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ANOTHER COMPENSATION SCHEME

The fundamental flaw in ACC was the belief that the primary function of insurance is redistributive and compensatory.

That is not the case. First, insurance, like banking, is a method of aggregating capital and investing it to create growth. Secondly, insurance can reduce risk, thus increasing the general welfare. Government insurance schemes share neither of these characteristics.

The other fundamental flaw of ACC was its attempt to define a particular category of the vicissitudes of life and provide compensation for them but not others. An inevitable consequence is the proposal that other vicissitudes should be compensated.

The Law Commission has now proposed that those "wrongly" convicted should be compensated.

There are a number of concerns about this proposal:

- it is uncosted;
- it ignores deadweight costs;
- it is the product of a static analysis; and
- it ignores experience of compensation schemes.

The Law Commission propose that the scheme should be limited to those who have been convicted and had the conviction quashed on appeal with no order for a retrial. While the arguments raised for these limitations are in themselves sensible, the result departs so far from the alleged principle that those who are innocent should be compensated that it is irrelevant as a basis for argument.

The proposed limitations demonstrate the inevitably arbitrary nature of any such scheme. But this arbitrariness has two destabilising effects. It enables agitators to have the scheme extended by Parliament beyond what was envisaged and it encourages the tribunal administering the scheme to push the boundaries out by compensating deserving cases which strictly speaking fall outside it. Both these factors have been evident in the history of ACC.

The justice sector seems to be able to put through reforms entirely uncosted. Doubtless the sector is still inhabited by those who believe that the matters they are dealing with are beyond price. The problem is that there is only a limited pot of money and that what is spent on one matter cannot be spent on another. Many victims of crime may feel that there are higher value uses for this money.

The Law Commission report admits that there will be operating costs. No attempt is made to quantify them or to assess an acceptable ratio of operating costs to pay out. Bearing in mind the number of unsuccessful applications, this will be large. Let us conservatively estimate the operating costs as 50 per cent of pay out, most of which is born by the state but some of which is born by unfortunates such as witnesses and victims who are summoned before this tribunal for a second time round.

There is then the element of deadweight cost of taxation which the report fails to take into account. Let us conservatively estimate this at 100 per cent. The result is that we are now inflicting a loss on the economy of nearly $3 million in order to hand out $1 million in benefits. Powerful arguments are required to justify this.

These arguments are not forthcoming. The Law Commission's first, that losses incurred through the use of the state's coercive powers should be compensated, is buttressed by an inapt analogy with compulsory purchase of land. This consists of deliberately depriving one of property, for some social purpose. It is the equivalent of imprisoning someone or keeping them in prison when they have done no wrong, for some social purpose such as to "send a message" in relation to a particular type of offending. Such things do not, of course, happen here.

The other arguments seem to be restatements of this argument, with the exception of one related to rehabilitation. It is supposed that an award of compensation will help the subjects rehabilitate themselves. This might be true, if it were not for the process. The effort and expense required to prove one's innocence to the tribunal is an enormous diversion of resources that could be expended getting oneself back on one's feet. The result is to create a grievance industry in which people have incentives to dwell on the past rather than look to the future and another group have incentives to encourage them to do so.

Most bizarre is the idea that a compensation scheme will encourage the state to avoid errors. But we already have tort liability designed to achieve that. This scheme is expressly designed to deal with the irreducible error rate.

Finally, the Law Commission believes that only a small number of cases will be involved each year. The founders of DPB and ACC believed the same.

The Law Commission believes that the requirement to prove innocence will be a disincentive to frivolous cases. But why should it deter the legally aided applicant? The only disincentive is an award of costs against unsuccessful applicants. The criminal defendant and defence counsel are on a one-way bet in the justice system as it is. They can raise bizarre arguments and lengthen trials without facing the threat of costs.

We will now see public choice theory in action. Although this scheme will be welfare reducing, its costs will be small and widely distributed. No one therefore has much incentive to oppose it. Meanwhile, we can expect criminal defence lawyers actively to lobby for it. They are the only certain beneficiaries. ❑

LETTER

Kevin Dawkins ("Medical Manslaughter", [1997] NZLJ 393) is entitled to his opinion concerning the various arguments for or against the Crimes Amendment Act 1997. The issues have already been extensively debated, and he raises few if any points concerning these which have not already been made by others and responded to by us before. We see little point in endless rehearsals of the same arguments on each side. We would simply ask readers of his article also to examine some of the material in which we and others have presented the case for change (see below) before accepting on face value all that Mr Dawkins has to say on the subject.

The subtitle of his article accurately includes the word "attacks". We think it is regrettable that Mr Dawkins has chosen to go beyond a debate of the issues and enter into what indeed does amount to an attack, a rather personal attack, on the process by which this change in the law was brought about. His article includes a number of quite unpleasant direct allegations as well as a fair amount of innuendo about some of the groups and individuals involved. Most of these allegations seem to be unfounded and unsubstantiated. A few examples follow.

The claim that Sir Duncan McMullin's report was "in effect" commissioned by the New Zealand Medical Law Reform Group (NZMLRG) is quite misconstrued. The facts are as follows. Mr Dawkins is correct in saying that the officials of the Ministry of Justice did at one stage oppose this reform. The Minister of Justice was faced with this official advice on one hand and on the other hand with repeated representations from the medical profession to the effect that something needed to be done to correct a situation seen by doctors as unjust. He decided that the best way to resolve this difference in opinion would be to appoint an independent and authoritative person to evaluate the issues. This proposal arose at a meeting with the Minister at which officials of the Ministry also attended. It was accepted by all present as a fair and reasonable approach. Sir Duncan was accepted by all involved as a neutral person with no previously stated view on the subject in hand. As a retired Judge of the Court of Appeal, Sir Duncan was seen as having the experience, the authority and the objectivity to conduct such a review. The NZMLRG left that meeting knowing that the future for the case for a change in this part of the law depended on the outcome of the review, and that a recommendation by Sir Duncan favouring the status quo would end any possibility of reform in the foreseeable future. Our group would have had to accept such a result.

For others to imply after the event that we "commissioned" Sir Duncan's report may be likened to impugning the integrity of one team and of the referee after the match is over and the result known. The comment that various officials "changed their tune after 'discussions' with Sir Duncan" also carries an implication which we do not think is justified. It seems that the opinion of many people did undergo some change over a period of time, and there may be many reasons for this, including the considerable effort made by members of the NZMLRG to advance the case for reform. That Sir Duncan, in the course of consultation, ascertained the present opinion concerning the very specific proposal contained in his report of people known to have previously opposed the idea of change in general, is perfectly in order. The references to "political patronage" and "the help of a report commissioned for the purpose" are without foundation.

A less overtly misleading statement, but a misleading statement nevertheless, is the comment that the Justice and Law Reform Committee had "recently heard submissions from apologists for the NZMLRG". More accurately, this committee called for submissions from the general public and received a substantial number. They presumably considered all of these, and then selected six for oral presentation, including as a matter of interest that of the Health and Disability Commissioner. After the hearings, the NZMLRG obtained and reviewed all the written submissions. Whether there were enough of them, whether there was enough publicity in calling for them, and whether enough people on either side were given an opportunity to speak are all matters of opinion, and would remain so whether there were two or two thousand. In our opinion, the submissions did represent a fair range of different viewpoints, and they certainly included a number which opposed the change. It is also interesting that a number in favour of the change came from non-medical sources. In the same way, although we are not privy to what was said, the list at the end of Sir Duncan's report of people and organisations consulted by him is long and includes many who are not medical as well as a good number known to disagree with the NZMLRG.

The truth, whether he likes it or not, is that neither Sir Duncan nor any member of the Justice and Law Reform Select Committee were subject to any influence on the part of the NZMLRG, or, so far as we know, any other member of the medical profession, except that of direct representation and persuasive argument. The NZMLRG had an almost impossible task in getting the Government even to take an interest in this matter. The processes followed by the Group were entirely open, above broad and appropriate. Any deficiencies (real or imagined) in the procedures followed by others were not the responsibility of the Group, nor would there have been any way of knowing in advance whether such (real or imagined) shortcomings would have been for or against the interests of those wishing change. Most if not all the points on the actual issue (ie as opposed to the process) made by Mr Dawkins seem to have been considered by Sir Duncan, and many are raised in some of the submissions to the Justice and Law Reform Committee. There is an opinion concerning each of them which does not accord with Mr Dawkin's, and the fact that Sir Duncan and the Committee preferred, on balance, to recommend a reform to this section of the Crimes Act rather than to recommend retention of the status quo (which would have been easier), speaks for itself.

In passing, the NZMLRG did not convince the minister (which minister, incidentally?) that the Anaesthetic Mortality Committee should be replaced by a non-statutory body created under the auspices of the Australian and New Zealand College of Anaesthetists, as Mr Dawkins suggests. Again, his comments are factually inaccurate; he appears to be unaware of the history of this committee, the details of its proposed replacement, and the motivations and issues at stake. To do justice to the subject would take considerable space, and we suggest that if it would be of interest to the readership of NZLR, it would be better for us to provide an in depth article on this matter (including the specifics and merits of the new proposals) than to labour the point here.

The final matter which we will address concerns his suggestion that members of the NZMLRG would condone "egregious incompetence". The first answer to that is that it is nonsense. All the key members of the group have been heavily involved in upholding

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ELECTRONIC COMMERCE

D F Dugdale, Law Commissioner

introduces the latest Law Commission report

Electronic commerce is a generic name for business transactions which are entered into using electronic rather than paper-based methods of communication and recording. It is an increasingly vital component of the domestic and international economy, and promises much for New Zealand businesses in terms of efficiency gains and new opportunities to compete in distant markets. Unsurprisingly, the subject has attracted a large quantity of analysis and comment. Not all of this has been helpful. The Law Commission has accepted the responsibility of trying to dispel some of the confusion.

The Law Commission's latest report *Electronic Commerce: a guide for the legal and business community* (NZLC R50 1998) is an attempt to shine a little light in the darkness surrounding electronic commerce, and in doing so to provide a useful resource for lawyers and businessmen alike. It is the first report in a series of four looking at aspects of international commercial law. The others are a second report on electronic commerce, a report discussing whether New Zealand should adopt the UNCITRAL Model Law on Cross Border Insolvency, and a report discussing whether New Zealand should adopt other international initiatives or conventions, such as the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

Our analysis is guided by four basic objectives:

- To ensure that business people can choose whether to do business through the use of paper documentation or by electronic means without any avoidable uncertainty arising out of the use of electronic means of communication;
- To ensure that fundamental principles underlying the law of contract and tort remain untouched save to the extent that adaptation is required to meet the needs of electronic commerce;
- To ensure that any laws which are enacted to adapt the law of contract or the law of torts to the use of electronic commerce are expressed in a technologically neutral manner so that changes to the law are not restricted to existing technology and can apply equally to technology yet to be invented;
- To ensure compatibility between principles of domestic and private international law as applied in New Zealand and those applied by our major trading partners.

The report tackles the subject by examining the very basic principles of commercial law to see just how a change in medium will affect commercial agreements and behaviour. In this aspect it is unlike most Law Commission reports; the objective is to provide clarity with regard to existing law rather than recommend reform. Electronic commerce, from a legal perspective at least, is in large part a question of old wine in new (electronic) bottles. The law of contracts or torts does not necessarily behave differently in an electronic environment, and in many instances there will be no difference in law between a transaction conducted in a paper medium and a similar transaction conducted electronically. However, new technology may place a different emphasis on existing law, and issues will arise as to how the law will adapt to new commercial practices in the absence of legal precedents.

Four areas of law relevant to electronic commerce are discussed in this report: the law of contract, torts, evidence, and conflicts of law. Specific issues discussed include the timing, attribution and authentication of electronic messages, the extent to which messages are subject to discovery and inspection, and the potential liability of Internet users and service providers for tortious acts. A further question addressed is how the law should react to the advent of electronic signatures, both as a mechanism for ensuring communications are secure and authentic, and as a means for meeting statutory requirements that documents be signed. In each case we set out how New Zealand Courts would, in our opinion, apply existing law to cyberspace. We also consider whether the UNCITRAL Model Law on Electronic Commerce, or parts of it, should be adopted in New Zealand. Finally, we raise a number of other issues including intellectual property, securities law, tax and the need to balance competing values of law enforcement and privacy in cyberspace. These matters are discussed in a general way, and submissions are invited where appropriate. These will be taken into consideration in our second report on electronic commerce.

Our final recommendations for reform will depend on the extent to which the law (rather than economic or technical considerations) impedes electronic commerce. There is not, in our current view, any real justification for creating an entirely new body of commercial law to regulate electronic commerce. It is better simply to suggest such minor reforms as may be needed where existing law is murky. It is of course necessary never to overlook that the nature of the Internet effectively places it outside the sovereignty of any individual state. New Zealand law should facilitate electronic commerce, but regulation can only occur at an international level.

This report represents a first response to challenges posed to the law by electronic commerce. There will be more as technology creates new commercial opportunities. By identifying areas of certainty and areas of concern, this report will, we hope, assist business to make the most of such opportunities.

Copies of the report are available from the Commission (phone 04 473-3453, fax 04 471 0959, or e-mail nrussell @lawcom.govt.nz) and can be downloaded from the Commission's web site at http://www.lawcom.govt.nz ❑

WHITHER *RYLANDS v FLETCHER?*

Ursula Cheer, University of Canterbury

examines the judgments in Autex Industries v Auckland City Council

Ever since the House of Lords decided in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 that the rule in *Rylands v Fletcher* was, for all intents and purposes, part of the law of nuisance; and the High Court of Australia decided instead a short time later in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 that it has been subsumed by the law of negligence, we in New Zealand have been wondering which way our Court of Appeal would go. Two years after the *Cambridge* decision, Salmon J in the High Court followed the House of Lords in *Delta Projects v North Shore City Council* [1996] 3 NZLR 446, and held that the principle is an aspect of the law of nuisance. A strong minority of the Court of Appeal has now affirmed this approach in the context of a summary judgment application in *Autex Industries Ltd v Auckland City Council* Unrep, 23 February 1998, CA 198/97 (*Autex*).

THE FACTS

Autex arose from a water main which burst at a point eight metres from Autex Industries' Auckland premises causing water damage to the premises, plant, equipment and stock. Autex Industries sued the council pleading two causes of action: the council was strictly liable for the escape of the water and the resulting loss (*Rylands*), and the council had been negligent in allowing the escape of the water from the main. The decision for the Court of Appeal was whether to grant an application for summary judgment by Autex Industries which relied only on the first cause of action. The company based its argument on an earlier Court of Appeal decision, *Irvine and Co Ltd v Dunedin City Corporation* [1939] NZLR 741, in which the facts were on all fours with the instant case, and the city corporation had been held strictly liable. The council sought to argue that *Irvine* no longer applied in New Zealand, relying on *Burnie*, and that accordingly, *Rylands* has in this country become part of the law of negligence. It did not admit negligence, since the application was not based on such an claim, but conceded that damage to the plaintiff's property from flooding was foreseeable if the main burst. In the alternative, the council argued that if *Rylands* remained part of the law of New Zealand, whether as a separate tort, or a subset of the law of nuisance, its use of the subsoil under the road to house the watermain was a natural or reasonable use, established defences to such claims.

THE DECISION OF THE MAJORITY

The majority (Richardson P, Gault and Henry JJ), described the rule in *Rylands v Fletcher* as a tort which arose from conceptions of mutual duties of neighbouring landowners, which, "with various qualifications imposes strict liability for escape of dangerous things in consequence of some non-natural use of that land" (at 3). The Court considered that the council had produced no evidence to establish an arguable defence to such a claim. The majority appeared frustrated that an important issue had been removed to it to be heard as a summary judgment application without sufficient supporting evidence. The arguments involved a challenge to New Zealand law which had existed for 60 years, and concerned the future course of the common law in this country. Yet the parties appeared to expect the Court of Appeal to determine the issues by reference only to decisions in other common law jurisdictions, New Zealand precedent and a general discussion of public policy issues. The Court indicated strongly (at 4-6) that it would have required further detailed evidence of the kind referred to by Lord Porter in *Read v Lyons & Co Ltd* [1947] AC 169, 176:

> ... each (ie the question whether something "is dangerous" and whether a "use" is a "non-natural" one) seems to be a question of fact subject to a ruling of the Judge as to whether the particular object can be dangerous or the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances.

