runs parallel to a central aspect of Thomas J's reasoning in *Waitakere*, is to articulate by reference to traditional and well established principles the fundamental right which the plaintiff claims the council has infringed. Property or economic rights as an aspect of civil rights and freedoms have received little attention from the legislature and the Courts, despite the considerable activity in recent years in other human rights areas such as the Bill of Rights, the Treaty and international human rights conventions. Yet property rights have long been recognised as a cornerstone of western democratic societies; whose protection is necessary to give meaning to other basic civil liberties. They have a lengthy and respectable pedigree in English law and there is little explicit judicial support for their being downgraded or ignored.

If the trial Judge in *Waitakere* had said the council's decision was unreasonable "because ...", and then after the "because" specified which of the plaintiffs' economic rights had been breached by reference to evidence of extreme actions by the council causing hardship and oppression would the case have been treated differently in the Court of Appeal?

The complexities in defining just which economic rights are enforceable in the Courts are of course immense. At what point, for example, does rating cease to be a tax or a payment for services and become oppressive, discriminatory or even confiscatory? The Courts have been able to devise workable rulings in especially complex areas as the Treaty with a large measure of acceptance. Therefore the revival and better recognition by the Courts of long accepted fundamental economic rights and liberties may also be achievable.

As Thomas J's judgment in *Waitakere* confirms, the potential for oppressive conduct against the legitimate economic interests of a minority by majority elected representatives is sufficiently great in our modern society that the Court should not disqualify itself from this area. However, the writer considers the way forward is to revive and re-emphasise traditional, albeit neglected, economic rights rather than in removing the restraints imposed on the Courts by *Wednesbury*. ❑

FAIRNESS IN EMPLOYMENT BARGAINING

Graham Rossiter, Massey University

compares the New Zealand and Canadian situations

CURRENT NEW ZEALAND LAW

This has to be examined with reference to the scheme of the relevant statutory provisions as contained in the Employment Contracts Act 1991 (ECA) as well as the limited jurisprudence that has developed in the Employment Court since its enactment.

The provisions of the ECA concerned with the obligations on employers and the rights of employees and their representatives with respect to bargaining are principally –

- section 12 requiring a party to contract negotiations to recognise the other party's representative in those negotiations once the representative's authority has been established;
- section 14 providing for a party's representative to have access to a workplace "at any reasonable time ... to discuss matters ... relating to those negotiations";
- sections 8 and 30 prohibiting undue influence with respect to membership or non-membership of an employee organisation; the latter provision allows an employee affected by undue influence a right of access to the personal grievance procedures and remedies;
- section 57 which entitles a party to an employment contract to have access to certain remedies including compensation where the contract has been procured by "harsh and oppressive behaviour or by undue influence or by duress" or where the employment contract or any part was harsh and oppressive when it was entered into.

There are now decisions of the Court of Appeal on most of the issues arising from these provisions. The major focus since 1991 has been on the nature of an employer's obligation to recognise a union as an "authorised representative" of employees in contract negotiations. The leading authority is *NZ Fire Service Commission v Ivamy* [1996] 1 ERNZ 285. In that case, the Court of Appeal, putting the matter shortly, held that while an employer is obliged to recognise an agent's authority once that is established and negotiate only with that agent, that principally means that the employer may not attempt to persuade employees to withdraw an authority or otherwise to act in such a way as to effectively deny or call in question the agent's authority. Nevertheless, the employer may communicate directly with its employees by way of conveying factual information to them regarding, for example, its negotiating position even if such communications may end up having a persuasive element to them. Although the Court asserted that it was following its own previous decision in *Capital Coast Health Ltd v NZ Medical Laboratory Workers Union* [1996] 1 NZLR 7, it is, in some respects, difficult to reconcile certain aspects of the reasoning in *Ivamy* with the earlier judgment.

With respect to unions' rights of access to workplaces, the approach taken by the Court of Appeal in *Foodstuffs (Auckland) Ltd v National Distribution Union Inc* [1995] 1 ERNZ 110 was to emphasise the need to strike a balance between the respective interests of the employer and employees (and their representatives) in terms of the reasonableness of an exercise of the rights conferred by s 14 ECA in any particular case. The Court held that a representative exercising its powers under s 14 may meet with more than one employee at a time and the employees are entitled to be paid while meeting with their representatives in relation to contract negotiations.

The meaning to be ascribed to the term "undue influence" as that expression appears in ss 8 and 57 ECA has been examined in several cases including *Eketone v Alliance Textiles Ltd* [1993] 2 ERNZ 783. Cooke P referred to the term's ordinary meaning of an "unconscionable exercise of influence rendering a contract liable to be set aside". According to Gault J the concept "focuses upon improper exploitation of inequality between people in their dealings which equity and good conscience will not condone". A comprehensive review of the authorities was conducted by Judge Colgan in *Marsh v Transportation Auckland Corp Ltd* [1996] 2 ERNZ 266. In that case, the employer breached the existing employment contracts of its staff by way of a so-called "partial lockout" to induce its employees to agree to a new collective employment contract. This conduct together with the employer's refusal or failure to recognise the union's authority pursuant to s 12(2) ECA was held to constitute "harsh and oppressive" behaviour, duress and undue influence for the purposes of s 57. The contract itself was not held to be "harsh and oppressive". Although Judge Colgan found that the employer's conduct was a "threat of an unlawful breach of contract", His Honour noted that the Full Court of the Employment Court in *Adams v Alliance Textiles (NZ) Ltd* [1996] 1 ERNZ 982 had left open the question of whether a lawful lockout might, in some circumstances, amount or contribute to conduct on the part of an employer in breach of s 57. This was upheld on appeal (*Transportation Auckland Corp Ltd v Marsh* CA 211/96; 14 August 1997).

The starting point for any consideration of the broader law of bargaining in New Zealand under the ECA, has to be the emphatic pronouncement of the Full Court in *Adams v Alliance Textiles* that employers are under no obligation to enter into collective contract negotiations and the North American (particularly Canadian) law of "good faith" bargaining does not form part of New Zealand law. Chief Judge Goddard noted at 1019 that –

> under Canadian legislation there is some pre-occupation with bargaining in good faith and all that involves and a body of rules has been built up one of which, for example, distinguishes between surface bargaining and hard bargaining. No such controls exist in New Zealand.