The majority considered that the council's defence depended on the ascertainment of further facts which it had not provided an evidential foundation for. Usually such a defendant would have to submit to summary judgment. In this case, the Court exercised its residual discretion not to give judgment (under R 136 of the High Court Rules) because the council had mistakenly assumed it did not have to adduce any affidavit evidence and now sought to do so. The case was remitted to the High Court for trial in the ordinary way. Exercise of this discretion is usually very restricted. However, it may be exercised where the circumstances disclose very unusual features which mean that the entry of summary judgment would be oppressive or unjust, or where there are complex questions of fact and law; (*McGechan on Procedure*, Wellington, Brooker's, 1988, HR136.13). *Autex* may have extended these categories for it appears in this case that the Court considered the case involved important and significant, rather than unusual, features, in which the answers to the questions of fact and law were profound and far reaching for the path which New Zealand nuisance law will take in the future. In spite of exercising the discretion in favour of the council, the majority nonetheless made an order of costs of $10,000 against it.

THE OPINION OF THE MINORITY

Keith and Blanchard JJ would not exercise the discretion in favour of the council, holding instead that the plaintiff was entitled to summary judgment because the defendant was fully aware of the nature of the claim and could have prepared the necessary affidavits. The minority reached this conclusion by first finding that the council had no defence to a *Rylands* claim, and secondly, by rejecting the council's argument that *Rylands* no longer applies in New Zealand as a separate tort or as a special form of nuisance action. In the process, the judgment gives us some indication of how these two Court of Appeal Judges view *Rylands* and its place in relation to the law of nuisance.

The minority noted that the *Rylands* action was the response to catastrophic dam or reservoir collapses (at 2) and the judgment emphasises this purpose of dealing with dangerous or hazardous things, in particular the collection of water, throughout. Keith and Blanchard JJ then considered the issue whether the bulk conveyance of things such as water, gas and electricity by a local authority through mains could ever be considered a natural use. After surveying the law in *Rickards v Lothian* [1913] AC 263, 280, *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* [1936] AC 108, *Charing Cross Electric Supply Co v Hydraulic Power Co* [1914] 3 KB 772, *Collingwood v Home and Colonial Stores Ltd* [1936] 3 All ER 200, and the *Irvine* case relied on by the plaintiff, the minority stated that as a matter of law, it is well established that such bulk conveyance, however common, is a non-natural use. The Judges then turned to the defendant's argument that this is now not so because times have changed. In contrast to the majority, these Judges were prepared to consider the issue without giving the council the opportunity to adduce historical and factual affidavit evidence in another Court. The Judges noted that water mains were commonplace at the time of the *Irvine* decision, and although there are more of them at the present day, they believed the risks associated with bulk carriage remain (at 7). Furthermore, they noted that although Lord Goff in the *Cambridge Water* case said that natural use has been extended to cover not only domestic but also recreational and some industrial uses, this did not appear intended to disturb the law established in the bulk carriage cases (at 7).

The council's most powerful argument arose from the Canadian case *Tock v St John's Metropolitan Area Health Board* (1989) 64 DLR (4th) 620, where the Supreme Court had refused to apply *Rylands* to damage arising from a blocked sewer which overflowed without negligence by a council, as in *Autex*. Canada's highest Court had accepted there that such drainage systems were natural use because they were an indispensable part of the infrastructure of urban life and for the benefit of the community. Keith and Blanchard JJ stated simply that they did not accept this argument, and observed further that the defendant council in the *Tock* case was found liable by a strict application of the law of nuisance in any event even though it had a defence of natural use to the *Rylands* claim (at 8). The Judges stated:

> ... when there is actual physical damage to property (as opposed to interference with tranquillity or amenity), the Courts are quick to conclude that the interference constitutes a substantial and unreasonable interference with the enjoyment of property and is thus an actionable nuisance ....

The minority concluded, therefore, that nothing the council's witnesses could say about construction, maintenance and monitoring of the watermains could alter its liability in nuisance (at 9) even if it had successfully argued that the use of watermains to store and transport water was a natural use.

The minority also considered that there was no tenable argument that in New Zealand *Rylands* actions have been absorbed into the law of negligence. In surveying the law, it firmly interpreted the original *Rylands* decision as dealing with nothing more than a particular kind of legal nuisance extended to cover cases of isolated escapes (at 3-4) and cited the *Cambridge Water* case as affirming this view. Keith and Blanchard JJ did not consider that the Privy Council would depart from that unanimous recent view of the House of Lords (at 10). The Judges noted that even *Burnie* had left the door open for nuisance to continue to apply instead of negligence in appropriate cases (at p 556 of the *Burnie* judgment).

Further, there were good policy reasons why a *Rylands* action should continue to exist. Firstly, a rough cost-benefit analysis supported the existence of a strict liability tort in relation to land: the cost of non-negligent failure of a public water system should be spread amongst all ratepayers or borne by a council's public liability under-writer rather than by an individual neighbour who cannot devise protection from such losses. Secondly, replacing the uncertainties arising from the exceptions and difficulties which have plagued the *Rylands* rule over time with the uncertainties and transaction costs associated with a negligence action was not justified. (In any event, the minority considered that there was no difficulty claiming for damage to chattels arising from nuisance, referring to the survey of this issue by Lord Cooke in the House of Lords' most recent discussion of nuisance law, *Hunter v Canary Wharf Ltd* [1997] AC 655, 719) (at 11). Thirdly, Keith and Blanchard JJ approved the view of Professor Fleming that the *Rylands* action is a vital component of tort theory. Fleming distinguished the underlying theory on which negligence is based from that underlying strict liability because he saw the former as turning on failure to take care while engaging in ordinary activities, while the latter is concerned with situations which involve the consummation of unusual risk where all care has been taken. The protective value of the latter was seen by Fleming to increase proportionately to the progress of the technological complexity of society (at 11). Finally, the minority noted that a *Rylands* action applied without difficulty in this case and a negligence action would not guarantee recovery for the plaintiff.

COMMENT

Simply locating *Rylands* within the law of nuisance does not assist in giving coherence to this difficult branch of tort law which is riddled with unanswered questions – questions which were steadfastly avoided by the House of Lords when it recently considered the nature of nuisance in the *Hunter* case. The minority in *Autex* recognised and gave value to the *Rylands* action as one where liability is strict. Yet in placing it under the umbrella of nuisance, they did not substantively discuss the fact that the latter has become invaded by negligence in recent years. Although Blanchard and Keith JJ noted that the *Cambridge Water* case held that foreseeability of damage of the relevant type is the test of remoteness in nuisance (at 4), there was no discussion of Lord Reid's statement in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd (The Wagon Mound No 2)* [1967] 1 AC 617, 639, when comparing negligence and nuisance liability that "... although negligence may not be

necessary, fault of some kind is almost always necessary and fault generally involves foreseeability ...". Fault appears to be a wider concept than negligence in that a person may take all reasonable care and yet still be at fault in the sense intended by Lord Reid. In this sense, the fault requirement looks compatible with the approach in a *Rylands* action. On the other hand, this interpretation of fault is also consistent with the non-delegable and variable standard of care in negligence which is higher for hazardous activities, devised by the High Court of Australia in *Burnie*. All that is certain is that nuisance law now features foreseeability in remoteness and to some unidentified extent in liability. The question is how does this sit with strict liability?

What is the point in identifying *Rylands* with nuisance? If it is to give coherence to the strict liability principle, then it must be said that there is little coherence in nuisance law to share. If it is to assimilate the two actions (and this seems to be the point of the arguments that either action could cover the same fact situation and the defences are to all intents and purposes the same) then the judgment in *Tock* appears to make nonsense of this. In that case a defence of natural use arising from use of sewers was successful in defeating a *Rylands* action, but a defence of ordinary and reasonable use failed on the same facts for nuisance. Although the minority in *Autex* would have rejected both defences on those facts, the decision in *Tock* indicates that not all Courts would agree and that the use of the different actions *can* lead to different results. Yet if nuisance can cover the same ground, then *Rylands* need not exist either as a separate tort, or as an extension of the law of nuisance – it should disappear altogether.

Further, the minority in *Autex* took a schizophrenic approach to the *Rylands* action. Throughout the case, Blanchard and Keith JJ were most concerned to emphasise and support the notion of strict liability as being a unique and valuable feature of *Rylands*. Yet they also endorsed a strict application of the law of nuisance where there is a hazardous activity and actual physical damage to property, meaning that liability can be established without the need to prove negligence (at 3 and 8-9), to achieve the same result. (Arguably, however, a fault requirement has invaded even the latter application of nuisance, and the defence of ordinary use imports an inquiry as to reasonableness as well.) Again, the question arises, why preserve both actions when one would do?

Finally, although Blanchard and Keith JJ saw strict liability as justified in relation to loss connected with use of land because of the progress of the technological complexity of society, they did not explain why the same technological complexity justifies the foreseeability test in negligence for personal injury, where the human cost of the damage is generally far more profound. ❑

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standards and assisting the various processes of regulating medical practice. The second answer is that our position has always been that the outcome of a trial under the higher standard is unknowable in any particular case and that the injustice does not necessarily lie in the result (although we do think personally that at least some of the results were unjust, however often the comments to the contrary of the Appeal Court Judge in the Yogasakaran trial are repeated). We think the key injustice lies in the fact that the cases were not tried under an internationally accepted standard, but instead under an aberrant local standard which even those who opposed change now accept was very low. What can possibly be the justification for requiring proof of gross negligence for exemplary damages in the civil jurisdiction (Mr Dawkins draws our attention to this point) while at the same time asking only for proof of simple negligence for manslaughter charges in the criminal Courts? Of course there is a problem in obtaining adequate compensation for injured people (not just injured patients) in New Zealand today. On this point we agree with Mr Dawkins. As we have said repeatedly, and as the Select Committee accepted, that does justify addressing inadequacies in the civil law or in ACC or both, but it is simply not a justification for the abuse of an inappropriately phrased and outmoded section of the criminal law.

We find it hard to believe that anyone who has observed such cases closely would endorse the distress caused to all concerned, including patients' families, of the hopelessly inappropriate, and expensive workings of a manslaughter case as a suitable means of resolving questions about standard of care at the lower end of the spectrum of negligence. We find it difficult to see in this process any advantage for the patient, the public or anyone else. The recent not-guilty verdict of a Tauranga anaesthetist is a case in point – members of the family went on television complaining that many questions remain unanswered, and they were right in this. The process wasn't designed to examine the wider and more subtle aspects of a complex medical case – it was designed to say whether an individual was a criminal or not, which is a different thing altogether. To their credit, it seems that very few of the lawyers who have actually been involved first hand in such trials want to see this method of trying to regulate medical practice continued. The place of the criminal law is for criminal behaviour (ie behaviour that people of all walks of life can look at and say that it was morally bad), and we have always endorsed its role for that, whether doctors are involved or not. Even in New Zealand there are already better ways of dealing with things that go wrong in medicine in spite of the best endeavours of all concerned, often under difficult circumstances. We support any effort directed at genuine improvements in those ways.

We have tried in this response to identify and deal with the criticisms made by Mr Dawkins which relate to process and carry explicit or implicit criticism of individuals involved in one way or another with obtaining the passage of Crimes Amendment Act 1997. In doing so we have also tried to avoid criticising Mr Dawkins' own motives and integrity, and to focus instead on the content of his comments and our reasons for objecting to them.

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CONFLICTS OF INTEREST AND CHINESE WALLS

David Coull, Bell Gully Buddle Weir, Wellington

considers the significance of Russell McVeagh v Tower Corp

The emergence of "mega-firms" in New Zealand has increased the possibility that law firms will face a conflict of interest when representing their clients. This raises the question of whether it is appropriate for a law firm to represent a client where it faces a potential conflict between the legal and fiduciary duties it owes to other clients. The recent decision in *Russell McVeagh McKenzie Bartleet & Co v Tower Corp* (25 August 1998, CA 86/98) is the first time the Court of Appeal has considered whether a law firm can accept instructions to act for a new or existing client where accepting those instructions potentially conflicts with the duties that the firm owes to other existing or former clients.

A law firm may face a conflict of interest resulting from the successive representation of clients (a "former client" conflict) in a number of different circumstances:

- the law firm accepts instructions to act from a new or existing client where the scope of that retainer conflicts with the continuing duties owed by the firm to its former clients;
- a lawyer who transfers into the firm has acted for a client in the past and that lawyer's knowledge of his or her former client's affairs conflicts with the duties that the law firm collectively owes to its existing and potential clients; and
- two law firms amalgamate and a client or a former client of one amalgamating firm has interests that conflict with an existing client of the other amalgamating firm.

The underlying principles relevant to determining whether to disqualify a lawyer or a law firm where a former client conflict arises were stated in the leading Canadian Supreme Court decision of *MacDonald Estate v Martin* (1991) 77 DLR (4th) 249. These principles were applied in *Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737. (Also see David Coull *Typhoid Marys: the Ethical Dilemma of Lawyers who Switch Firms* (1998) 28 VUWLR 41.)

This article primarily touches upon three aspects of the decision in *Tower Corp*: the relevance of the fiduciary relationship between lawyer and client in a conflict of interest situation, how the fundamental principles expressed in *MacDonald Estate* were applied by the Court of Appeal and whether the decision clarifies the circumstances in which Chinese walls can be relied upon by law firms to prevent disqualification.

THE FACTS AND ALLEGATIONS

Tower Corp concerned an application made to the High Court by Tower to prevent Russell McVeagh from acting for a large merchant bank in relation to the acquisition and demutualisation of Tower. Russell McVeagh, through a partner in its Wellington office, had previously been retained by Tower to act in a specialist capacity on four tax matters that were of concern to Tower.

The instructions to act in relation to the demutualisation process were received by Russell McVeagh through a partner in its Auckland office who specialised in corporate merger and acquisition work. Before accepting these instructions, the Auckland partner discussed the potential conflict of interest with his Wellington partner. The Wellington partner took the view that he was advising Tower in a narrow specialist capacity only and that he was not aware of any confidential information that would prevent these instructions from being accepted. The instructions from the merchant bank (and later from Guinness Peat Group (GPG)) were accepted by Russell McVeagh on that basis. Tower was not advised that Russell McVeagh had accepted instructions from GPG and its consent was not sought for Russell McVeagh to do so.

The High Court held that a conflict of interest existed and that Russell McVeagh should be disqualified from acting for any party against Tower in relation to the demutualisation process. The protective measures put in place by Russell McVeagh to prevent the disclosure of confidential information were not sufficient to prevent disqualification. The issues were, however, sufficiently finely balanced for Gallen J to comment that he reached this conclusion "with some hesitation".

Perhaps unsurprisingly, Russell McVeagh appealed. Tower argued that Russell McVeagh should be disqualified from acting for GPG because it either:

- represented Tower and GPG simultaneously and therefore breached the fiduciary duty of loyalty that it owed to Tower; or
- possessed confidential information pertaining to Tower and there was a risk that this confidential information would be disclosed.

The majority of the Court of Appeal overturned Gallen J's decision and held that neither ground was sufficient to disqualify Russell McVeagh in the circumstances. The judgment of Richardson P, Gault and Henry JJ was delivered by Henry J and focused primarily on Russell McVeagh's possession of confidential information. A shorter concurring judgment was also delivered by Blanchard J.

Thomas J dissented from the majority's decision not to disqualify Russell McVeagh. Thomas J's judgment is particularly significant because it analyses whether simultaneously representing clients whose interests conflict will result

in a law firm breaching the fiduciary duties that it owes to those clients.

BREACH OF FIDUCIARY DUTY

Tower claimed that Russell McVeagh should be disqualified from acting for GPG because it breached the fiduciary duty that it owed to Tower. The legal basis for Tower alleging a breach of fiduciary duty was that Russell McVeagh had acted simultaneously, albeit on unrelated matters, for Tower and GPG The different approaches taken by Henry and Thomas JJ demonstrate that the ability to rely on a breach of fiduciary duty to found an injunction to prevent a law firm from continuing to act is far from settled.

Henry J took the view that disqualification of a law firm was only appropriate where there was an existing breach of the fiduciary duty of loyalty. Even where the breach occurs during the simultaneous representation of clients, the fact that the law firm has ceased to act for the client means that disqualification is no longer available as a remedy. Where the law firm has ceased to act for one client, the basis underlying disqualification (ie the law firm's divided loyalties) no longer exists.