Since *Adams*, however, there have been dicta in certain decisions of the Employment Court which suggest that employers, once they have agreed to enter into collective bargaining with their employees may be subject to obligations as to the manner in which those negotiations are carried out. These obligations may be seen as arising out of the mutual and reciprocal duties between employer and employee in terms of that relationship being one of trust and confidence. In particular, employers are obliged to not act in a manner calculated or likely to destroy or impair that relationship (without good and sufficient cause). In *Rasch v Wellington City Council* [1994] 1 ERNZ 367, 372, the Chief Judge was highly critical of the "negotiating" tactics of the employer which he characterised as amounting to "an uncalled for interference in and obstruction of the exercise of the employees' inherent freedom of association including the right to bargain collectively and to organise for that purpose". His Honour referred to –

> the European doctrine of culpa in contrahentro (as) apparently an extrastatutory concept of good faith and fair dealing developed by European Courts. While the boundaries of the concept may be unclear, its application to a state of affairs such as that disclosed by this case would not be difficult to imagine under any civilised legal system.

Possibly the most interesting example of this development in judicial reasoning may be the judgment of Judge Colgan in *Unkovich v Air New Zealand Ltd* [1993] 1 ERNZ 526. These personal grievance applications challenged certain redundancy dismissals carried out by the respondent following the company's decision to engage independent contractors to service its catering requirements. The dismissals were held (by a majority of the Court) to be unjustified for several reasons including, in particular, the failure of the respondent to give to the union notice of the intended lay-off as well as the period of notice to which the employees were contractually entitled. An important contextual feature of the case was that the lay-off decisions followed a breakdown in contract negotiations between Air New Zealand and the union. The clear aim of the employer in these negotiations was to reduce its labour costs.

Underlying Judge Colgan's approach was the view that the employer's obligations of trust and confidence meant that reasonable notice of the intended lay-offs should have been given so that it could have been made clear to the affected employees that the company had not been or was no longer bluffing in the position taken by it in the contract negotiations "and that there was a very real and immediate prospect of job losses unless decisive action was taken by those employees prior to the expiry of the relevant periods of notice". The employer had previously indicated that if there was a breakdown in the collective contract negotiations, it would then offer individual contracts to its staff. Judge Colgan held that having shifted its position on this point (to insist on collective contracts for all affected employees) after it "had held the prospect of such alternative arrangements to the (employees') bargaining agents in negotiations the respondent was duty bound in fairness to have notified this important change of tack to its employees to have allowed them a proper opportunity of knowing of and considering the prospect of contracting out and therefore redundancy if a majority of employees collectively continued to reject the company's proposals". In what was probably the most crucial passage of relevance in his decision, the learned Judge opined, at p 589, that –

> the period from expiry of an old contract until its replacement is negotiated and settled has traditionally been ... one during which employers and employees seek to improve their respective individual positions .... The law allows for hard bargaining, even the use of coercive tactics which might appear to be the antithesis of trust and confidence in a subsisting relationship of employment. But even within that altered relationship during the period of bargaining and negotiation, I would find that the underlying obligations of trust and confidence which arise from an existing and continuing employment relationship survive, albeit perhaps modified in some instances to take account of the parties' conduct towards each other permitted by law at the time of bargaining.

reasonable notice of the intended lay-offs should have been given so that it could have been made clear to the affected employees that the company had not been or was no longer bluffing

CANADIAN LABOUR LAW

There are Labour Codes in the Federal Canadian and each of the ten provinces. At the heart of this legislation, which is influenced by the US National Labour Relations Act 1935, is provision for recognition of trade unions and support for the principle of collective bargaining. Recognition of a union is basically afforded by a procedure whereby such bodies seek certification by the appropriate Labour Relations Board. All Canadian jurisdictions require the relative union to claim a majority of employees in the bargaining unit to be members of it. The federal and all the provincial jurisdictions exclude from eligibility for union membership and coverage of collective bargaining processes employees exercising managerial functions.

Certification of a union generally, although not always, requires a ballot of the particular workplace or enterprise. Where a union in such a process receives majority support from the employees, it becomes the bargaining agent which must be recognised by the employer as the exclusive representative of all employees. In most jurisdictions, unions so certified are required to represent all employees "without discrimination, bad faith or arbitrariness".

Canadian Labour legislation regulates the process of collective bargaining by providing for so-called "unfair labour practices", omission of which by one party will give the other the right to seek remedies from the relative Labour Board. Certain provisions of the Codes are specifically protective of trade unions and their membership. For example, no province permits an employer to interfere in the formation of a trade union or contribute to it financially. Further, it is an unfair labour practice for an employer to discriminate against an employee because he or she is or is not a member of a union. Collective agreements may require membership of a trade union as a condition of employment.

The various labour codes also regulate the resolution of disputes and the taking of industrial action. It is mandatory that all collective agreements include procedures for the resolution of grievances without work stoppages. Such issues are usually presented to an arbitrator for resolution, but in some places they may be referred to the Labour Relations Board. In any event, the procedures of the Boards will provide for settlement or conciliation officers to, in effect, offer services of a mediation nature to the parties.

With respect to industrial action following a breakdown in collective negotiations, most jurisdictions require a "cooling-off" period to be observed before a strike can legally occur (this may not be, in any event, during the term of a collective agreement). Every province requires that a vote be held by secret ballot before a strike can take place. Two provincial jurisdictions (British Columbia and Quebec) prohibit the use of replacement workers during a strike.

Good faith bargaining in Canada

The federal and most provincial labour codes provide that where a notice to bargain collectively has been given by a "certificated" union, then the workers' bargaining agent and the employer are obliged to:

- bargain collectively in good faith, and
- make every reasonable effort to enter into a collective agreement.

The nature and scope of the duty to bargain has been defined and elaborated on by the various labour boards and (by way of review of their rulings) in a limited body of decisions of the higher Courts. The effect of those decisions is that certain specific conduct by a party to collective negotiations eg misrepresentations, will be unlawful as being an unfair labour practice. Further, a labour board might censure a party's entire bargaining position where it is concluded that its real objective is to avoid a collective agreement. Nevertheless, there remains a "freedom of contract" rationale underlying the duty as a consequence of which there is a reluctance to review the "fairness" of proposals or impose an agreement of the parties.

In *DeVilbiss (Canada) Limited* [1976] 2 Can LRBR 101, the Ontario Labour Board explained that the duty to bargain in good faith has two principal aspects to it. The first is to reinforce the employer's obligation to recognise the union's exclusive right to represent the employees in the workplace in questions. However, this does not mean that the obligation to recognise can be used to redress imbalances of economic bargaining power between the parties. Secondly, the duty to bargain in good faith is aimed at fostering informed rational discussion between the parties on the basis that a "frank" exchange of information will minimise the potential for unnecessary industrial strife. Again, however, the existence of this duty is not to result in the parties "abandoning the bargaining table for the Board simply because the bargaining table is not working in their favour". The Supreme Court of Canada in *Royal Oak Mines v Canada Labour Relations Board* (1996) 133 DLR 4th 129, 126 held that –

> in the context of the duty to bargain in good faith, a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.

The Court went on to say that –

> as a general rule, the duty to enter in a bargaining in good faith must be measured on a subjective standard while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a Board looking to comparable standards and practices within a particular industry.

The content of the duty to bargain in Canada may be examined with reference to the following specific issues:

Subject-matter of negotiations

In terms of the so-called "doctrine of illegality", a bargaining proposal may be held to constitute a breach of the duty to bargain in good faith where, for instance, it is inconsistent with the statutory scheme of labour relations or otherwise illegal. This basic principle has, at times, been extended to bargaining positions which have not necessarily been unlawful in a strict sense but have been evidence of an intention to avoid reaching a collective agreement. For example, in *Re Tandy Electronics Ltd and United Steel Workers of America* (1980) 115 DLR 3rd 197 the Higher Court of Ontario upheld a decision finding that the insistence of the employer that a term be included in a collective agreement requiring the specific consent of individual employees to the deduction of union fees was aimed at avoiding a collective agreement and undermining the union. This accordingly was a failure to bargain in good faith. In *Royal Oak Mines*, it was held that the refusal of the employer to include in an agreement "such basic and standard terms as a requirement for a just cause for dismissal clause ... or a refusal to consider a grievance arbitration clause" led to the inference that the employer had no real intention of reaching an agreement.

Recognition of the union and review of employer's bargaining tactics

Direct bargaining with employees by an employer is contrary to the union's right of exclusive representation and is a breach of the statutory duty. Under this heading, the Labour Boards may examine the nature of the employer's bargaining posture to determine whether it is acting in good or bad faith. The focus here is on the employer's dealings with the union as agent for the workplace employees.

A failure or refusal to meet with a union is a fundamental breach of the statutory duty. Furthermore, even a cursory attendance at several meetings may be insufficient to meet the duty of good faith if a party's intransigent position suggests a clear unwillingness to reach a collective agreement. However, where an impasse is reached after extensive bargaining, a refusal to meet again when there is no reasonable indication that such an exercise will have an outcome will not violate the duty.

At this point, the review by Labour Boards of employer actions can involve a somewhat problematic examination of the quality of the bargaining that is taking place. In *Re Canadian Union of Public Employees and the Labour Relations Board of Nova Scotia* (1983) 1 DLR 4th 1, the Supreme Court of Canada noted that the "jurisprudence recognises a crucial distinction between 'hard bargaining' and 'surface bargaining'". Hard bargaining is not a violation of the duty to bargain in good faith. It is the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms. Hard bargaining is not a violation of the duty because there is a genuine intention to continue collective bargaining and to reach agreement. On the other hand, one is said to engage in

surface bargaining when one pretends to want to reach agreement but in reality has no intention of signing a collective agreement and hopes to destroy the collective bargaining relationship. It is the improper objectives which make surface bargaining a violation of the Act. "The dividing line between hard bargaining and surface bargaining can be a fine one." In this regard, the deliberate tabling of inflammatory proposals which would likely provoke a breakdown in negotiations may breach the duty. On the other hand, an impasse in bargaining will not be found to result from a breach of the duty of good faith if it can be said that the proponent is merely using its economic position to negotiate terms which favour its economic interests. As a related point, while there is no presumption that the tabling of new demands by a party is bad faith, a sudden unexplained change of position may constitute a violation of the bargaining duty.

Fundamental to this aspect of labour law is the principle that if the employer's actions are motivated by an "anti-union animus", or amount to an attempt to get rid of the union, then the employer will be manifestly acting in breach of the statutory duty of good faith.

Rational discussion and "reasonable efforts to bargain"

It has been held that "rational discussion is likely to minimise the number of problems the parties are unable to resolve without the use of economic weapons". With this policy in mind, labour boards have required that misrepresentations not be made in the course of negotiations, that the true decision makers participate in negotiations, and that parties be prepared to justify particular stances which they may take.

It therefore follows that a failure to make the commitment of time and preparation required to attempt to conclude an agreement is a failure to make "reasonable effort". Furthermore, if negotiations are to be meaningful, then the bargaining must occur in the presence of the employer representatives who are sufficiently proximate to the ultimate decision-maker to ensure that the employee concerns will be heard. In the negotiation process itself, the parties must be ready and willing to explain their positions and this requirement is seen as having the effect of discouraging the making of frivolous proposals. In one case, misrepresentations were categorised "as the antithesis of good faith (because they) destroy the rational basis upon which collective bargaining decisions are made". It was said, however, that there must be an element of deceit and inducement for a misrepresentation to be bad faith and consequently an unfair labour practice.