Henry J concluded that because Russell McVeagh no longer acted for Tower at the time the injunction was sought, there could be no breach of a continuing fiduciary duty of loyalty. Accordingly, there was no basis on which the Court could disqualify Russell McVeagh from acting for GPG.

The effect of the majority's approach is that even where a breach of fiduciary duty is shown, disqualification cannot be sought by a disgruntled client unless the law firm continues to act for that client. Once a retainer has ended, the remedy for a "historic" breach of the law firm's fiduciary duty of loyalty lies in damages rather than injunctive relief. However, in these circumstances, the law firm remains under a continuing duty not to disclose confidential information about its former client to anyone else. A breach of that continuing duty would clearly provide the basis for disqualification even though the retainer has ended.

The conclusion reached by the majority of the Court of Appeal meant that they did not consider whether the continuing simultaneous representation of clients would result in the law firm being disqualified where the firm still acted for the disgruntled client. However, it is implicit in Henry J's approach that the client seeking disqualification must show that such simultaneous representation results in the law firm breaching the fiduciary duties that it owes to its client. This necessarily will require the law firm to have divided loyalties between its clients. Where the case concerns matters which are unrelated (a "separate matter" conflict), this later aspect would seem difficult to establish.

Thomas J adopted a different approach. His Honour held that where a firm simultaneously represented clients with competing interests, the Court would disqualify the law firm from continuing to act. This was so even where the law firm no longer acted for the disgruntled client when the disqualification order was sought. The breach of duty was not "spent" and could therefore form the basis for disqualifying the law firm. The essential reason given for this view was that the law should not condone a law firm retaining an advantage which arose as a result of breaching a fiduciary duty that it owed to its client.

Thomas J held that Russell McVeagh breached the fiduciary duty of loyalty it owed to Tower. Simply performing the agreed legal services and preventing the disclosure of confidential information was not sufficient. By not disclosing that it intended to accept instructions from GPG, Russell McVeagh breached the obligations of trust, confidence and loyalty it owed to Tower.

Another important point was made by Thomas J about the relationship between "specialist" instructions and the fiduciary duties owed by a law firm to its clients:

> While the scope of the fiduciary obligation is also to be determined by reference to the contract of retainer, it is imposed as a matter of law. The obligation of loyalty is not narrowed or limited simply because the contract of retainer may relate to a narrow or limited specialist instruction. While the nature of the instruction may bear on the question of what is required to discharge the obligation of loyalty, once it is applicable the obligation of loyalty loses none of its force.

The necessary implication of this approach (if correct) is that law firms would need to carefully assess the nature of the instructions and how those instructions relate to other matters that the law firm, as a whole, is working on for other clients. Where there is even the possibility of a conflict of interest, the law firm would owe a fiduciary duty to its existing clients to disclose the existence of the new instructions. It is, however, necessary to recognise that the two instructions must be related in some way before any question of a conflict of interest arises.

Thomas J's dissenting analysis of how the breach of a fiduciary duty can form the basis for law firm disqualification is an important contribution to the conceptual basis underlying conflict of interest issues. The message is clear – where the simultaneous representation of clients may, potentially, result in the law firm as a whole having divided loyalties, the law firm cannot accept the new instructions unless the existing client consents. The breach of this duty, irrespective of whether the conflict of interest continues when disqualification is sought, will be sufficient to disqualify the law firm from acting for its new client.

CONFIDENTIAL INFORMATION

The second ground relied upon by Tower was that there was a risk that confidential information would be disclosed if Russell McVeagh continued to act for GPG.

The overarching principle that Henry J identified as being relevant was the need to ensure the reasonable protection of confidential information. Henry J held that three questions should be considered when determining whether to disqualify a law firm from continuing to act:

- first, whether any confidential information is held which, if disclosed, is likely to adversely affect the client's interests;
- secondly, whether in the particular factual circumstances, when viewed objectively, there is a real or appreciable risk that confidential information will be disclosed; and
- thirdly, once the first two questions have been answered affirmatively, whether in light of the "significance and importance of the fiduciary relationship which gives rise to the duty of protection", the Court should exercise its discretionary power to disqualify the law firm.

The matters relevant to the Court determining whether to exercise its discretion to disqualify the firm were the desirability of maintaining a person's right to the services of a solicitor of choice (and the corresponding right of a solicitor to offer services to the public generally), preserving mobility within the legal profession, ensuring access to specialist legal

services, and promoting market competition. These factors had to be balanced to determine where the "overall ends of justice" lie.

The majority of the Court then turned to assess the risk that confidential information may be disclosed. Henry J analysed the risk of both general and specific information being disclosed. The general information related to, among other things, the way in which Tower operated its business, the way it negotiated, its management mores and its interface with other external advisers. The specific information allegedly at risk of being disclosed related to Tower's approach to tax provisioning, its investment management and the level of its business expenses. This specific information was said to be relevant to determining the current net worth of Tower for the purposes of the impending acquisition.

Both Henry and Blanchard JJ held that the general knowledge and information obtained by the Wellington partner while advising Tower in relation to its tax affairs was not sufficient to warrant disqualifying Russell McVeagh. Furthermore, there was no reasonable apprehension that such information would now be deliberately or inadvertently disclosed.

The same conclusion was reached in relation to the specific financial information identified by Tower. This information related to Tower's accounting policies and costs as they existed in 1990 and as such it was of little relevance to Tower's current position. Henry J commented that it was "extremely doubtful" whether sensible use could have been made of this information. This would, in itself, have been sufficient to prevent disqualification. However, both Henry and Blanchard JJ further held that there was no realistic chance of disclosure. The relevant Russell McVeagh files were currently being held at the High Court and the chances of the Wellington partner remembering the information contained in those files was extremely remote.

This aspect of *Tower Corp* demonstrates that the possible disclosure of general information about a client, such as its management practices or the way in which it operates, will not be sufficient to disqualify a law firm from acting against its former client's interests. Where an existing or former client is seeking to disqualify a law firm from acting for another client, it will be necessary to specifically identify the confidential information that may be disclosed and to prove that there is a real risk of material disclosure. Focusing on general information and practices will not, in light of *Tower Corp*, be sufficient to disqualify a law firm from continuing to act for an existing client.

THE APPEARANCE OF JUSTICE

The majority judgment of the Supreme Court of Canada in *MacDonald Estate v Martin* emphasised the "appearance of justice" when determining whether to disqualify a lawyer or a law firm from acting for a client. The perception that confidential information may be disclosed, rather than actual disclosure, was held to be sufficient to justify disqualification. The test adopted by the majority of the Supreme Court was therefore whether "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur".

The Court of Appeal seemed to adopt this approach in *Black v Taylor* [1993] 3 NZLR 403 when determining whether to disqualify a barrister who faced a potential conflict of interest. Richardson J applied (at p 412) the reasonable member of the public test to determine whether justice would have been seen to be done had the lawyer involved continued to act. Cooke P framed the question (at p 406) in terms of "what is needed or may be permitted to ensure in a particular case both justice and the appearance of justice".

In *Tower Corp*, Henry J rejected the "appearance of justice" test and took the view that the rational for the Court intervening was not "some perception of disloyalty or impropriety" but rather the principle of ensuring the reasonable protection of confidential information. The decision in *Black v Taylor* was distinguished on the basis that it related to the inherent jurisdiction of the Court to control judicial proceedings rather than a law firm giving commercial advice to clients.

However, Thomas J, in his dissenting judgment, considered that it was a "fundamental concern" that justice should not only be done but should manifestly be seen to be done. Although acknowledging that *Black v Taylor* was factually distinguishable, Thomas J thought that the underlying principle, ensuring the appearance of justice, was relevant to determining whether to disqualify a law firm from acting. This approach clearly imposes a more onerous standard on law firms to avoid actual or potential conflicts of interest.

On the basis of the majority's decision in *Tower Corp*, the appearance of justice does not seem relevant to determining whether to disqualify a law firm unless Court proceedings are involved. However, it is arguable whether a distinction should be drawn between a law firm representing a client before the Courts and simply giving legal advice to a client outside of Court (as occurred in *Tower Corp*) when potentially disqualifying conflicts of interests are considered.

The significance of the majority's rejection of the "appearance of justice" principle where a law firm is acting for a client out of Court should not be understated. One effect is to make it more difficult for clients to disqualify law firms where an apparent conflict of interest arises – the threshold that clients must now cross has risen significantly. It also makes it necessary for the Court to consider the nature of the actual confidential information allegedly disclosed before determining whether to disqualify the law firm. The need to obviate the Court from having to consider the actual information was one of the reasons why the majority Judges in *MacDonald Estate* adopted the "appearance of justice" test. This is clearly an important consideration where the client's commercial interests are at stake.

REJECTION OF THE PRESUMPTION

Consistent with his earlier judgment in *Equiticorp Holdings*, Henry J rejected the use of the "rebuttable presumption" that had found favour with the majority of the Supreme Court of Canada in *MacDonald Estate*. This approach requires that where the concurrent representations are sufficiently related, a rebuttable presumption that confidential information has been disclosed arises. The law firm must then demonstrate there was no risk that confidential information has, in fact, been disclosed.

Henry J expressed a preference for the "common sense" practical approach of assessing the evidence rather than using either rebuttable or irrebuttable presumptions that confidential information has been disclosed. However, where a law firm does possess confidential information, Henry J commented that in the absence of "negating evidence of protection", the Court will readily infer that there is a risk of disclosure. This later comment suggests that there are unlikely to be many situations where a law firm is disqualified under the presumption-based approach but not

disqualified under the "common sense" practical approach adopted by the majority in *Tower Corp*.

Arguably, the rejection of the rebuttable presumption does not create a significant inconsistency with the developing Canadian jurisprudence in relation to conflicts of interest. A presumption is merely a device used by the Courts to assess the relevant evidence and reach a conclusion based on that evidence. The same conclusion may be reached after the Court has made a balanced assessment of that same evidence. By way of example, applying the *MacDonald Estate* approach to the circumstances that existed in *Tower Corp*, it is unlikely that a "substantial relationship" existed between the Tower retainer and the GPG retainer so as to give rise to a rebuttable presumption. Simply put, the threshold for disqualification, the fact that the relevant matters were sufficiently related, would not have been satisfied. The finding of the majority of the Court of Appeal would be unlikely to change had this test been applied.

LAW FIRM DISQUALIFICATION AND CHINESE WALLS

A client will typically seek to prevent both the lawyer and the law firm who advised them from advising another client where there is a risk that confidential information will be disclosed. The greatest risk that confidential information will be deliberately or inadvertently disclosed is where the same lawyer who has previously acted for a client of the firm acts for another client of the firm whose interests are opposed to those of that lawyer's other client. There is no effective way for one lawyer to "compartmentalise" his or her mind when acting for separate clients. For this reason, a Court is likely to disqualify that lawyer from continuing to act for the existing client unless the lawyer can show that there is no risk of confidential information being disclosed (for example, the lawyer advised the former client so long ago that he or she would not be able to remember any confidential information). A recent example of a lawyer being disqualified in these circumstances is Gallen J's decision in *Merck Sharpe and Dohme (NZ) v Pharmaceutical Management Agency Ltd* (7 June 1996, High Court, CP 23/96).

The more difficult question is whether the confidential information possessed by one lawyer in a firm should be imputed to the other lawyers in the same firm. Where knowledge of confidential information pertaining to a former client is imputed to all lawyers practising in the firm, the entire firm will be disqualified from acting against that client's interests where there is an appreciable risk that confidential information will be disclosed. There are numerous decisions in foreign jurisdictions which demonstrate that Courts will infer that lawyers within the same law firm share confidences with each other and that this may result in the entire firm being disqualified (see, for example, *MacDonald Estate v Martin* and *Mallesons Stephen Jacques v KPMG Peat Marwick* (1990) 4 WAR 357).

Chinese walls are frequently relied upon by law firms to prevent the flow of confidential information between different lawyers in the same firm. The legal status of Chinese walls in New Zealand has not yet been determined by a Court. It would, however, be fair to say that New Zealand Courts have not looked favourably on Chinese walls to date (see, for example, *McNaughten v Tauranga City Council* (No 2) (1987) 12 NZTPA 429). In *Tower Corp*, the factual findings of the majority meant that it was not necessary for the majority Judges to consider whether Chinese walls are sufficient to prevent the disclosure of confidential information. There are, however, indications in the majority judgments that the Courts may now accept Chinese walls in some circumstances. In this regard, Henry J said:

> For the reasons expressed we do not consider Tower has made out a sufficient case to justify disqualifying Russell McVeagh from acting for GPG Although the concepts of Chinese walls and cones of silence leave much to be desired, and cannot be allowed to obscure the realities of life and the ordinary behaviour and incidents of relationships where individuals practice together in a firm, internal control measures may nevertheless in some circumstances be both appropriate and sufficient to ensure protection. Other aspects of today's conditions must also be kept in mind. New Zealand is still comparatively small, and in some professional areas the availability of expert advice is limited. That availability should not be unduly restricted by Court imposed control or sanctions which are not required in the overall interests of justice to protect individual rights. This particular area of concern is not, in our view, one capable of being controlled by the Courts in terms of absolutes, which although they may provide a measure of certainty, would do so at the expense of possible, indeed likely, undue interference with rights and interests other than those being protected. As is so often the case when there are competing interests it becomes a matter of balance, which is achieved by the application of principle to particular facts. In that way the overall public interest is best served.

Henry J's approach demonstrates that the Courts are likely to hold that a Chinese wall will prevent the disclosure of confidential information in some circumstances. This approach is clearly influenced by practical considerations such as the limited availability of expert legal advice and the ability of clients to gain access to that advice. A similar approach is evident from Blanchard J's approach.

In contrast to the majority's view, Thomas J was sceptical of the effectiveness of Chinese walls to prevent the disclosure of confidential information and expressed the view that they should only be used where there is an "overriding and compelling" need. Thomas J is clearly mindful of the risk of deliberate and inadvertent disclosure of confidential information between lawyers working in the same firm.

In this regard, Thomas J seems to draw a distinction between partners and staff solicitors who practise in large law firms. Although staff solicitors may be aware of their fiduciary duties to clients, the fact that they do not "share responsibility for the firm" in the same way as partners in law firms may suggest that strict confidentiality is not always maintained by these solicitors. However, there would appear to be no conceptual basis for drawing a distinction between partners and non-partners when it comes to observing duties of confidentiality – the duty exists irrespective of the lawyer's status in the law firm.

Thomas J expressly limits his guarded approval of the Chinese wall concept to cases involving successive representation (ie where a lawyer agrees to act against his or her former client's interests), where the only issue involved is the confidentiality of information. However, where the case involves the simultaneous representation of two or more clients whose interests conflict, Thomas J states:

> The notion that, in the absence of express and informed consent, one section of a firm can act for one client and another group in the firm act for another client where

> the interests of those clients are in conflict, or potentially so, providing that no information is exchanged, is fundamentally wrong. In such circumstances the firm is in breach of its fiduciary obligation of loyalty to both clients, irrespective that information may not be disclosed. It is the firm, and not the particular partners, which is retained by the client and which is subject to the obligation of undivided loyalty.

The view that different partners should only act simultaneously for clients whose interests conflict where both clients expressly consent to such representation (and the potential for divided loyalties) is consistent with the conceptual basis underlying the fiduciary relationship between lawyer and client. Although *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 was not cited by Thomas J, that decision is the leading New Zealand authority for the proposition that a solicitor's loyalty to his or her client must be undivided. Once it is accepted that solicitor/client fiduciary duties are owed by the firm as a whole, and not the individual lawyers acting for a client on a particular matter, the rule in *Farrington* must apply to the law firm as an entity. The loyalties of the firm cannot be divided in the absence of the consent of all clients involved.

The effect of Thomas J's approach to the issue of simultaneous representation is that Chinese walls should not be used to allow a law firm to act for two clients whose interests conflict without seeking the client's consent. There is, based on Thomas J's approach, no scope to consider the policy considerations that may suggest Chinese walls would be appropriate. The absoluteness of the existing fiduciary relationship underpins this view. A law firm proposing to simultaneously represent clients who have conflicting interests would be well advised not to implement a Chinese wall without seeking the consent of those clients. *Farrington* and *Nocton v Ashburton* [1914] AC 932 demonstrate that the result of doing so without consent may well be that a client has an equitable remedy for the breach of fiduciary duty resulting from the law firm's failure to disclose material information. This remedy may take the form of equitable damages or disqualification.