Disclosure of information

This point is related to the foregoing. In *Pine Ridge District Health Unit* [1977] OLR Rep 65, the employer refused to disclose relevant information regarding budget restraints placed on it by the Ministry of Health. The Ontario Labour Board found the employer's refusal violated the statutory bargaining duty because without this information there was no basis for rational discussion as to the necessity for the restraints. In another case, the employer refused to provide the union with existing wage rate and classification data about the bargaining unit during negotiations for a "first" collective agreement. It was held that this information must be disclosed. The Board commented that –

> it (was) blatantly silly to have a trade union 'in the dark' with respect to the fairness of an employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining units.

Conduct away from the bargaining table

In part, this issue arises, in a practical sense, as a related aspect of the fundamental duty on the employer to recognise the bargaining authority of the union. In particular, Labour Boards have on occasions had to deal with the question of whether an employer may lawfully communicate with its employees while negotiations are under way. On the one hand, an employer's right to free speech is generally guaranteed as a matter of statute. On the other hand, an employer must be careful not to interfere with the union's right to exclusive representation of the bargaining unit employees. Thus, where an employer published a series of newsletters attacking the union's bargaining stance and ridiculing the union's request for the details of existing terms of employment, it was held that such communications were direct breaches of the duty to bargain in good faith as they were intended to undermine the union's bargaining authority. Communications will also not comply with the employer's bargaining duty where they consist of new proposals made directly to employees before the union can respond or before the union has had a chance to communicate them to its members.

However, the employer's right to freedom of speech meant that a newspaper publisher was held to be entitled to win public sympathy for its industrial position through its newspaper columns. A parallel was there seen with the actions of unions which try to win public sympathy through pickets and distribution of their own publications.

Remedies in Canada

A failure or refusal by a party to collective agreement negotiations to bargain in good faith is an unfair labour practice which may be the subject of a complaint to the relative labour board. In most jurisdictions, there is provision for the encouragement of settlement discussions before a complaint is proceeded with. The remedial provisions of most labour codes are to substantially like effect. In essence, they provide that where a complaint of an unfair labour practice is upheld, the labour board may make:

- an order directing the employer or union "to cease doing the act or acts complained of";
- an order directing the employer or union "to rectify the act or acts complained of"; and
- an order requiring an employer to reinstate or compensate an employee affected by the unfair labour practice.

The nature, scope and limits of labour boards' remedial powers has been tested in several cases that have come before the higher Courts in Canada. The privacy of the principles of free collective bargaining is at all times the starting point in a consideration of remedial outcomes. The cases reveal a reluctance by labour boards to review the "fairness" of proposals on the basis that the parties are best able to determine the content of their agreement and, failing agreement, each has recourse to industrial sanctions.

What may be especially problematic is the question of whether a labour board can, if effect, arbitrate an unresolved negotiation by imposing an agreement on the parties. In some jurisdictions, labour boards are given the specific statutory power to arbitrate where the collective bargaining relates to a "first agreement". Such a course will not other-

wise be followed, save in very exceptional circumstances. Indicative of the mainstream line of authority is the judgment of the Supreme Court of Canada in *Labour Relations Board of Nova Scotia*. After finding that an employer had bargained in bad faith contrary to the Nova Scotia labour legislation, the labour board made an order requiring certain action by both parties including submission of proposals by the employer to the union by her specified date with the content of certain proposals regarding union security and wages being set out in the order. The employer was also to promise not to subcontract out its bus driving in the future if the union promised not to withdraw its services. The legislation conferred very broad remedial powers on the labour board to "make any order requiring any party to collective bargaining to do such things that in the opinion of the Board are necessary to secure compliance with (the good faith provision)". The Supreme Court of Canada held that the labour board had exceeded its powers. It did not, it was concluded, have the authority to require a party to propose terms, the content of which was fixed by the Board, although it could require a party to draw up and present a set of proposals for negotiation.

Perhaps the leading example of the exceptional judicial sanctioning of the imposition of a settlement by a labour board is *Royal Oak Mines*. In this case, the employer put forward a tentative agreement which the unionised workers rejected. A bitter 18 month strike followed. The employer was adamant that it would not agree to grievance arbitration for the striking employees who had been dismissed and made resolution of this issue a precondition to bargaining on other issues. Several attempts to resolve the matter with the assistance of ministerially appointed mediators proved fruitless. The union filed a complaint with the Canada LRB. The Board found that the employer had failed to bargain in good faith and directed the employer to tender the tentative agreement which it had put forward earlier with the exception of four issues about which the employer had changed its position. The parties were given 30 days to settle those issues; if they remained unresolved, then compulsory arbitration was ordered.

Those orders were upheld by a bare majority of the Supreme Court with a strong dissenting judgment being issued. The majority held that free collective bargaining "is a cornerstone of the Canada Labour Code and of labour relations and, as a general rule, it should be permitted to function". However, this –

> principle cannot dominate where the dispute has been bitter and lengthy, the parties intransigent, one of the parties has been found not to have bargained in good faith and a community is suffering as a result of the strike.

It was considered that a labour board is justified in exercising its experience and skill in order to fashion a remedy even where the remedy ends free collective bargaining. The Board did not impose the tentative agreement and additional conditions without first ensuring that all other options had been exhausted.

The references to the suffering sustained by the community and the bitterness of the dispute need to be contextually understood. The community in question was an isolated mining town in the North-West Territories which was economically dominated by the employer. The dispute had been characterised by such events as the employer's engagement of a substantial security force, numerous instances of violence on the picket lines and a deliberately set explosion which let to the deaths of nine strike-breaking workers. There had been communication from the town mayor to the Canadian Prime Minister which had included requests that the federal government consider the imposition of martial law. Notwithstanding these somewhat extreme circumstances, the Court's dissenting judgment adopted the reasoning that "the fundamental purpose of the (Labour) Code was the constructive settlement of labour disputes through the medium of free collective bargaining". The Court's minority was of the view that even on facts as exceptional and unusual as those as this case, the Labour Board did not have the jurisdiction to impose binding arbitration on the parties and the order that had been made was antithetical to the objects of the federal labour code.