THE BRICKS IN THE CHINESE WALL

The clear effect of *Tower Corp* is that, in at least some circumstances, Chinese walls can be relied upon by law firms to prevent the knowledge of one lawyer "tainting" the other lawyers in the firm and thereby causing the law firm itself to be disqualified from acting for a particular client. What, then, is required to construct a Chinese wall that does not leak?

The decisions of the Canadian and United States Courts provide useful guidance for determining what kind of internal control measures will be sufficient to prevent disqualification of the law firm. It is outside the scope of this article to analyse this jurisprudence in any detail. However, these Courts seem to have focused on the physical separation of the individual lawyers who are acting for clients whose interests conflict (see, for example, *Canada Southern Petroleum v Amoco Canada Petroleum Company Ltd* (1997) 144 DLR (4th) 30 and *Schiessle v Stephens* 717 F 2d 417 (7th Cir, 1983)). The size and structure of the firm involved and the rigour with which the firm enforces the relevant protective measures that are put in place by the firm have been seen as being particularly important.

Only Thomas J in *Tower Corp* considered whether the internal controls put in place by Russell McVeagh would eliminate the risk of confidential information being disclosed. Thomas J held that the range of undertakings given by Russell McVeagh's lawyers and the quarantining of relevant information was not sufficient to eliminate the risk of confidential information being disclosed.

Russell McVeagh relied upon the fact that the lawyers who acted for the opposing interests were in different cities. However, Thomas J held that electronic communication meant that mere physical separation, without more, is not sufficient to alleviate the risk that confidential information would be disclosed. The fact that a senior Auckland tax partner had an "advisory role" in representing Tower seemed to undermine Russell McVeagh's assertion that the geographical separation of offices was significant.

THE SIGNIFICANCE OF THE DECISION

The respective approaches of the minority and majority Judges to the issues raised in *Tower Corp* are themselves significant. The majority judgments seem to suggest a reluctance to disqualify a law firm where the breach of fiduciary duty is historic (because the law firm has ceased acting) and where there is no realistic chance that confidential information will be disclosed in the future. The fundamental importance of the "appearance of justice", previously recognised in *MacDonald Estate* and *Black v Taylor*, has been rejected by the majority of the Court of Appeal. Arguably, the rejection of this seemingly fundamental principle will make it more difficult to disqualify firms in future in conflict of interest situations and may undermine the public perception of the integrity of the justice system.

This can be contrasted with the stricter approach taken by Thomas J. His Honour approached the case as one of simultaneous representation resulting in the firm breaching its fiduciary duty of undivided loyalty to its clients. This would, in itself, have been sufficient to disqualify the law firm – protective measures to prevent the flow of confidential information could not, in principle, prevent disqualification. Thomas J also held, in the alternative, that the risk of Tower's confidential information being disclosed would have been sufficient to disqualify Russell McVeagh in any event. Although Chinese walls may sometimes be acceptable to prevent disqualification in cases of successive representation, the Chinese wall erected by Russell McVeagh fell well short of the required standard.

The difference in the philosophy underlying the minority and the majority judgments may explain the different approaches taken by the Judges in *Tower Corp*. Thomas J sought to give greater prominence to the "rights" of clients. The corollary of this approach is the strict application of the fiduciary standard to lawyer and client relationships. It then becomes the responsibility of law firms and the legal profession generally to adjust the way in which they operate to observe the strict standards of behaviour required of them by the Courts. There is less emphasis on clients' rights evident from the approach of the majority Judges.

All of the judgments in *Tower Corp* lend some support to the use of Chinese walls to prevent the disclosure of confidential information within a law firm. However, Thomas J expressly states that Chinese walls cannot be used to overcome divided loyalties within law firms – the majority Judges do not address this aspect. In any event, the nature of the internal control measures required to implement a successful Chinese wall remain uncertain. ❑

REGULATORY CREEP REVISITED

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replies to Shirtcliffe and English and distinguishes between rules that define and rules that distort

In the July 1998 issue of the Law Journal, Janet Shirtcliffe and Conor English address the problem of regulatory creep, the ever increasing role of government in the lives of citizens ("Reversing Regulatory Creep" [1998] NZLJ 259). They refer to the complexity of current rules in force, and to the fact that over the past ten years, government has introduced over 1600 pieces of legislation and 3600 new regulations. They identify the threat to liberty, democracy and prosperity that an overabundance of laws creates, smothering creativity and investment, alienating individuals from government, and inhibiting social progress. The solution they propose is a compulsory reduction of the number of regulations in force: "For every new regulation that is created, a number of existing regulations must be repealed."

This paper is in general agreement about the existence of the problem. The unrestricted growth in regulatory control and the sheer size of government has legal, political, and economic ramifications, some of which are identified by Shirtcliffe and English. The overall goals of their analysis are laudable: to reduce the extent of government intervention, and to ease the task of complying with law. They suggest that their analysis is not a complete answer, but a starting point towards an eventual reversal.

The purpose of this article is to take one more step towards that objective. The solution to regulatory creep proposed by Shirtcliffe and English is based purely on the number of regulations. It does not consider the nature of the rules. This article describes a way to distinguish good rules from bad. Good rules are rules that define markets. Bad rules are rules that distort markets. The most objectionable kind of regulatory creep is produced by uncontrolled growth in the number of market distorting rules. Such rules should be amended, justified, or repealed.

RULES THAT DEFINE THE MARKET

Consider the concept of a free market. There is, of course, really no such thing. A "free" market is a regulated market. Without regulation, the market cannot function. Many economic thinkers, including Adam Smith, have observed that this is so. In *The Wealth of Nations*, (London: JM Dent & Sons, 1947 at 392-393) Smith wrote:

> Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice; in which the people do not feel themselves secure in the possession of their property; in which the faith of contracts is not supported by law; and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay.

Thus there is no such thing as a "natural" or "unfettered" market. The market exists because it is fettered. In the absence of rules, commerce does not proceed. Market transactions would be replaced by other kinds of struggle such as the exercise of physical force. In other words, a market exists where there is government with power to enforce rules against physical conflict and breach of contractual promises. Such rules create and define the market. Such rules do not hinder competition. Indeed, they allow it to occur by stipulating the conditions under which all transactions will take place. (To be strictly accurate, such rules do restrict certain kinds of competition, such as competition based upon physical force. It may be more correct to say that such rules define what kind of competition is to occur.)

What makes a rule a market defining rule is its scope (not its content nor the number of rules there are). If the rule is generally applicable, it defines the market. If it is a specific rule that applies only to a particular kind of transaction or activity, it does not. When generally applicable rules exist, Adam Smith's "invisible hand" operates – the market determines supply, demand and price within the parameters that have been set. Many actors make individual choices about buying and selling in a competitive environment. A market reflects the aggregate effect of all their transactions, and is a better decision making mechanism than an agency pulling economic levers at a central location.

Once the line has been crossed from complete freedom (anarchy) to a regulated market, the extent of market definition is a matter of political values far more than a matter of economic or legal principle. Perfect competition can occur in a highly regulated economy. Perfect competition does not occur in a lightly regulated economy if the regulations are not generally applicable. The function of the market does not depend on whether there are very few market defining rules (no one shall use physical force; all persons shall honour their contracts) or whether there are many market defining rules (there are many examples of such rules – prohibition of child labour, tort liability, minimum wage laws, competition laws and many more). These market defining rules do not upset the operation of the market. Indeed, in a sense they cannot because they make the market what it is. Such rules apply to all of the actors in the economy, and therefore none of those persons are placed at

a competitive disadvantage. All bargainers are subject to the same restraints.

Defining rules may have distributive effect: they may affect the distribution of resources and the outcome of transactions. If they do, they do so across the market. They may affect the bargaining power of parties in a particular transaction relative to each other, but not the bargaining power of the parties relative to their competitors. For example, a rule providing for a minimum wage will affect the bargain reached between a company and an unskilled worker. In the absence of the minimum wage law, the worker might have accepted less pay than the level of the minimum wage. The content of their bargain has been influenced by the rule. However, what has not changed is their bargaining position relative to their competitors'. There is no change to what each party can offer the other relative to other parties with whom they could decide to contract instead. All companies are subject to the minimum wage law. Therefore, the law places no company (except foreign firms) at a competitive advantage or disadvantage. Similarly, none of the worker's competitors are able to offer themselves to the company for less than the minimum wage in an attempt to make themselves more competitive. Whether the worker is paid minimum wage or some amount above minimum wage will depend upon the aggregate of the market transactions for unskilled labour.

RULES THAT DISTORT THE MARKET

Rules distort a market when they do not change general conditions. They interfere with particular transactions, or particular kinds of transactions. They change particular transactional outcomes rather than the community rules about entering into transactions. They upset the relative competitiveness of the players. They force some players to tolerate restrictions or obligations that their competitors do not have, or they create advantages for some that their competitors do not enjoy. A minimum wage law that distinguishes between waged employees and independent contractors, making one group subject to the rule and the other not, distorts the market. Since both groups sell their labour, such a rule does not treat all transactions for the sale of labour in the same way. Government subsidies for oil exploration mean that the oil industry does not do business under the same conditions as the suppliers of other forms of energy. Regulations that prohibit people untrained at drilling teeth from offering dental services promotes public safety at the expense of open entry and perfect competition. Some such regulations can be justified on policy grounds, but not all are as easily justified as professional training standards for dentists.

Rules that distort markets come in two forms: very specific rules which apply to specific facts or parties; and very vague rules that depend on discretionary decisions for their application. The examples below are from the environmental field, but they could have been as easily taken from many other areas.

Specific rules for specific facts

Consider an environmental regulation that says that pesticide X is not to be used in concentrations greater than five parts per million within 500 metres of residential dwellings. The regulation reflects an abstract idea, that no hazardous substance should be used in a manner that poses a threat to human health. However, it is not a general rule with that effect. The rule restricts only the use of that particular pesticide to that particular concentration in those particular circumstances. No other scenario is caught unless there is another, equally specific rule that applies to it.

Vague, discretionary rules

Compare the above regulation to the process of granting resource consents under the Resource Management Act 1991. The statutory framework for resource consent decisions consists of vaguely defined statutory objectives ("sustainable management") and procedural requirements to gather and consider information. There are no substantive rules about when consents should be granted or denied. The process of hearing applications does not develop binding principles, but consists of a series of isolated decisions about particular facts.

These two types of rules seem quite different: one is very specific and non-discretionary, and the other is vague and very discretionary. However, the process of applying the latter has the effect of producing the former. Applying a vague, discretionary rule produces a specific rule for a specific factual circumstance. This is especially so when a decision is administrative rather than judicial because no reasons are given which articulate the decision, and the doctrine of precedent does not apply. The result is a series of isolated decisions which lack common principles. Thus, neither kind of rule expresses a standard or principle which is consistently applied to the entire market.

THE PROPER ROLE OF GOVERNMENT

Unfortunately, one feature of ideological politics is a focus on end results rather than upon legal method. At neither end of the political spectrum is there a preference for general or specific rules because that choice in itself does not favour any particular political constituency. Market defining rules are not "right wing rules", nor do market distorting rules belong to the left. For example, those on the right might be expected to approve of general rules that establish the principle of freedom of contract, but not to approve of a generally applicable minimum wage law. Those on the left could be expected to approve of the reverse.

This point is important because it demonstrates that market defining rules can have distributive implications and can be used by governments with vastly different political objectives. For example, a generally applicable law that provides for a generous minimum wage helps to define the market for labour. All employers and employees must make their decisions and reach their bargains in the context of the rule. The existence of the rule affects the bargains reached. However, even in the presence of the rule, the "invisible hand" of the market operates to determine the final price for labour and the number of jobs available.

The same kind of policy objective could be pursued using market distorting rules instead of the single, generally applicable minimum wage law. Regulations could stipulate particular wages for employees in particular industries or companies. Both the general and specific rules would have distributive effects because they would both affect bargains between employer and employee. In the context of regulatory creep, a minimum wage law is a good law if it applies to the whole market, and is not a good law if it does not. The desirability of the result in distributive terms is irrelevant. As long as the rule is generally applicable, it is a market defining rule. As such, it is no more "artificial" or arbitrary

than a rule that says bigger, stronger people are prohibited from taking other people's property.

Professor Robin Malloy explains the difference between general and specific rules in the context of urban planning:

> Consider the example of a city seeking to revitalise its urban downtown. A revitalisation plan consistent with Smith's view on the rule of law could include a number of actions by the local government. For instance, the city could spend public resources to upgrade educational and job training facilities, streets, utilities, and police protection downtown; or the city could conduct studies, promote its location, and revise zoning codes and other regulations, all for the purpose of creating a better business climate to attract entrepreneurs. By this process the city would upgrade its economic environment and improve its business climate, hopefully causing individuals to react positively by entering and choosing to remain in the newly enhanced urban marketplace. Importantly, the ultimate decision to buy, sell, enter, or exit this urban marketplace would still be left to individuals. Furthermore, as a result of generality, governmental power is used to improve the economic environment for everyone rather than to unfairly benefit a few special interest groups.
>
> In contrast to a general rules approach, the city could adopt a specific rules approach. The specific rules approach would encompass such practices as predetermined, site specific zoning and tax incentives and subsidies for specific projects and developers. Examples of these activities include the so-called co-financing projects recently undertaken by many cities. With co-financing, city departments for economic development select specific projects such as downtown malls or hotels for specific locations within the urban marketplace. Public subsidies are then used to encourage the completion of the projects as approved by the city. As a consequence, subsidies are given out and projects are constructed, not in accordance with general principles but at the direction of government officials acting in response to special interests. As a result, power is shifted to those politically connected to outcome specific decision makers. ("Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics" (1988), 36 Kansas LR 209 at 232-233.)

Thus, to require that rules be generally applicable in order to be appropriate is not to usurp the legitimate political role of government. It is instead a statement about appropriate legal methods of achieving whatever goals government has identified. Put another way, government can legitimately decide the location of the level playing field, but it ought to provide one. The market can be regulated, but regulated in a clear and precise way with generally applicable, market defining rules. To do so is to enable the economic game to proceed under stipulated conditions, rather than to obstruct it with red tape or to distort it by interfering in particular transactions.

This approach requires no evaluation of the substantive content of rules. A rule might exist for an admirable purpose or it might not. The primary focus is not on the content of the rule, but on its applicability. From a legal perspective, the concern is not the desirability of the outcome, but the equal application of the mechanism: the most important thing is that competitors be subject to the same restraints (not all actors, but all competitors).

REVERSING REGULATORY CREEP

There may be many stages in a complete reversal of regulatory creep. However, the first stage should be to distinguish rules that define markets from rules that distort markets. The second stage should be to fix the rules that distort.

Stage 1 – Distinguishing rules that define from rules that distort

Can the rule be applied generally, to all persons, all types of activity, all environments, or is it aimed at particular persons, activities or places? If the rule cannot be applied to all persons, can it at least be applied to all competitors? Is the rule capable of being applied to new facts, or is it so narrow as to limit its applicability to circumstances specifically described? Is the rule sufficiently precise to mandate an outcome, or does it rely on a large degree of discretion on the part of the decision maker? Is the decision maker required to give reasons and is he bound by precedent, or is the rule to be applied in a series of isolated decisions? Is the content of the rule knowable? Does it answer the question, "What is everyone not allowed to do?"

Stage 2 – Fixing rules that distort

Rules that distort should be abstracted to generally applicable rules; or justified on a compelling policy ground; or repealed.

- Abstracted to generally applicable rules: The process of abstracting specific decisions to general principles is the heart of the way common law systems work. Specific rules are lazy rules. From a legislative point of view, it is easy to draft specific rules to deal with specific situations. The more difficult task is to abstract specific rules to general rules which are sufficiently precise to catch the target problem, but also sufficiently broad to apply to all. That requires real legislative skill.
- Justified on a compelling policy ground: This step does not call for the justification only of the content of the rule, but of its form: is there a reason why the rule must be in the form of a specific rather than a general rule?
- Repealed: If the purpose of a particular regulation is important, it will be able to be abstracted under (a) or justified under (b). If the idea is not important, the regulation should not exist.