CONCLUSIONS

The law examined in this article brings into focus between on the one hand a New Zealand statute that has been characterised as being "union-neutral" but when enacted had, as a clear policy objective, the removal of the "recognition" of unions provided for in previous legislation and, on the other hand, Canadian labour law which underpins the principle of collective bargaining through work organisations where the majority of employees in a bargaining unit opt for that to happen. The law in New Zealand regarding the manner in which employment bargaining should be conducted and the "rights" of employees in this context is sparse and piece-meal. One has to look to several scattered provisions of the ECA to find the law (such as it is) of collective bargaining. By contrast, there can be seen in the North American and specifically Canadian situations a body of collective labour law which continues to coexist in parallel with traditional individual employment law. At the heart of that labour law is the somewhat problematic reconciliation of two possibly conflicting principles namely, (a) bargaining based on the notion of freedom of contract and (b) a requirement of employers to negotiate collectively where certain conditions are met and to do so in "good faith" as that term has been judicially defined.

Nevertheless, there are some reasonably significant parallels as well as differences between the New Zealand and Canadian systems. An equivalent to the obligation on an employer pursuant to s 12 ECA to recognise the authority of a bargaining agent once that has been established may be found in the application of the federal and provincial labour codes in Canada. Not dissimilar legal debates have taken place in both jurisdictions with respect to the circumstances in which employers may communicate directly with their staff once collective bargaining has been undertaken.

The key distinguishing feature is, of course, the employer's obligation in Canada to negotiate collectively where that is sought by a majority of workers in the "bargaining unit" as well as some specific concomitant duties relating to such matters as, for example, the disclosure of information to the union having coverage of a workplace. As the Full Court noted in *Adams v Appliance Textiles*, it is axiomatic that employers in New Zealand are under no obligation to negotiate with their workers, whether collectively or otherwise.

That said, it might be contended that at least with respect to the manner in which negotiations are conducted once an employer agrees to that course, there is a small step rather than a giant leap between the reasoning of Judge Colgan in *Unkovich* and the mainstream principle of "good faith" bargaining in North America. ❑

SAME-SEX MARRIAGE AND DISCRIMINATION

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asks what Quilter and Pearl *reveals about the role of the Bill of Rights Act*

INTRODUCTION

Section 19 New Zealand Bill of Rights Act 1990 ("Bill of Rights") guarantees everyone "the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". Those grounds include sexual orientation (s 21(1)(m) of the 1993 Act). Under s 5 of the Bill of Rights, the rights and freedoms which it protects may be subjected to limitations which are reasonable and demonstrably justified in a free and democratic society. However, although s 6 requires that whenever a statute can be given a meaning consistent with the Bill of Rights that meaning shall be preferred to any other, s 4 is clear that the Bill of Rights cannot be relied upon to set aside inconsistent legislation, even where that legislation unjustifiably limits Bill of Rights rights.

In *Quilter v Attorney-General* three lesbian couples relied on the Bill of Rights to argue that it was unlawful for the Registrar of Births, Deaths and Marriages to deny them marriage licences under the Marriage Act 1955. The 1955 Act does not define marriage, although the common law understanding of "marriage" has been of a union between members of the opposite sex (*Hyde v Hyde* (1866) LR 1 P&D 130). The appellants argued that the absence of a definition of marriage meant that there was no bar to interpreting the Act as permitting marriage between same-sex partners. Indeed, as this meaning would be compatible with s 19, but the traditional meaning would not, the former must, consistently with s 6 of the Bill of Rights, be preferred.

The Court of Appeal ((1997) 16 FRNZ 298) ruled (a) by a majority (3-2) that a prohibition on same-sex marriage did not amount to a prima facie infringement of the appellants' right to be free from discrimination; and (b) unanimously that the concept of marriage contemplated by the Marriage Act was the traditional female-male partnership and, accordingly, it would not be right to interpret the Act in a manner consistently with the right to be free from sexual orientation discrimination because that would be to repeal the Act contrary to s 4 of the Bill of Rights.

The case was the Court of Appeal's first opportunity to examine s 19 of the Bill of Rights. Thus, the decision was a very important one not only in terms of the immediate issue of same-sex marriage but also in terms of the general treatment of the concept of discrimination in the Bill of Rights. Moreover, the judgments raised essential issues related to the justification of different treatment, the use of overseas and international jurisprudence, the interaction of ss 4, 5 and 6 of the Bill of Rights, and the proper role of the Courts under the Bill of Rights.

DISCRIMINATION

A number of reasons were advanced by the majority for holding that there was no prima facie discrimination in restricting marriage to opposite sex couples. As we shall see none of these went to the heart of the matter.

Gault J (Richardson P concurring) began by observing that the Registrar's reaction would have been "no different" had the appellants both "been heterosexual and simply seeking a marriage relationship to take advantage of perceived civil benefits". While an undoubtedly correct observation it is no answer to a plea of discrimination. Discrimination is not confined to differentiation explicitly based on a prohibited ground. Rather it goes further and attempts to detect differentiation the effect of which is to adversely impact on a protected group – thus a minimum height requirement may well be regarded as discriminatory against women and certain races, because it has the effect of ruling out more members of those two groups. This indirect discrimination approach has been widely adopted overseas (see eg *Eldridge v British Columbia* (1997) 151 DLR (4th) 577 (SCC); *Griggs v Duke Power Co* 401 US 424 (USSC); *Adams v Czech Republic* (1996) 1 BHRC 451, 458 (HRC); *R v Secretary of State for Employment, ex p EOC* [1994] 1 All ER 910 (HL); BVerfGE 8, 51(64) (1958) (GerCC)) and s 65 of the Human Rights Act (and hence the Bill of Rights) explicitly proscribes indirect discrimination (unlike the provisions in the overseas cases just cited). Further, as both Tipping and Thomas JJ emphasise in their separate partly dissenting judgments, the broad and purposive interpretation of the Bill of Rights established by the Court's case law requires an impact assessment, not reliance on a simplistic the-same-rule-applies-to-all approach. Any other view would not deliver equality. Thus, a strong reason needed to be given for not looking at impact, but none was proffered.

Next Gault J dismisses the invocation of sexual orientation because it relates merely to choice of partner: "denial of choice always affects only those who wish to make the choice. It is not for that reason discriminatory". With respect, this is wrong. First, the choice which is denied here is one which directly relates to a prohibited ground of discrimination: the plaintiffs wished to marry a person of the same-sex because that is what their sexual orientation dictates. Second, on Gault J's logic a statute which bans interracial marriages would not be discriminatory – after all all that such a law would do is deny a person of one race the "choice" of marrying a person of another race, yet it would leave them the option of marrying someone, even if not the person of their choice. Such logic got short shrift from the United States Supreme Court in *Loving v Virginia* 388 US 1

(1967) (an interracial marriage case) and deserves similar treatment in New Zealand.

The next flawed feature of Gault J's judgment (shared by all other judgments, except that of Tipping J) relates to the definition of "discrimination" for the purposes of s 19. According to Gault J:

> to differentiate is not necessarily to discriminate. It is necessary to distinguish between permissible differentiation and impermissible differentiation amounting to discrimination. This is a definitional question and is to be considered before any issue of the possible application of s 5 of the Bill of Rights Act arises.

Section 19 of the Bill of Rights refers to "the grounds of discrimination in the Human Rights Act 1993". When one looks at the latter Act it is clear that the term "discrimination" means "different treatment" related to a prohibited ground pure and simple (indeed that phrase is used throughout the 1993 Act: see eg ss 22(2), 28(1), 29(1), 39(2), 65). Thus, differentiation is the key concept and "discrimination" must be understood in the same way in both Acts. The Human Rights Act then proceeds to delineate circumstances (generally referred to as "exceptions") where different treatment is allowed. Under the Bill of Rights the corresponding section under which these circumstances can be most naturally justified is, obviously, s 5. It is that section which allows for "consideration of all economic, administrative and social implications" (*MOT v Noort* [1992] 3 NZLR 260, 283 (CA), per Richardson J) which might provide objective and reasonable grounds for different treatment. Thus, contrary to Gault J's view, the task under s 19 is to find different treatment of a prohibited group, while under s 5 the discriminator has the burden of justifying that treatment if he or she can. (This approach of defining a right broadly and then subjecting it to limits was applied in eg *Duff v Communicado Ltd* (1995) 2 HRNZ 370, 382-383 (HC).)

In adopting the same definitional approach Keith J regards the American Constitution and the International Covenant on Civil and Political Rights (ICCPR) as supportive. Yet in neither of these documents is there an explicit limitations clause like s 5 of our Bill of Rights. Obviously then, both the Human Rights Committee (HRC) and the US Supreme Court have had to imply limitations as otherwise even reasonable differentiations would be outlawed. What is significant however is that when, for example, the HRC says in its *General Comment 18* that "not every differentiation of treatment will constitute discrimination" in the same sentence the Committee states that differentiations are only permissible within art 26 "if the criteria for differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant". Thus, the international material requires justification of a differentiation, as reasonable and objective. This is a two-stage approach which corresponds to my view of what ss 19 and 5 require in our system.

Finally, Gault J held that the Marriage Act permissibly discriminated "because this differentiation has long been conventional in the concept of marriage ... and should be ruled unjustifiable only by the legislature because of the social policy implications". With respect this cannot be right. First, objective and reasonable justification must be given for treating a protected group differently – this is what s 5 of the Bill of Rights requires and what the HRC and the European Court of Human Rights have required in relation to their equality provisions (see eg General Comment 18, para 13; *Fredin v Sweden* (1991) 13 EHRR 784, para 60). Longevity does not satisfy this: slavery, execution, criminalisation of birth control and sodomy, racial and gender discrimination were all blessed with long lives but did not survive scrutiny once placed alongside human rights norms. Second, I take issue with His Honour's view that it is for Parliament to rule the discrimination unjustifiable because of the social policy implications. In my view, Parliament has allocated to the Courts the task of determining whether its legislation complies with the rights and freedoms set out in the Bill of Rights: by s 3, the Bill of Rights applies to acts of the legislative branch of government (which must include statutes) (Tipping J makes precisely this point in his judgment), while all that s 4 says is that where a statute is an unjustified interference with a right or freedom, the Courts cannot strike the statute down or seek to disapply it. Hence, as Thomas J quite correctly points out, "it would be a serious error not to proclaim a violation if and when a violation is found to exist in the law, whether it be common law, statutory law or the administration of the law", even if in the end the Courts cannot remedy that violation (see to similar effect F M Brookfield, "Constitutional Law" [1992] NZ Rec L Rev 231, 239-40, though see the doubts of Cooke P in *Temese v Police* [1990-92] 3 NZBORR 203, 208).

Keith J (Richardson P and Gault J concurring) took a somewhat different line. His Honour held that s 19 could not "reach" the question of the right to marry, for three reasons. First, overseas jurisprudence did not support the view that a ban on same-sex marriage was discriminatory, but rather showed that equality provisions had to be "understood and applied in a pragmatic, functional way", with discrimination on some grounds being regarded as more suspect than others. Second, "[the Bill of Rights'] general language would have been a remarkably indirect way to effect such a major change in a basic social, religious, public and legal institution". Third, Keith J referred to "the vast range of the incidents of marriage" which "all emphasise the extreme unlikelihood of a change in the basic elements of marriage being made in such an indirect way as by way of enactment of s 19". Indeed, Parliament's approach to the legal treatment of homosexuality and other family matters had been "particularistic", changing law piecemeal.

There are a number of problems with each of these reasons. First, the notion of "reach" suggests that certain subject-matter is exempt from scrutiny on Bill of Rights grounds. This cannot be correct. If the right invoked is potentially affected by a particular law then the question of the compatibility of the law with the right is reached. Confining marriage to heterosexuals clearly implicates s 19.