This approach does not concentrate on reducing the absolute number of regulations. Nevertheless, it would have this effect. When rules are generally applicable, fewer rules are needed. Many rules are required when they are targeted at specific circumstances.

CONCLUSION

The solution to regulatory creep proposed by Shirtcliffe and English is based purely on the number of regulations. It does not consider the nature of the rules. It establishes no criteria for deciding when a regulation is proper or unduly interventionist in the lives of citizens. There is a more principled basis upon which to distinguish appropriate rules from inappropriate ones. It is not based upon the number of regulations, nor on their content. Instead, the most important characteristic of any rule in the context of regulatory creep is its scope. The most dangerous kind of regulatory creep is caused not by too many general rules, but by too many particular rules designed for particular facts; by rules which erode legal norms; by rules which distort rather than define the economic marketplace. ❑

LITIGATION

edited by
Andrew Beck

COSTS AGAINST COUNSEL

In *McDonald v FAI (NZ) General Insurance Co Ltd* unreported, Giles J, 24 September 1998, HC Auckland CP 507/95, the High Court had to decide the issue as to whether costs may be awarded personally against a barrister. The question has not previously been decided in New Zealand, and the judgment may in fact be a ground-breaking one in common law jurisdictions, although the area is specifically covered by the "wasted costs" provisions in England.

The claim arose out of the activities of Renshaw Edwards. McDonald failed against FAI, and succeeded against the Law Society, but for less than had been offered in a Calderbank letter. Substantial costs had been awarded against McDonald in favour of FAI ($115,000) and the New Zealand Law Society ($30,000). This particular decision related to an application by McDonald that he be indemnified by his solicitors and counsel in respect of the costs payable to FAI, and an application by his former solicitors that they be declared entitled to a lien over the judgment sum due to him from the Law Society.

The Court had, on previous occasions, made it clear to McDonald's former counsel that it considered the litigation against FAI unmeritorious, and warned that continuing with the proceeding could have an adverse costs result. Counsel decided to carry on, and turned down a settlement offer from the Law Society, apparently without authorisation. During the whole litigation, McDonald had been represented by a barrister, who had arranged a "reverse brief" with a firm of solicitors. The Court clearly considered that the barrister bore a large measure of personal responsibility for the costs, and the jurisdiction to award such costs therefore had to be decided.

JURISDICTION TO MAKE AN AWARD

The argument for the respondents was that a barrister could never be personally liable for costs by virtue of barristerial immunity, and a solicitor should not be held liable for anything short of knowingly deceiving the Court. Giles J was unimpressed by these arguments, pointing out the very unsatisfactory position of a client represented by a barrister acting virtually as a solicitor.

The Court made the point that a barrister doing solicitor's work might well be found liable for carrying out such work negligently. It was not necessary to decide that, however, because the Court considered that there was in any event jurisdiction to make an award of costs against a barrister. Having referred to a number of decisions (including *Rae v International Insurance Brokers (Nelson-Marlborough) Ltd*, discussed below) which clearly envisaged the jurisdiction extending beyond solicitors, Giles J concluded that R 46 and the inherent jurisdiction of the Court were sufficient to confer such jurisdiction. He said of this jurisdiction (at p 12):

> It is available to the Court as a means of ensuring, in the appropriate case, that a litigant should not be financially prejudiced by unjustifiable conduct of litigation by counsel.

He went on to make it clear that an award against counsel personally would be a rare event, and every case would depend on its facts. However, it is not necessary to go as far as knowingly deceiving the Court.

JUSTIFICATION FOR THE AWARD

On the facts, the Court concluded that the plaintiff's counsel had pursued a hopeless case without providing the objective and independent advice to which the plaintiff was entitled. As the plaintiff had been aware that the litigation was in progress, he could not be entirely absolved from the liability for costs. The Court held, however, that the whole position should have been thoroughly reviewed before any preparation for trial took place.

In the end, the plaintiff had no proper opportunity to "bail out of a hopeless case", and in fact a number of crucial decisions relating to the conduct of the litigation appear to have been taken without any reference to the plaintiff at all. In the circumstances, it was held that the conduct of counsel was "unreasonable, improper and negligent". The Court decided that it would be appropriate for the plaintiff to be indemnified in respect of costs to the extent of $65,000, and made an order that the solicitors and counsel were jointly and severally liable for this amount. Giles J was not prepared to make any apportionment between solicitors and counsel, but considered that a significant proportion of the costs should be borne by counsel.

The Court did not see the result as eroding the principle of barristerial immunity, pointing out that the jurisdiction would only ever be exercised "sparingly and in the most glaring of cases". Furthermore, the effect was only compensatory in a limited sense, and could in other situations have been achieved by a personal order of costs (in this case the successful defendants already had a charging order over the judgment sum in respect of their costs).

CONSEQUENCES

There are references in the judgment to the possibility of negligence claims against solicitors and counsel. The Court expressly did not decide that

issue, indicating that further proceedings would be necessary. It seems quite clear, however, that the Court did make a finding of negligence, which could give rise to an issue estoppel; the only questions remaining for decision would be the extent of the immunity and the quantum of any loss suffered.

It is difficult not to see the decision as one nail in the coffin of the separate treatment of barristers, and there may well be a further opportunity for the Courts to investigate the whole area if a formal negligence claim arises out of these proceedings. In an era of professional accountability, barristerial immunity does appear somewhat anachronistic and very difficult to justify. Once it disappears, however, the need for a separate class of legal practitioner becomes otiose.

Also of some interest is the form of the order made by the Court. The plaintiff had previously attempted to bring an application for an order that he be relieved of any obligation to pay his former solicitors or counsel on the grounds that they had acted without instructions. The Court declined to deal with that as an interlocutory matter.

While costs are always within the Court's discretion, the idea of an indemnity is somewhat unusual: the Court is effectively imposing a type of contractual obligation on a practitioner. It is an ingenious way of getting around some of the difficulties in the situation – the contractual obligations of the client to pay the solicitor remain, but are covered to some extent. It would be difficult to set aside the contractual obligation in the course of the proceeding (as accepted by the Court), and it would be necessary to satisfy the requirements of the Contractual Remedies Act in order for the contract to be cancelled. As the costs discretion has always been held to be a particularly wide one, there is probably no objection to using the method adopted by the Court.

Although the Court stressed the rare nature of such awards, the message of this judgment will be apparent to all counsel. It also seems likely that there will be further developments relating to counsel's liability before the saga is over.

ASPECTS OF APPEALS

Several recent cases have highlighted issues concerning the proper approach to be adopted by appellate Courts. The question as to who has to prove what in order to succeed on appeal ought to be a straightforward one. There are, after all, hundreds of appeals heard every year where the issue does not generate so much as a passing thought. From the various pronouncements which have been made by the Courts, including the Court of Appeal, it is clear that there are a number of ambiguities and unresolved matters.

WASHWORLD SERVICES

One interesting statement is found in the decision in *Washworld Services (Auckland) Ltd v M F Astley Ltd* unreported, Giles J, 11 August 1998, HC Auckland HC90/98, an appeal against summary judgment awarded in the District Court. Giles J expressed the principles as follows:

> This is an appeal and the appellant bears the onus of establishing that the Judge below has been wrong either in applying the applicable legal principles or in reaching determinations on the facts. Accepting, as I do, that in summary judgment applications the evidence is addressed on affidavits and that I am in as good a position as the Court below to reach determinations, nonetheless an appellate Court is not simply entitled to substitute its views for that of the Court below. Rather its duty is to determine whether or not there was a proper basis open on the evidence upon which the Court below could have reached the decision that it did. If there is such a basis and if the Court below has applied the proper legal tests then the decision should stand.

Support for those conclusions was found in the recent decision of the Court of Appeal in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190, which is discussed further below.

The approach described is diametrically opposed to that which was held appropriate in *Gisborne Memorial RSA Club Inc v Gisborne District Licensing Agency* unreported, Randerson J, 25 June 1998, HC Gisborne AP 3/98, discussed in [1998] NZLJ at 283. In that case the Liquor Licensing Authority was criticised for not exercising its own judgment on the established evidence. It was held to be inappropriate for the Authority simply to conclude that there was nothing wrong with the Agency's decision.

While it is true that the *Gisborne RSA* case involved an appeal from a Tribunal while the *Washworld Services* case concerned an appeal from the District Court, it has to be asked whether that is enough to justify a completely different approach. Like all appeals, both of these appeals were founded on statutory provisions, and those statutory provisions are essentially similar. Both provide for the appeal to be by way of rehearing, and both permit the appellate Court to hear further evidence in its discretion. At this stage it may be helpful to consider the effects of the Court of Appeal decision in *Rae*.

THE COURT OF APPEAL DECISION IN *RAE*

The crucial issue in *Rae* was a finding of fact in the High Court that a particular conversation had not taken place. On appeal, the appellants sought to challenge the factual findings, and to adduce further evidence. In dismissing the appeal, Tipping J, in a judgment on behalf of himself and Richardson P, said (at 197):

> While not purporting to set out an exhaustive test, there are two conventional circumstances in which an appellate Court may differ from the trial Judge on a matter of fact. They are: (a) if the conclusion reached was not open on the evidence; ie where there was no evidence to support it; and (b) if the appellate Court is satisfied the trial Judge was plainly wrong in the conclusion reached.

As the conclusion reached by the trial Judge had been open to him and was not plainly wrong, the appeal could not succeed.

Tipping J also provided a general warning about the very narrow ambit of appeals on fact:

> Any tendency or wish to engage in a general factual retrial must be firmly resisted. This Court will not reverse a factual finding unless

compelling grounds are shown for doing so.

In a separate judgment, Thomas J explored some of the policy reasons behind this approach. He started by stating that the principle is so well-established that it does not require the citation of authority, and then outlined the pragmatic considerations:

- the trial Judge has observed the witnesses first-hand over a period of time and is able to form an impression (not always expressed) as to reliability;
- the trial Judge is able to gain an impression from evidence which is not necessarily apparent from the transcript, and formulates a perception of the facts over the course of the trial;
- the Judge perceives first hand the probabilities inherent in the circumstances and can form a superior impression of these;
- a reformulation of facts on appeal can be unfair because there is no appeal on law as applied to the new facts.

He went on to make it clear, however, that there are cases where there is no, or very little, gap between the advantages enjoyed by the trial Judge and the appellate Court. An example of such a case is where the evidence is largely documentary (199).

The points made by Thomas J are, of course, all valid and important considerations. What cannot be lost sight of, however, is the starting point from which the matter has to be approached. This was made clear by Somers J in *Hutton v Palmer* [1990] 2 NZLR 260 (at 268):

> An appeal such as the present is by way of rehearing and the Court has an obligation to come to its own conclusion.

It is only where the appeal Court is not in a position to come to its own conclusion that the findings of the trial Judge will be taken as given. This is the essence of an appeal by way of rehearing, and as virtually all appeals in the New Zealand Court system are appeals of this nature, the statement is of general application.

Appeals to the High Court and Court of Appeal may be on matters of fact or law. The rehearing approach applies in both cases. The appeal Court must therefore reach its own conclusion on all matters of fact and law which are under appeal. Strictly speaking it is not correct to suggest that there can be no retrial of fact. There must be a retrial of factual matters, but in practice it is of a more limited nature in cases where there has been oral evidence, especially where credibility is in issue.

This may be illustrated by the decision in *Riddell v Porteous* unreported, 29 September 1998, CA171/96. In that case, the High Court had overturned the fact findings made by the District Court. The Court of Appeal held that this had been incorrect because it required a reversal of credibility findings. Blanchard J said:

> A Court exercising an appellate function should act in this way only where the evidence accepted by the Judge is inconsistent with the facts incontrovertibly established by the evidence or is patently improbable?.

In exercising its appellate role, the Court of Appeal therefore reverted to the facts as found by the District Court Judge. It is important to note, however, that this was only because credibility was so crucial to the decision, not because the appeal involved matters of fact. In that way, it was a very similar situation to that in *Rae*.

ATTITUDE OF THE COURT OF APPEAL

Whatever the correct approach might be, it is clear that the Court of Appeal does not look kindly on appeals on factual matters. The judgment of Tipping J in *Rae* stresses the duty of counsel to impress on clients the narrow ambit of appeals on the facts. In his judgment, Thomas J echoes this, and ends with a warning that costs may well be awarded against solicitors or counsel personally in "forlorn" appeals against fact findings.

It seems clear that the actual appeal in *Rae* was doomed to failure because it required a reversal of what was essentially a credibility finding in the High Court. In that light, the pronouncements of the Court are quite understandable. What is of some concern, however, is that the judgment could be seen as a much wider condemnation of appeals on factual matters. Although the statements of Thomas J are very carefully couched in language which is directed to specific types of cases, it is all too easy for these qualifications to be glossed over.

Such an approach has particular dangers in the area of summary judgment, which is the context in which the *Washworld Services* case came before the High Court.

SUMMARY JUDGMENT APPEALS

Applications for summary judgment fall into the category of case mentioned by Thomas J in *Rae* where there is no special advantage enjoyed by the trial Judge. Apart from very rare cases where oral evidence has been permitted, all the evidence is documentary, and the decision is made solely on the papers. The question which has to be decided is whether there is an arguable defence, and an appeal Court is in as good a position to do that as the Court of first instance.

A useful example is provided by the decision in *MacLean v Stewart* (1997) 11 PRNZ 66, a case involving a building dispute. The District Court granted summary judgment, and an appeal to the High Court was dismissed. On appeal to the Court of Appeal, it was held that the Court had not been entitled to reject expert evidence, and that it had not been established that there was no arguable defence.

The Court of Appeal did not ask whether "it was open" to the Courts below to reach the decisions which they had. They decided the matter on the materials before them, and reached an opposite conclusion. The same approach was followed in *Vauclause Holdings Ltd v Lindsay* (1997) 10 PRNZ 557, although in that case the Court of Appeal reached the same conclusion as the Master.

In *Treeways 2000 Ltd v Ryan* (1995) 8 PRNZ 398, the Court of Appeal made statements that the Master "was entitled to" take certain matters into account and to enter summary judgment. It is nevertheless evident that the Court examined all the material before it and came to the same conclusion as the Master.

Washworld Services was in many ways a similar scenario to *MacLean v Stewart*. There was, however, not the "contest between experts" which proved so crucial in the latter case. Ultimately, the High Court was satisfied that the District Court had adopted the correct approach and dismissed the appeal. The High Court held that the evidence was "more than ample" for the conclusion reached, and that the District Court Judge did not "misdirect himself" on the law.

As has been suggested above, this is not what is contemplated in an appeal by way of rehearing. The Court should have examined the evidence and applied the law, coming to its own judgment. In the end, though, there would

clearly have been no difference in the outcome of the appeal.

BURDEN OF PROOF

In *Wilson v Neva Holdings Ltd* (1993) 6 PRNZ 654, Fisher J discussed the features of an "appellate approach" in the context of applications to review decisions made by Masters. He said (at 659):

> On appeal, the original decision is normally presumed to be correct until the contrary is demonstrated. The appellant normally goes first. Facts are normally derived from the existing record with appropriate deference to the advantages of the original Court in the assessment of witnesses. On matters of judicial discretion the appellate Court intervenes only where positive grounds for doing so are established.

This would suggest that, in order to succeed, the appellant must show that the Court below was wrong. That is how the Court saw the matter in *Washworld*. This may, however, be expressing the matter in an unfortunate way. In *Coghlan v Cumberland* [1898] 1 Ch 704, Lindley MR said:

> Even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge, with such other materials as it may have decided to admit. The Court must than make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from overruling it if on full consideration it comes to the conclusion that it is wrong.

If the Court is genuinely rehearing the case, then the onus on the merits should remain where it was in the Court below. In a summary judgment case, for example, the plaintiff must still show that there is no arguable defence. It may be, however, that notions of onus of proof in a strict sense do not sit easily with the nature of an appeal process. The appellant is asking the appeal Court to reconsider the matter, and pointing out any flaws in the way in which the Court below has dealt with it. The appeal Court will then agree or disagree with the conclusions of the lower Court by virtue of its own reasoning, not because the appellant has discharged any onus.

It is true that the appellant conventionally goes first, but that is because it is the appellant who is asserting that a rehearing is required. A defendant appealing against summary judgment would still be trying to show that the plaintiff had not established that there was no arguable defence. As a matter of course, this does involve showing the Court below to be wrong, but that is incidental to the main aim, which is convincing the appeal Court of what is right.

The position is different where the exercise of a discretion is concerned, because there is a wide band of "right" decisions. It is well-recognised that, to succeed on appeal, it must be shown that there has been a wrong application of principle or a clearly wrong conclusion: *Wilson v Neva Holdings Ltd* at 659. This is essentially a practical consideration in the interests of promoting finality, otherwise discretionary matters would always be subject to appeal.

Where the appeal is on a matter of fact, the task once again is to persuade the appeal Court what the correct findings of fact are. In some respects, however, the Court will not be able to make its own decision because some pieces of the puzzle are missing. In such cases, the pieces used by the trial Judge will be relied on unless it can be clearly shown that they were incorrectly constructed. Once again, this is – as acknowledged by Thomas J in *Rae* – essentially a limitation imposed by practical considerations.

A good example of a factual appeal can be found in *Hutt City Council v New Zealand Railways Corporation* (1997) 6 NZBLC 102,320. It was acknowledged that whether accord and satisfaction had been established was a question of fact. On appeal, the High Court re-examined all the evidence and reached the same conclusion as the District Court: that the defence of accord and satisfaction had been made out. Because the vital evidence was largely documentary, the problem of witness assessment did not arise.

SECOND APPEALS

In the *Hutt City Council* case, leave was granted for an appeal to the Court of Appeal. On appeal, the Court took the opportunity to reaffirm the very restricted nature of second appeals on questions of fact: *Hutt City Council v NZ Railways Corp* 17 June 1998, CA171/97. Richardson P, referring to *Willis v Castelein* 31 August 1993, CA89/93, stressed that where there have been concurrent findings of fact in the Courts below, special circumstances have to be shown to justify a further appeal. He described the principle as "well settled", although it appears to derive from the practice of the Privy Council rather than any clearly established policy of the Court of Appeal.

In any event, the decision serves to entrench the Court of Appeal's dislike of factual appeals. In the case of second appeals this is quite understandable, and is no doubt one of the reasons why s 67 of the Judicature Act requires leave as a prerequisite. The situation has to be distinguished from one where there is an appeal as of right.

Even where questions of law are involved, there is clearly a reluctance to permit second appeals. This is shown in *MacLean v Stewart*, where the Court of Appeal commented that leave would not normally have been justified in a summary judgment case which had already been appealed to the High Court. Although it was held that leave had been correctly granted, the Court did not say why. It appears to have been one of those cases which it regarded as clearly incorrect.

Where there have been conflicting decisions on the law in the District Court and the High Court, leave to appeal to the Court of Appeal will be more readily granted: *Riddell v Porteous* (1996) 10 PRNZ 66. It is of interest to note that, in that case, the Court of Appeal reversed the High Court decision on the law: 29 September 1998, CA171/96. The Court made no comment on the decision to grant leave, but clearly approved of it in the circumstances.

CONCLUSION

Appeals involve an enormous diversity of situations, and the particular configurations will often dictate what has to be done by the appellate Court. It appears, however, that many of the principles or approaches are matters of legal consciousness rather than being clearly and systematically laid down. It is therefore not surprising that there are at least apparent discrepancies in the approaches followed by Courts when hearing appeals.

A standardised approach would be helpful so as to avoid potential confusion when it comes to ascertaining precisely what an appeal entails. The time may well have come for a single and comprehensive set of rules which can be applied across the board. ❑

LAST MINUTE UPDATES

STUDENT COMPANION

edited by
Richard Scragg

FIDUCIARY RELATIONS

Andrew Butler

Russell McVeagh McKenzie Bartleet & Co v Tower Corp
(Court of Appeal, CA 86/98, 25 August 1998)

A Wellington partner of RMMB (X) was acting for Tower in a tax dispute. During the course of this retainer, an Auckland partner of RMMB (Y) accepted instructions to act for GP which was intent on effecting a (hostile) takeover of Tower. Tower learned of Y's involvement in GPG's takeover bid some 16 months after his retainer had begun. By this stage, X was no longer acting for Tower as the tax dispute was resolved. (The overlap in retainers was approx 11 months.) On learning of Y's involvement, Tower sought an injunction preventing any partner of RMMB acting for GP against Tower. Tower claimed that an injunction was an appropriate remedy in light of the fact that for some time RMMB had been in a position of conflict of interest regarding Tower and GP This was a breach of the fiduciary duty of loyalty. In addition, Tower claimed that RMMB could have acquired confidential information about it which it might pass on to GP contrary to fiduciary duty. In the High Court Tower succeeded.

The Court of Appeal (4-1) held that no injunction should issue. RMMB was no longer acting for Tower and was unlikely to act for them again. Hence, there was no danger of any conflict between duties of loyalty being breached in the future. The appearance of justice did not require RMMB to be punished for the past conflict (if any) by disqualification. Past breaches sound in damages not injunctions. Moreover, the facts did not support the conclusion that RMMB had confidential information about Tower which it would be likely to disclose to GP. The tax matter was separate and distinct from the takeover. The majority considered that the test is whether there was objectively a real risk that Tower's confidential information material to GPG's takeover interests might be disclosed. That test was not to be assessed by reference to possible difficulties which might be perceived by a member of the public. The evidence did not establish such a real risk and further, the majority considered that the existence of mechanisms within RMMB at a later stage to ensure that information would not pass between partners in relation to Tower's affairs demonstrated that from that date onwards there was no real risk of disclosure. In reaching its conclusion, the Court emphasised the smallness of New Zealand's legal community, the limited availability of expert advice and the "right" of RMMB to offer and of GP to seek specialist legal services.

In terms of the law of fiduciary relations, Thomas J, dissenting, points out first, that the majority decision accords little significance to the prophylactic principle that equity's rules and remedies should be designed to discourage conduct inconsistent with duties of loyalty. Second, the majority's approach gives little regard to the interests of the client who is the beneficiary of the fiduciary principle. Third, the majority's approach seems to place a high burden on the client to prove that the fiduciary has/will act inconsistently with its duty of loyalty. Fourth, the majority approach leaves a great amount of discretion in the hands of lawyers to determine whether a conflict of interests exists or not: arguably this is something for a client to decide. (See Legal Ethics below.)

INSURANCE

Lynne Taylor

Benjamin v State Insurance Ltd
(Court of Appeal, CA 197/97, 3 June 1998

In this case the respondent insurer sought to avoid both a house policy and a household contents policy on the grounds that there had been a material non-disclosure by the insureds. The alleged material non-disclosure was a failure on the part of the insureds, Mr and Mrs Benjamin, to disclose that one of them, Mr Benjamin, had a two-year-old conviction for theft as a servant.

The Court of Appeal held that the non-disclosure of the conviction was a matter that would have been considered material by a prudent insurer in the sense that it would have influenced the judgment of a prudent insurer in determining whether to grant insurance cover and, if so, on what terms. It was argued for the insureds that the Court of Appeal, as Cartwright J had done in the High Court, ought to apply the second limb of the test proposed by the majority of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501, that is, that the non-disclosure induced the making of the insurance contract by the insurer. The insureds then argued that this second limb was not met because the non-disclosure of the conviction was not the "dominating and most influential circumstance" in the respondent's decision to accept the policies. This argument, said the Court of Appeal, was putting a gloss on the majority view in *Pan Atlantic* which was that inducement in this context was to be viewed no differently from inducement relating to the formation of other types of contracts, that is to say, it need not be a predominant influence. Further, the Court referred with approval to *St Paul Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96 where it was held there is no general inference of inducement from proven materiality. The Court then held that on the evidence presented to the High Court, inducement had been established.

The Court concluded by saying that, although it had applied the tests approved by the majority in *Pan Atlantic*, it had done so without determining whether such an approach was to be the law in New Zealand. The Court further indicated that the appellants would not have succeeded if the test

for materiality had been that proposed by the minority in *Pan Atlantic* or that recommended by the New Zealand Law Commission in its Report No 46 on *Some Insurance Law Problems*.

UEB Packaging Ltd v QBE Insurance (International) Ltd
[1998] 2 NZLR 64

In this decision of the full Court of Appeal, the appellant had obtained judgment by default against an insured. It was unable to recover this judgment and accordingly sought leave to bring a claim directly against the respondent (the insured's insurer) pursuant to s 9 of the Law Reform Act 1936. Leave had been refused in the High Court on the ground that no direct claim pursuant to s 9 can lie when the insurer is entitled to decline to indemnify the insured. In the Court of Appeal the appellant accepted that the insured had breached its contractual obligation to notify the insurer promptly of the issue of proceedings against it by the appellant. The Court, whose unanimous opinion on this issue was delivered by Tipping J, held that the late notification of the proceedings resulted in prejudice to the insurer and thus the insurer was not prevented by s 9 of the Insurance Law Reform Act 1977 from declining to indemnify the insured. This in turn meant that the initial requirement in s 9(1) of the Insurance Law Reform Act 1936 was not satisfied – there was no contract of insurance by which the insured was indemnified for the liability it faced. Further, said the Court, s 9(1) refers to a charge on "all insurance money that is or may became payable" and no such moneys were payable in the case before it. The Court thus reiterated the point that in relation to s 9 of the Insurance Law Reform Act 1936 a claimant can be in no better position as against the insurer than is the insured.

Section 9 of the Insurance Law Reform Act 1936 is one of a number of statutory provisions targeted for reform in the Law Commission's recent *Report No 46: Some Insurance Law Problems* but its proposed replacement will not affect this decision of the Court of Appeal.

Thomas J delivered a separate judgment in which he noted that the time at which a cause of action accrues for the purposes of s 9 of the Insurance Law Reform Act 1936 is unsettled. This point is addressed in the Law Commission's Report where the proposed solution is that the provisions of the Limitation Act 1950 ought not apply as between a third party and an insurer so long as the insured has commenced proceedings against the insurer within the limitation period.

INSOLVENCY

Lynne Taylor

Welch v Official Assignee
[1998] 2 NZLR 8

This case concerned an appeal against an order of the High Court that a disposition was a voidable gift pursuant to s 54(3) of the Insolvency Act 1967. A husband and wife separated and the husband transferred his half share in the matrimonial home to his wife. The agreed consideration was a sum slightly below the true value of the property. No part of the agreed consideration was ever paid by the wife and the husband was adjudicated bankrupt within two years of effecting the transfer. The wife argued that the transfer of property was effected in discharge of her husband's obligations to maintain the children and as recognition that for some years she had been meeting all household outgoings. The Official Assignee sought to recover the entire amount of the agreed consideration from the wife.

The Court of Appeal noted that s 54(3) of the Insolvency Act 1967 contains a number of essential and cumulative requirements. First, there must be a disposition for valuable but not adequate consideration in money or money's worth. It was accepted, following earlier authority, that the discharge of the husband's obligations to maintain his children amounted to "valuable consideration" – it being defined as something more than nominal consideration sufficient to support a contract but which does not equate to the true value of the property. "Adequate consideration", said the Court, means something more but as the term "full value" is not used it may also be less than the true value of property. Further, the adequacy of the consideration relied upon must be quantifiable in monetary terms. It was accepted that the consideration relied upon by the wife was quantifiable in money terms but for the most part had never actually been quantified. The Court, however, affirmed the High Court assessment that the consideration supplied by the wife was inadequate.

Second, the Court must be satisfied that, having regard to the difference between the value of the property disposed of and the value of the consideration and all other circumstances, the intention of the debtor was to make a gift of the difference between the consideration and the actual value of the property and that the gift would be voidable pursuant to subss (1) or (2) of s 54. In the present case subs (1) was applicable and it only required that there be a gift of property within two years of the donor being adjudged bankrupt. A disposition will be a gift, said the Court, unless it is made in good faith and for valuable consideration. Here, of course, the second element was lacking.

The Court then has a discretion to order, having regard to all the circumstances, that the sum in question be paid to the Official Assignee. The factors taken into account, said the Court, would differ from case to case but could include matters that would not necessarily amount to valuable or adequate consideration, quantifiable in monetary terms.

In this case, given that the amount of consideration supplied by the wife had never been fully quantified in monetary terms, the issue of the amount of the sum repayable to the Official Assignee was remitted to the High Court for determination and it was only to this extent that the appeal was allowed.

The Court of Appeal noted that the Official Assignee had dealt with the application by commencement of summary judgment proceedings and expressed the view that in general it would be better for such applications to be dealt in the ordinary way by the calling of evidence.

Registrar of Companies v First Investments Ltd (in liquidation)
[1998] 2 NZLR 352

Here Master Kennedy-Grant considered the scope of s 250 of the Companies Act 1993. Section 250 allows the making of an order terminating the liquidation of a company at any time after the appointment of a liquidator if the Court considers that it is just and equitable to do so. The Master was faced with his own earlier decisions in *Watts and Hughes Construction Ltd v Parklane Apartments Ltd* (1995) 7 NZCLC 260,781 and *Holmden Horrocks v Promo Marketing International Ltd* (1997) 8 NZCLC 261,409 in which he had held that s 250 was only to be used for the purpose of taking a company permanently out of liquidation. Here the company went into voluntary liquidation at a time when there were five sets of outstanding liquidation proceedings against it. The application made by the Registrar of Companies pursuant to s 250, if successful, would have the effect of terminating the voluntary liquidation so that the company would be put into liquidation by the appointment by the Court of a liquidator. The Master held, on reflection, that the scope of s 250 was wider than he had previously indicated and accepted that in the present case there was good ground for making the order. Evidence had been supplied by the receivers of the company, and was accepted by the Master, that there were a number of dealings by the company that appeared to be voidable preferences or charges pursuant to ss 292 and 293 of the Companies Act

1993. The appointment of a liquidator by the Court would result in moving back the time in which a liquidator could act thus increasing the number of transactions that could be attacked. This was so because the "specified" periods in ss 292 and 293 in which the liquidator can act are defined as the one or two year periods prior to the commencement of liquidation but in the case of a liquidator appointed by the Court the period is extended to include the time between the filing of Court proceedings and the making of the order of the Court.

BANKING

Lynne Taylor

Carter Holt Harvey Ltd v McKernan
(Court of Appeal, CA 9/98, 12 May 1998)

In this case the full Court of Appeal considered a question of law referred to it by the High Court pursuant to s 64 Judicature Act 1908. The question was whether a contract by which the respondents gave a continuing guarantee of the debts of Pioneer Builders Ltd to John Edmonds Ltd continued in respect of liabilities incurred by Pioneer Builders Ltd after John Edmonds Ltd amalgamated with Carter Holt Harvey Ltd.

Carter Holt Harvey Ltd had made an application for summary judgment against the respondent guarantors which was dismissed by both the High Court and the Civil Appeal Division of the Court of Appeal on the ground that there was nothing in the contract of guarantee to oust the common law rule that any change to the identity of the creditor discharges the liability of a guarantor under a continuing guarantee in so far as future transactions are concerned. Carter Holt Harvey sought leave to appeal to the Privy Council. The wider significance of the issue for consideration having become apparent, a method of allowing further and more extensive arguments to be advanced in the Court of Appeal was sought and to this end an order was made by consent in the High Court that the above question of law be determined by the Court of Appeal.

After reviewing ss 209A, 209D and 209G Companies Act 1955 (the equivalent provisions in the Companies Act 1993 are ss 219, 222 and 225) the Court concluded that it was Parliament's intention that both the benefits and burdens of all amalgamating companies are to continue for all purposes. Specifically, this meant that an amalgamated company was not to be treated as a new or different entity in respect of existing contractual arrangements. The Court then reviewed a number of authorities from Canada and United States of America and indicated that its interpretation of the New Zealand statutory provisions was consistent with those authorities. It distinguished the decision of the House of Lords in *Nokes v Doncaster Amalgamated Collieries Ltd* [1914] AC 1014 which had taken the opposite view in relation to the issue of whether an employee of a company which had amalgamated with another company, remained an employee of the newly amalgamated company.

The Court of Appeal saw no disadvantage resulting from its interpretation of the statutory provisions to guarantors as a group. It noted that an amalgamation was just one method by which one company could merge with another and that in respect of a merger by takeover there was no discharge of a guarantor's liability in respect of future transactions. The Court indicated that it should not be forgotten that it remained open to a guarantor under a continuing guarantee to cancel his or her liability in respect of future transactions by giving notice to the creditor. It followed that the Court of Appeal answered in the affirmative to the question of law put to it.