Second, as regards overseas experience, in none of the documents cited is sexual orientation an explicitly prohibited ground of discrimination. Not surprisingly, the Courts in those jurisdictions are reticent to strike down distinctions based on sexual orientation. (This point is well made in the recent contrasting decisions of the South African High Court in *S v K* (1997) 3 BHRC 358, 386-387 and of the European Court of Justice in *Grant v South-West Trains* C-249/96, 17 February 1998.) In New Zealand, however, the general wrongfulness of sexual orientation discrimination has been established by the people's representatives. Accordingly, decisions proclaiming (but not invalidating – s 4) laws wrongful on that ground would not be the result of judicial fiat but rather give effect to the views taken by Parliament. Nor is there any indication in the Bill of Rights nor the Human Rights Act that sexual orientation is to be regarded as a less

"suspect" ground of discrimination. Few of the statutory exceptions provided by the latter Act permit discrimination on sexual orientation. All of this makes those overseas cases immediately distinguishable and far from "significant" to the interpretation of our s 19.

Third, the very nature of bills of rights is the generality of their language (as the White Paper itself noted: see *A Bill of Rights for New Zealand – A White Paper* (1985) at p 45). That does not make them an "indirect way" of effecting social change. Outside of New Zealand, decisions on abortion, criminalisation of homosexuality and execution – the list is endless – have all been based on general, broad statements of human rights. That is the nature of the beast.

Fourth, Keith J's "particularistic" approach is simply irrelevant to the interpretation of s 19. Parliament's reaction to a finding of a violation of s 19 (coupled with s 5) is for it to decide – if it wishes to adopt a particularistic approach it can, if it wishes to engage in a wholesale overhaul to eliminate discrimination then it can. But this has nothing to do with determining whether there is a violation: as Thomas J puts it: "Accepting that any change should be made by legislation does not mean that the existing law is not discriminatory against gays and lesbians".

Thus, Keith J makes the same error as Gault J – none of the reasons he advances provide any objective reasons to justify treating homosexuals differently from heterosexuals for the purposes of civil recognition of their relationship. In fact, all the reasons in his judgment go to a totally different question – did Parliament intend by the Bill of Rights to repeal the traditional understanding of marriage? This is a legitimate question in terms of s 4 of the Bill of Rights, but does not answer the s 19 and s 5 issues.

The two partly dissenting judgments are much more satisfying on the discrimination point. Both Thomas and Tipping JJ emphasised the importance of anti-discrimination laws in realising the goal of a society based on equality, because, in Thomas J's words, they promote "a commitment to the recognition of each person's individual worth regardless of individual differences". As noted already, both Judges emphasised that in determining whether there is discrimination the inquiry must embrace impact. Both Judges were clear that on an impact analysis restricting marriage to opposite sex couples was discriminatory. Said Thomas J:

> Just as the sexual orientation of heterosexual men and women leads to the formation of heterosexual relationships, so too it is the sexual orientation of gays and lesbians which leads to the formation of homosexual relationships. Sexual orientation dictates their choice of a partner in both cases. To a heterosexual person that sexual orientation can lead to a valid marriage relationship; to a gay or lesbian person it cannot.

At this stage of the analysis the two Judges appear to proceed down different paths. Tipping J, having found there to be prima facie discrimination, did not consider whether the discrimination was justifiable within the meaning of s 5, but rather preferred to consider whether it was clearly provided for by statute and therefore "legitimate" in light of s 4. The rest of his judgment is devoted to demonstrating that the Marriage Act unequivocally embraces the traditional, discriminatory conception of marriage. This is unfortunate, because in my view the really hard issues in this case centred on whether the traditional concept of marriage was justifiable notwithstanding its discriminatory effect.

On the other hand, Thomas J correctly pursued the substantive issues further. Having noted that marriage is a "state-conferred status" under which "the parties ... enjoy a number of exclusive rights and benefits reserved to them by the law simply because of their married status", Thomas J opined that the "essential justification" for denying same-sex marriage is the absence of "the biologic ability" to procreate (see eg *Layland v Ontario* (1993) 104 DLR (4th) 214 at 222-3 (per Southey J) and *Egan v Canada* (1995) 124 DLR (4th) 609 at 625-6 (per La Forest J)). To this (and having noted that not all heterosexual couples have, or wish to have, children), Thomas J responded, "I do not apprehend that in this day and age the notion that procreation is the sole or major purpose of marriage commands significant support. While procreation, or the capacity to procreate,may be an aspect of many marriages, the definition of marriage by reference to that function ignores those facets or qualities which make up the essence of the marriage relationship, such as cohabitation, commitment, intimacy, and financial interdependence. Yet, the rejection of procreation as the sole or major purpose of marriage at once eliminates the one component which can be said to warrant the restriction of marriage to heterosexual couples. Only they can procreate. Other aspects of the relationship ... are not unique to heterosexual relationships." He stated later, "The essence of marriage is to be found in the nature of the relationship, not in some biological purpose".

Referring to marriage as "a basic civil right of all citizens", the prohibition on same-sex marriages effectively excludes homosexuals "from full membership of society". Moreover, because the law denies homosexuals the ability to marry their natural partner it denies them "one of the vital personal rights essential to the orderly pursuit of happiness by free people" (quoting *Loving v Virginia* supra at 2) and thereby "can only add to the stigmatisation of their relationship and have a detrimental effect upon their sense of self-worth". Hence, a prohibition on same-sex marriage amounted to discrimination on sexual orientation grounds.

There are perhaps two weaknesses in His Honour's analysis of the issues. First, to the extent that Thomas J's opinion hinges on which views of marriage "command significant support", it is suspect. It makes a majority view of what marriage is about determinative of the content of rights designed primarily to protect minorities. This cannot be right. Moreover, how does His Honour know that procreation is not seen by the community as a major/sole purpose of marriage? There is nothing cited in support (though see similar comments by Ellis J in *A-G v Family Court at Otahuhu* (1994) 12 FRNZ 643 (HC)).

Second, Thomas J states that s 5 has no place in a discrimination case: "Differentiations which are discriminatory cannot be reconciled with the democratic ideal of equality before and under the law. Discrimination in all its forms is odious. ... As such, it is or should be repugnant in a free and democratic society." While the sentiments are laudable, with respect the conclusion is wrong, because it rests on the same flawed definitional analysis of s 19 as employed by Gault and Keith JJ. As argued above, the better approach is to hold that "discrimination" comprehends any "different treatment" between persons on one of the prohibited grounds, and to examine whether there are reasonable and objective grounds for any different treatment under s 5. In the end it is clear that Thomas J requires the state to provide reasonable and objective grounds to justify the restriction of marriage to opposite-sex couples and hence engages in a two-stage analysis. Our difference of opinion

may therefore appear to be a matter of semantics. But it is not: I share Tipping J's fear that "if restrictions which may legitimise or justify in some circumstances are built into the right itself the risk is that they will apply in other circumstances when they are not legitimised or justified".