Chayag v Removal Review Authority
[1998] 2 NZLR 72

Here the Court of Appeal considered the issue of whether a facsimile copy of a cheque complied with a statutory requirement in s 63B Immigration Act 1987 that an appeal be "accompanied by the prescribed fee". The Court upheld the decision of Morris J in the High Court that payment by way of a facsimile copy of a cheque does not meet this criterion. Parliament, said the Court, must have intended that only commercially recognised and accepted methods of payments would fall within the ambit of the section and payment by a facsimile copy of a cheque was not such a method. The Court added that, as a facsimile copy is only a copy, it cannot be equated with, and does not have the status of, a cheque.

TORTS

Rosemary Tobin

Exemplary Damages

Ellison v L
[1998] 1 NZLR 416

Since *McLaren Transport v Somerville* [1996] 3 NZLR 424 exemplary damages have increasingly been sought in actions involving negligence. The Court of Appeal has, however, issued a warning in *Ellison* as to how it might deal with such an application when a case comes before it specifically on this point. "We are prepared to accept for the sake of argument, though leaving the matter to be decided on another occasion, that in some cases of negligence exemplary damages may be awarded. But because negligence is an unintentional tort those cases are likely to be rare indeed." The Court also had strong words to say about the level of damages sought, $250,000. Solicitors were reminded that exemplary damages were awarded to mark out and punish outrageous behaviour and this could be achieved by a relatively modest penalty. The Court emphasised that such awards were not intended as compensation. "Legal advisers should be careful not to be associated with claims for amounts of damages which on any objective view are unattainable...."

Solicitor's Duty of Care

Brownie Wills v Shrimpton
[1998] 2 NZLR 320

In rare cases a solicitor has been found to owe a duty of care to someone other than his or her client. This case was an attempt to extend the recognised categories to include a duty owed to a director of the client company. The solicitor was acting for the client company when he was instructed by its bank to act on behalf of the bank also and obtain the signatures of the directors to a guarantee. The solicitor was also required to confirm to the bank that the guarantee had been signed in his presence after its contents and the nature of the transaction had been explained. The Judge found the signatures were taken by a staff member and no explanation of the terms of the guarantee was given. While the solicitor was "in flagrant breach of his obligation to the bank" it did not automatically follow that the solicitor was in breach of any duty to the director, who was not his client and who was unaware of the bank's requirement.

In the Court of Appeal it was found that there was not sufficient proximity between the solicitor and the non-client director. As Tipping J explained, liability for negligent omissions only arises where the person concerned has assumed a responsibility to act, and that responsibility to act has to be assumed to the plaintiff. As His Honour said in considering whether it is fair, just and reasonable to impose a duty of care in the case of an omission to act, it is highly relevant to both the question of proximity and to any policy considerations that there has been no assumption of responsibility by the defendant to the plaintiff. It must be remembered that solicitors owe single minded duties to their clients. Thus it is not a sound policy consideration to impose a duty of care on a solicitor in tort in favour of someone who is not the client. While there are exceptional cases, this was not one of them.

Defamation

Reynolds v Times Newspapers Ltd
(Times, 9 July 1998, Court of Appeal)

In this case the English Court of Appeal took a different approach to the expanded defence of qualified privilege from that taken by the New Zealand Court of Appeal in *Lange v Atkinson* (discussed [1998] NZLJ 287). In *Reynolds* a former Irish Prime Minister sued *The Times* because of an article which implied he had deliberately and dishonestly misled the Irish Parliament. Counsel for Times Newspapers relied heavily on comments by both Elias J in the High Court and the members of the New Zealand Court of Appeal in *Lange v Atkinson*. While agreeing with much that was said by the New Zealand Court of Appeal, the English Court considered that in examining the defence of qualified privilege the duty test was unwarrantably elided with the interest test and reciprocity downgraded.

In a somewhat surprising statement, the English Court also thought that undue weight had been accorded to the *Derbyshire* case, and that insufficient weight was given to the proper balance between freedom of expression and the protection of reputation. As a result, the English Court of Appeal thought that "this important decision" should not represent the English common law. The Australian *Lange* decision fared a little better. Although approving the requirement that a newspaper relying on the defence must prove reasonableness, the Court of Appeal still did not consider that the Australian solution should represent the law.

The Court considered that any publication had to meet the following test:

1. Was the publisher under a legal, moral or social duty to publish the material in question to those to whom the material was published? (The duty test.)
2. Did those to whom the material was published have an interest in receiving the material? (The interest test.)
3. Was the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice? (The circumstantial test.)

In *Reynolds* only the duty test and the interest test were satisfied. As the circumstantial test was not satisfied the defence of qualified privilege could not protect the publication.

The New Zealand Law Commission.

In an extraordinary move the New Zealand Law Commission has issued a discussion paper (NZLC PP 33) on the *Lange v Atkinson* decision before the case has been heard in the Privy Council. The Law Commission has tentatively proposed to leave undisturbed the Court of Appeal's ruling that there can be circumstances in which general publication does not preclude a defence of qualified privilege, but suggests that further safeguards be imposed. Consequently, the Law Commission has proposed that the defence might be relied on only if:

(i) the defendant believed on reasonable grounds that the statement of fact was true, and

(ii) the news medium in question complied with a request to publish a letter or statement by way of explanation or contradiction.

ADMINISTRATIVE LAW

Hamish Hancock

Thompson v Grey Lynn Board of Trustees
(High Court, Auckland, CP 74/98, 22 April 1998, Potter J)

T (the principal) unsuccessfully challenged moves by the Board of Trustees following an unfavourable Education Review Office report to appoint an independent investigator and to suspend the principal.

Potter J applied previous authority that judicial review should not be used in educational matters unless the rights of staff or students were seriously threatened.

The fact that Board members became informed of certain facts in their capacity as trustees and formed views thereon did not disqualify them through bias. Whilst the trustees might have the appearance of bias they occupied the position of decision-makers through statute. In that situation, something closer to actual bias, rather than the appearance thereof, must be established.

The decision is of interest in view of the number of occasions in recent months in which school staff, pupils and board members have become embroiled in administrative law disputes on topics ranging from involvement in drugs and alcohol to students' hair styles.

Steelfort Engineering Co Ltd v Attorney-General
(High Court, Palmerston North, CP 11/98, 25 May 1998, Greig J)

S imported product duty free over several years under a concession originally authorised by Customs but subsequently ruled by them as inapplicable to the product. The Collector initially decided to claim duty for only one of the previous three years in question but the Ombudsman, acting on a complaint by a competitor of S, after investigation, advised Customs it was obliged under statute to collect the full duty owing and had no discretion to relieve importers of their liability to pay duty. The Collector thereupon imposed on S duty for the full period.

S sought judicial review of this decision. Greig J held that the Collector did not have a discretion under the Customs Act to waive or remit any tax but, "That, however, is not the end of the matter because, ... the Collector like other government officials is bound to act fairly ... in relation to individual taxpayers." His Honour also found that S had been entitled to use the concession which was applicable to its imports.

Relying on English authorities including *Preston* [1985] 1 AC 835 and *MFK Underwriting* [1990] All ER 91, the Court said it was an abuse of power for a public body to act unfairly towards a private citizen absent an overriding public interest to warrant it. *Brierley v Bouzaid* [1993] 3 NZLR 655 CA (where judicial review in similar circumstances was refused) was discussed but it was considered there is a distinction between the recovery of tax on income and the recovery of duty on goods which are imported. In the latter case it was commercially impossible once the goods had been sold for the importer to recover duty subsequently reassessed.

Pennell v District Land Registrar Ors
(High Court, Auckland, M 1871/97, 16 July 1998, Salmon J)

P obtained judicial review of the Maori Land Court decision that certain land claimed to be in a Crown grant of 1859 was Maori customary land. His Honour noted he had available to him the same plans as were used by the Maori Land Court and was therefore in as good a position as they were to reach a conclusion as to the extent of the original grant.

The Court analysed the survey and historical evidence and found that the evidence of the grant itself enabled no conclusion other than the subject land was part of the original Crown grant. It therefore held the Maori Land Court erred in law, in that the essential evidence was inconsistent with and contradictory of the determinations made, and the true and only reasonable conclusion contradicted those determinations.

R v Essex County Council, ex parte Tandy
[1998] 2 All ER 769 (HL)

The appellant suffered from a disease making it at times impossible for her to attend school.

Under s 298 Education Act 1993 each local education authority was required to make arrangements for the provision of suitable full-time or part-time education for those children of compulsory school age

who through illness, might not otherwise receive suitable education. T's parents were advised that, for financial reasons, the maximum number of hours of home tuition provided under s 298 would be reduced from five hours to three hours per week.

T, through her mother, applied for judicial review of that decision. Allowing the application, the Judge held the education authority had taken into account an irrelevant factor, ie the shortage of resources, when deciding to reduce the number of hours of home tuition, that the decision was made in pursuit of an ulterior purpose, namely the reduction of expenditure and that it was irrational. By a majority the Court of Appeal reversed this decision, holding it was legitimate for the education authority to take into account the shortage of resources.

T successfully appealed to the House of Lords which held the education authority's decision was unlawful. On a true construction of s 298 of the Education Act 1993, the question of what was "suitable education" was to be determined purely with reference to educational considerations. There was nothing in the section to indicate that the resources available were relevant to that determination. If, however, there was more than one way of providing "suitable education", the education authority would be entitled to have regard to its resources in choosing between different ways of making such provision.

Boddington v British Transport Police [1998] 2 All ER 203 (HL):

B was convicted of the offence of smoking in a railway carriage where smoking was prohibited, contrary to by-law 20a of the British Railways Board's By-laws. These by-laws were made under s 67(1) of the Transport Act 1962 which conferred a power to make by-laws to regulate "the use and working of, and travel on, [the] railways" and referred to the making of by-laws on particular matters, including s 67(1)(c) "with respect to the smoking of tobacco in railway carriages and elsewhere".

B appealed against his conviction by way of case stated to the Divisional Court, which dismissed the appeal. B then appealed to the House of Lords. The issues were, first, whether a defendant could raise as a defence to a criminal charge a contention that a by-law, or an administrative decision made pursuant to powers conferred by it, was ultra vires and, secondly, if he could, whether he could succeed only if he could show the by-law or administrative decision to be unlawful.

The House of Lords held that a defendant in criminal proceedings was entitled to challenge the lawfulness of subordinate legislation, or an administrative decision made thereunder, where the prosecution was premised on its validity, unless there was a clear parliamentary intention to the contrary. as Lord Irvine LC said:

"It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a Court as unlawful."

There was nothing in the language of s 67 of the 1962 Act or in the by-laws to indicate that Parliament had intended to deprive the smoker of an opportunity to defend himself in criminal proceedings by asserting the alleged unlawfulness of the decision to post "no smoking" notices throughout the train. B failed, however, because a ban on smoking in all railway carriages is a form of regulating the use of the railway under s 67(1)(c). This notwithstanding, the case provides an example of the significance of administrative law concepts in the context of a criminal prosecution.

Porter v Magill (1997) 96 LGR 157

The majority party of a marginal ward formulated a policy of increasing sales of council-owned properties in the belief that owner-occupiers would vote for it at the next election. It was advised that the policy was unlawful in view of the council's statutory duties as a housing authority to provide housing for the homeless. The policy was nonetheless implemented.

Complaints were made to the defendant auditor on the basis that all expenditure arising from the sales was unlawful. The complainants, under s 20 Local Government Finance Act 1982, sought a certificate from the defendant of a sum due for the loss caused to the council.

The defendant notified the plaintiffs of his preliminary findings of wilful misconduct and informed them that he would be making his findings public. The plaintiffs' complaints of unfairness were dismissed. Following further hearings, the defendant found the plaintiffs jointly and severally liable for wilful misconduct. The plaintiffs appealed.

The Court held that the designated sales policy in marginal wards, which was substantially influenced by a wish to increase the majority party's share of the vote, was unlawful. The first and second plaintiffs, the former council leader and deputy council leader, both knew that the policy was unlawful but still deliberately sought to achieve electoral advantage and, by causing the housing committee to adopt the policy, knowing that the council would endorse that decision, caused the loss resulting to the council.

Under s 20, the council was entitled to be put back in the position it had been in as owner of the properties. The appeals of the first and second plaintiffs were dismissed. There was no basis to show the plaintiffs had been prejudiced by media attention or that there was real danger of bias in the defendant's conduct.

The appeals of the other plaintiffs, the chairman of the housing committee, the director of housing and the managing director of the council, against whom wilful misconduct had not been proved, were dismissed. The Court further added that council officers should avoid imperilling their independence by adopting political partiality so as to suppress their professional views or lend support to policies which were not in the interest of the council taxpayers as a whole.

MEDICAL LAW

Nicola Peart

R v Collins and others, ex parte S [1998] 3 All ER 673

In this case the English Court of Appeal set aside a High Court order authorising a compulsory caesarean section on a pregnant woman against her express wishes. It also granted relief by way of judicial review against the respondents in respect of their decisions to apply ex parte for the woman's compulsory admission, detention and treatment under the Mental Health Act 1983.

S developed severe pre-eclampsia (high blood pressure) 36 weeks into her pregnancy. She was advised that she required immediate admission and an induced delivery to save her and her baby's life. She refused. She understood the nature and severity of her condition, but she had an aversion to medical treatment and preferred nature to take its course even if that resulted in death.

Concerned about her mental state, the health professionals arranged for her compulsory admission to hospital "for assessment" in accordance with s 2 Mental Health Act 1983. When she continued to refuse treatment, the hospital made a successful ex parte application to the High Court for a declaration authorising a caesarean section. Later that day a caesarean section was performed and a healthy baby girl was born.

After her discharge, S commenced proceedings seeking to overturn the declaratory order and judicial review of the decisions of the hospital authorities to admit her under the Mental Health Act. She succeeded on both counts.

The Court of Appeal reiterated the fundamental principle that an adult of sound mind is entitled to refuse medical treatment even when his or her own life depends on it. This principle applies equally to pregnant women. Unless there was a lawful justification, S's compulsory caesarean section was an infringement of her autonomy.

Such justification would have existed if S had been incompetent when she refused treatment, but the Court found that she was not. Her thinking process was bizarre and irrational and contrary to the views of the overwhelming majority of the community, but her capacity to consent was intact. S was detained to treat her physical condition, not her mental disorder. That purpose did not come within the scope of the Mental Health Act and so the application for admission was unlawful.

The Court also condemned the use of ex parte applications in these circumstances, because they are unjust and ineffective. S had not been given notice of the proceedings nor an opportunity to be heard. She was therefore not bound by the order and the declaratory order was set aside, thus enabling her to claim damages for trespass.

Re S is a salutary warning to health providers that no matter how unreasonable patients' decisions may be, their right to refuse medical treatment is sacrosanct unless they are incompetent. This right is also part of New Zealand law: s 11 NZ Bill of Rights Act (1990) and Right 7 Code of Health and Disability Services Consumers Rights (1996). It thus seems likely that a New Zealand Court would come to the same conclusion as that of the Court of Appeal in *re S*.

EMPLOYMENT LAW

Graham Rossiter

Ramage v Minister of Education
(AEC, 20/98, 24 March 1998)

Sections 40(2) and 41(3) of the Employment Contracts Act 1991 provide for the Employment Tribunal and Employment Court to have the power to take into account conduct by the employee which has contributed to the situation that gave rise to the dismissal where the Tribunal or Court finds the grievance submitted to be sustained. Section 40(2) is confined to the situation where the grievance alleged is that of an unjustified dismissal. The principles to be applied are well summarised in Butterworths *Employment Law Guide (3rd ed)* at para 40.10 and such articles as Woodward: *The Relevance of Employee Actions to Personal Grievance Remedies* [1995] Employment Law Bulletin 127 and Hawkesby: *A Pyrrhic Victory – Reduction of Remedies to nil in unjustified dismissal cases* [1998] Employment Law Bulletin, 67.

The Tribunal and Court have shown themselves willing, to date, to adopt a reasonably vigorous and robust approach to the application of these provisions and award very low or no remedies where there is a substantial level of substantive justification for a dismissal. In *Ramage v Minister of Education* AEC, 20/98, 24/3.98, the appellant, a school teacher, had developed a negative attitude to his employment which resulted in his refusing to attend staff meetings, refusing to liaise and deal with other staff as necessary, greeting those who approached his classroom with hostility, approaching newspapers to publicise his dispute with his school and refusing to respond to a written complaint regarding an alleged assault on a pupil.