Tipping J, effectively writing for the Court on this point, concluded that the concept of marriage in the Marriage Act is that based on opposite-sex couples. Accordingly, it was impossible to read the Act in conformity with the Bill of Rights non-discrimination right.

First, His Honour referred to the "well established common law background" against which the Act was passed. Second, while Tipping J acknowledged the absence of a definition of "marriage" in the Act, and the general use of gender neutral as opposed to gender specific language in the Act, he referred to some expressions used in it which "reflect the underlying common law meaning of marriage". Third, His Honour emphasised that while it referred to "lawful impediments" to marriage, the Act did not exhaustively set out what these were (eg no provision in the Act deals with bigamy, yet a still extant earlier marriage is clearly a lawful impediment). Thus, Parliament clearly intended that those impediments which existed at common law be regarded as imported into the Act.

There is a problem with this analysis. Under s 3 of the Bill of Rights the rights and freedoms which it contains apply to the common law (see eg *Solicitor-General v RNZ* [1994] 1 NZLR 45, 58 (CA), *Duff* at 382). Accordingly, a common law rule or principle must be set aside if it conflicts with the Bill of Rights and a statute which allows for an interaction with subsisting common law must be read as permitting use of Bill of Rights-conformable common law rules alone (unless it has been expressly incorporated into a statute). This being the case, Tipping J's invocation of the common law understanding is, on the face of it, wrong.

However, later parts of his judgment are more convincing. His Honour looked at marriage-related legislation enacted after the Bill of Rights: "To the extent that such legislation supports the traditional concept of marriage, it will become more difficult to hold in terms of s 6 that the Marriage Act can now be interpreted as the appellants suggest." That is because Parliament's "contemporary understanding of marriage" will be discernible therefrom, and a fair guess can be made as to whether an interpretation consistent with the Bill of Rights would be in effect repealing the Marriage Act contrary to s 4 or not. To Tipping J references in the Births, Deaths and Marriages Registration Act 1995 to "the husband, the wife and two other witnesses" (s 55), "man and a woman" (s 77), "clearly signal that a legal marriage must be between a man and a woman". Similarly, the Marriage (Forms) Regulations 1995 use "the gender specific words 'bride' and 'bridegroom'". In addition, noting that "any change from the traditional concept of marriage would have ramifications beyond the immediate scope of the Marriage Act", and that "it is highly unlikely that Parliament would have intended to make such a substantial change to one of society's fundamental institutions by the indirect route of s 19 and s 6 of the Bill of Rights", Tipping J concluded that the meaning of the Act for which the appellants contended could not "properly" be given to it by a "legitimate process of construction".

CONCLUSION

For the future development of discrimination law in this country it is probably unfortunate that *Quilter* was the Court of Appeal's first judgment on s 19 of the Bill of Rights. Same-sex marriage is perhaps one of the more difficult discrimination claims which contemporary Courts have to face. In their eagerness to lob that issue into Parliament's Court, the majority Judges have departed from basic tenets of discrimination and human rights law. The concept of adverse impact – a crucial feature of our Human Rights Act and of overseas discrimination law – is not applied by the majority; longevity of the discriminatory practice is invoked to vindicate it, with no appreciation of the irony that longevity of discriminatory practices and the common law's tolerance of intolerance are precisely why Parliament enacted anti-discrimination laws; overseas and international jurisprudence which does not explicitly prohibit sexual orientation discrimination is inappropriately used to read down our law which does; the hallmark of charters of rights – generality of language – is relied upon as indicating that Parliament did not intend the Courts to determine the substantive issue of discrimination even though the White Paper and overseas experience shows that difficult human rights issues should and can be decided under generally worded provisions; the word "discrimination" is incorrectly interpreted; and, finally, the majority fails to advance a single reason which provides a reasonable and objective basis for justifying the exclusion of homosexuals from the state of marriage. This last point is particularly concerning. For those who believe that marriage should be confined to heterosexuals, the majority decisions must be disappointing because they suggest that there are no legitimate reasons for different treatment – may be there are? For same-sex couples it must be deflating to hear a Court declare no discrimination without putting forward a single objective reason therefor. Finally, the message for the Crown from *Quilter* is that no reasons for different treatment of protected groups need be given once controversial social issues are involved.

Next, *Quilter* shows that the Court of Appeal is still uncertain as to its proper role vis-à-vis Parliament under our Bill of Rights. The majority take the view that it is not for them to examine the compliance of a statute with the rights and freedoms which Parliament has solemnly declared – yet all that the Bill of Rights says Judges cannot do is strike down a statute which is inconsistent with the Bill of Rights. Moreover, as Thomas J points out, the s 4 issue "does not arise at all" unless there exists unjustified discrimination (to similar effect see Richardson J in *Noort* at 284). Thus, Parliament expects the Courts to grapple with the substantive issues – the majority's failure to do so goes against the statutory duties imposed by the Bill of Rights.

Finally, *Quilter* is important in regard to its treatment of ss 4 and 6 of the Bill of Rights. The decision emphasises that even where in a linguistic sense it "can" be read and given effect to in a way compatible with human rights, legislation will not be so interpreted if it would be inconsistent with a Court's assessment of Parliament's stance on the issue as discernible from the available statutory and other materials. The Courts are reticent to interpret legislation to provide a result which, they believe, Parliament would not itself have legislated for. (As Thomas J puts it: "[Section 6] does not authorise the Court to legislate. Even if a meaning is theoretically possible, it must be rejected if it is clearly contrary to what Parliament intended.") Thus *Quilter* highlights again the nature of the relationship between ss 4 and 6 and the dilemma which the Bill of Rights creates for the New Zealand judiciary (see Butler, (1997) 17 OxJLS 323). ❑