The Employment Court held that there were a number of procedural problems with the school board's decision to dismiss the appellant. These included a failure to conduct a proper investigation and disclose to the appellant the various matters that it would be considering of relevance to the continuance or otherwise of his employment. There had not been, it was found, an adequate opportunity given to the employee to be heard. The Tribunal's finding that the dismissal was justified was, therefore, reversed. The contributory conduct of the employee, however, did not justify the award of any remedies. The Court agreed with the Tribunal that the appellant had been a "most difficult" employee whose conduct on several occasions could well have justified his dismissal. The appellant's conduct was causative of his dismissal and could be taken into account.

Hodgson v The Warehouse Ltd
(cc 14/98, CEC 25/98, 2 June 1998)

It is trite to observe that an employer may find an employee guilty of serious misconduct thus justifying summary dismissal if the employee has acted in a way that has substantially impaired the trust and confidence of the employer.

An issue that has exercised the current employment institutions and their predecessors from time to time is whether conduct outside and unconnected with the workplace can provide justification for a dismissal. Some discussion of this topic can be found at para 27.37 of the Butterworths *Employment Law Guide* (3rd ed). This point came before the Employment Court in the context of an application for an interim reinstatement injunction in the case of *Hodgson v The Warehouse Ltd* cc 14/98, CEC 25/98, 2 June 1998. The plaintiff had been employed as an assistant branch manager by the Warehouse. He was convicted in the District Court of four offences relating to the possession of objectionable material and one charge of distribution of such material in breach of the Films, Videos and Publication Classifications Act 1993. These offences related to graphic or text images which the plaintiff had downloaded at home from the Internet. The content of this material included some 106 images relating to the sexual exploitation of young girls. Following the plaintiff's conviction and sentencing in the District Court, the Warehouse conducted a disciplinary interview which resulted in his dismissal. On the application for the interim reinstatement injunction, it was contended, on behalf of the plaintiff, that "any dismissal would be unjustified because the plaintiff's convictions were not connected with his work, did not involve work equipment and were not related to the plaintiff's job in any way". The respondent argued that the Warehouse was strongly supportive of family values, expected that its managers were role models for staff, that the plaintiff's action constituted "conduct unbecoming of his position" and that he had irreparably damaged the necessary level of trust and confidence in which the Warehouse had held him. While at pains to make it clear that he was not determining the personal grievance which was a matter for the Employment Tribunal, Palmer J found that he was unable to accept that what had occurred with reference to the plaintiff's convictions could be categorised as "activities outside the workplace and as not misconduct as it was unconnected to his employment in any way". On the contrary, the Judge found that the convictions could be taken into account in considering whether the plaintiff's employment should be terminated. Although the Court found that the plaintiff had established an arguable case or serious question to be tried, that case was overall seen as being "relatively weak".

Accordingly, the application for an interim injunction was dismissed.

LEGAL ETHICS

Duncan Webb

Russell McVeagh v Tower Corp
(Court of Appeal, CA 86/98, 25 August 1998)
(See Fiduciary Relations above.)

Henry J sets out a test to be applied when considering whether a lawyer is disqualified from acting for a new client where there is a suggestion of conflict of interest with a current or former client. The test has two stages. First it must be shown that:

- the lawyer holds confidential information, and
- the information must be sensitive, that is to say of a nature such that its disclosure would adversely affect the client, and
- if the lawyer continues to act for the client with whom a conflict exists there

is a real or appreciable risk that the information would be disclosed.

If this test is met then the Court will consider whether there are reasons bearing on whether the Court should exercise its discretion to disqualify the lawyer or not. Reasons that were specifically identified were:

- the value of litigants being able to avail themselves of their counsel of first choice;
- the right of the solicitor to offer his or her services to the public generally;
- the ability of lawyers holding confidential information to move between firms;
- the value of competition within the profession and access to specialist advice.

There was some guarded approval of the use of "Chinese walls" in law firms to reduce the risk of a breach of confidence occurring in a conflict situation.

This decision represents a departure from the approach in other jurisdictions and earlier views of the New Zealand Court of Appeal which presumed that confidences would be breached where a conflict of interest existed and disqualified the lawyer from acting unless it could be shown that no real risk of disclosure existed. Those views are stated by Thomas J in this case in a strong dissent. Of particular note is the fact that the majority did not consider as relevant the need for a stringent test to be applied to ensure that the integrity of the legal profession generally was upheld in the eyes of the public.

This case represents a shift away from a clear, though strict, rule in favour of a rule which seeks to balance a number of considerations. This is a matter of concern, particularly in light of the fact that the initial decision as to whether a conflict exists, and whether it is one which warrants disqualification, is made by the lawyers themselves. The fact that lawyers are not always sensitive to such situations is demonstrated by the facts of this case where Russell McVeagh did not consider any conflict problem had arisen. Also of concern is the fact that the Court found that by failing to disclose the existence of this conflict to its clients (and the consequent ageing of the information) Russell McVeagh improved its position. While the Court may possibly have disqualified it at the time the conflict arose, the fact that the putative conflict of interest was now of only historical significance meant that they were able to act.

LAND LAW

Julia Pedley

West Coast Settlement Reserves Lessees Association (Inc) v Attorney-General
(Court of Appeal, CA 98/98, 1 July 1998)

A declaratory judgment has been made by the Court of Appeal on the meaning of s 4 of the Maori Reserved Land Amendment Act 1998, ("the 1998 Act"). The provisions of the Maori Reserved Land Amendment Act 1997 ("the 1997 Act") provides for compensation for lessees of Maori reserved lands in respect to the change to more frequent rent reviews, to change to a fair annual rent based on the unimproved value of the land and conditions imposed by the 1997 Act on the assignment of the lessee's interest in the lease. Originally, under the 1997 Act, where lessees elected to have their compensation assessed by the Land Valuation Tribunal (as opposed to an applied formula under the 1997 Act), then s 18(3) required the Land Valuation Tribunal to place a market value on the lessee's interest as if the 1997 Act had not been enacted.

As a result of widespread concerns expressed about these provisions, however, ss 17 and 18 of the 1997 Act were replaced by ss 3 and 4 respectively of the 1998 Act. The amending legislation was designed to allay the concerns of lessees by providing that where a lessee elected to have compensation assessed by the Land Valuation Tribunal, the tribunal must, as soon as practicable after 1 January 2001, determine the market value of the lessee's interest in the lease (a), on the basis of what that market value would have been, as at 1 January 2001, if both the 1997 and 1998 Acts 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 both Acts. Under this elected valuation the amount of compensation payable to a lessee would be the difference between (a) and (b).

Following the enactment of these amending provisions to the 1998 Act, the West Coast Settlement Reserves Lessees Association, together with certain other lessees, made an application for a declaratory judgment to the High Court. The proceedings were subsequently transferred by Greig J to the Court of Appeal due to the urgency and importance of the matter.

Despite the amendments made by the 1997 Act, the lessees remained concerned about the basis upon which the market value would be determined. Before the Court of Appeal it was argued that the announcement in 1993 of the government proposals for change depressed the market value of the leases and that a true before and after comparison should take that matter into account. Furthermore, the lessees expressed concerns about the meaning which both value sand the Land Valuation Tribunal might give to the words "if the Maori Reserved land Amendment Act 1997 and this Act had not been proposed or enacted" in s 4(3)(a) of the 1998 Act. Particular concern centred on the meaning of the word "proposed".

Accordingly, on 15 June 1998 the Court made a declaration that it clarified the meaning of s 4 of the 1998 Act. In particular, the Court held that in s 4(3)(a) of the 1998 Act. "proposed" does not mean "introduced into the House of Representatives", but includes any proposal publicly announced by the government in 1993, or subsequently, for changes to the Maori Reserved land Act 1995 to the same substantive and economic effect as there identified in s 4(1) of the 1998 Act.

Stating the Court's reasons for the declaration, Blanchard J, having reviewed the history of the amending legislation, emphasised that in s 4(3)(a) of the 1998 Act, the word "proposed" is not to be equated with "introduced" and has to be read as encompassing the government's proposals prior to the introduction of the Bill in 1996 (which led to the passing of the 1997 legislation). To do otherwise would make the benefit conferred by s 4(3)(a) illusory.

The Court did, however, make the observation that the declaratory judgment was concerned only with the meaning of particular words in s 4(3)(a), concluding that "those charged with valuing the lessees' interests must disregard certain adverse effects on the value of the leases after the announcement of the government's proposals in April 1993". It will, however, be a matter for the Land Valuation tribunal to make a finding on the factual question from the evidence given and valuation methodology used.

Young v New Bay Holdings Ltd
(High Court, CP 99/98, 19 June 1998, Randerson J)

Where a lease contains a right of renewal, under s 120 Property Law Act 1952, the High Court has the power on an application made to it, to grant to a lessee relief against a lessor's refusal to grant a renewal of the lease. In considering such an application under this section, the Court has a broad discretion to grant or refuse relief as it thinks fit, having regard to all the circumstances of the case. It is well settled, however, that a lessee wishing to apply for such relief must make application for relief within three months after the lessor's refusal to grant a renewal has been first communicated to the lessee as prescribed by s 121 Property Law Act 1952. It is equally well settled that s 121 operates as a limitations provision in respect of which compliance is mandatory, *Boyden v New Zealand Guardian Trust Co Ltd* [1995] 3 NZLR 208.

In *Young v New Bay Holdings Ltd*, Young, the lessee, failed to seek a renewal of his lease in accordance with the time provisions stipulated in the lease. Subsequently, a late notice requesting renewal was refused by New Bay Holdings Ltd and communicated by a letter dated 22 October 1997. The lessee filed an application for relief on 20 March 1998, and the lessor, relying on the limitation provision of s 121, contended that the proceedings were out of time.

In considering this issue, Randerson J, in a reserved judgment, analysed the provisions of s 121 Property Law Act 1952, and in particular the question of what, in terms of correspondence, amounts to an unequivocal refusal by the lessor to renew. After canvassing the relevant case law, Randerson J concluded that this is a question of fact to be determined in each case and that, with regard to the present case, he was satisfied that the lessor's letter of 22 October 1997, was an unequivocal refusal to renew the lease. From the evidence, there had been an indication given of the possibility that the lessor would be prepared to change its mind. The Court, however, reaffirmed that the time period prescribed in s 121 Property Law Act 1952 operated as a limitation period which was not capable of being extended, stopped or suspended despite any subsequent indication that the matter of renewal having been made might be reconsidered. As a consequence, the letter of refusal to the lessee, of 22 October 1997, operated to start the running of time against the lessee in terms of s 121.

Despite this, the lessee's application for relief, albeit clearly outside the limitation period under s 121, succeeded. Giving judgment for the lessee, Randerson J took the view that the circumstances may be such as to amount to a waiver of the time limit, or be sufficient to amount to an estoppel preventing the lessor from enforcing the running of time under s 121 against the lessee. Citing authority in support of his view, Randerson J asserts that *Young* is a straightforward application of the principles of promissory estoppel. In *Young*, the lessor's solicitor's words or conduct, during his discussions and correspondence with the lessee's solicitor from October 1997 to February 1998, were such as to amount to an express or implied assurance that proceedings for the lessee need not be issued pending further instructions on a reconsideration of the initial refusal. Accordingly, in such circumstances it was necessarily implied that while such instructions were being obtained, the time limit under s 121 would not run against the lessee. Hence estoppel would operate in the lessee's favour by virtue of the lessor being estopped from enforcing against the lessee the statutory time period under s 121. From the evidence, His Honour concluded that only on the 10 February 1998 did it become clear that the lessor remained adamant about the refusal to renew.

Consequently, the Court held that from this point in time, the lessee was entitled to a reasonable period to file an application for relief under s 120. This was duly done on 20 March 1998 and was held by the Court to be within time, and, in accordance with its discretionary powers under s 120 of the Act, the Court granted a renewal of the lease.

While it may be acknowledged that much would depend upon the circumstances of the case, (and indeed this point was emphasised by the Court), the decision of Randerson J should operate as a sound warning to those who, despite having communicated to a lessee an unequivocal refusal to renew a lease, then, by their conduct, go on to lead the lessee to believe that proceedings need not be issued until the lessor's position on a request for reconsideration is known. The decision in *Young* makes it clear that in such circumstances, where the lessee suffers detriment as a result of being led to believe that statutory rights will not be strictly enforced against them or will be kept in suspense or abeyance for some particular time, then waiver or estoppel will arise and will apply in the context of such statutory rights.

FAMILY LAW

John Caldwell

Wood v Wood
[1998] NZFLR 516

The ability to "contract out" of the Matrimonial Property Act 1976 under s 21 of the Act (with an equivalent regime proposed for the De Facto (Relationships) Bill 1998) has provided an important concession and reassurance to those persons who wish to regulate their own property affairs in an autonomous way. It has always been somewhat misleading, however, to term the agreements "contracts", as the agreements are not inviolate in nature and have been susceptible to judicial striking down. Some commentators have been concerned that the Courts have been too ready to exercise this power. In *Wood v Wood*, which is likely to prove a defining case in Matrimonial Property Law, Fisher J has attempted to allay those concerns.

In this case the wife did not sign the agreement until the night before the wedding, when the husband told her he would not proceed with the wedding without her signature. In the previous three months, however, the parties had been discussing an agreement, with the husband wishing to protect assets he already owned, including an existing house which was going to be used as the matrimonial home. The parties separated two or three years later (the date of separation being contested) and the wife applied successfully to the Family Court to have the agreement set aside. The Judge, described by Fisher J as "one of the acknowledged judicial leaders" of the Family Court, was particularly persuaded by the wife's sense of pressure on the day before the wedding.

The husband appealed, successfully, to the High Court. In his judgment, Fisher J expressed a fear that agreements were being set aside "too readily", and enunciated a number of significant points.

First His Honour emphasised that the crucial, ultimate test under s 21(8) and s 21(10) is whether the agreement is "unjust", with the claimant having the onus of proof. In deciding whether the test is met, His Honour asserted, the Court must have regard to each of the mandatory matters in s 21(10), without concentrating on one consideration and ignoring the rest. The Court, he said, must then stand back and ask in an overall way whether the agreement is unjust, with the individual matters in s 21(10) being subservient to that ultimate issue. Interestingly, though, it was suggested by the Judge that, unless the agreement was substantively unreasonable, it would be unlikely that a Court would hold an agreement to be unjust solely because of procedural unfairness relating to the circumstances of entering into the agreement.

Secondly, and most importantly of all, Fisher J announced that it would be difficult, on the grounds of substantive unreasonableness, to challenge successfully a pre-nuptial agreement which, as in this case, did no more than protect existing separate property. Otherwise, His Honour said, there would be little point in having a statutory provision for contracting out. Accordingly, this agreement which protected the husband's house from falling under s 11 of the Act, could not be characterised as unjust.

Whilst the judgment is likely to be an important judicial marker of a new respect for sanctity of pre-nuptial matrimonial property agreements, Fisher J did advise that the Courts may be slightly readier to strike down "compromise" agreements reached at the end of marriage, and did warn that attempts to contract out of statutory provisions dealing with property produced during marriage would be an "uphill battle" (at p 524). Generally, though, s 21 agreements do seem to have a more solid and enduring quality as a result of this decision. ❑

HEALTH LAW AND PRACTICE IN THE USA

Bill Atkin, Reader in Law, Victoria University of Wellington

reflects on recent changes in the land of managed care

THE CURRENT FERMENT

As in New Zealand, the health system in the United States is in a state of ferment and turmoil. Health is a major subject of political debate and media interest – not, it is true, outscoring the fascination with the President's alleged sex life, but nevertheless absorbing much attention from politicians, voters and writers. One sign of this is that in 1997 over a thousand Bills on medical issues had been introduced into state legislatures.

I was privileged to spend the spring term – January into April – as a visiting professor at the California Western School of Law in San Diego. I had been asked to teach medico-legal problems and expected to spend a considerable amount of time on medical malpractice claims and draw some comparisons with the New Zealand accident compensation model. I soon realised that the ground in the United States had shifted quite dramatically. While medical malpractice is still important, the big legal concerns for doctors and patients alike have changed. What follows are some initial reflections on aspects of the US system.

Americans are getting used to a new vocabulary: "managed care", "health maintenance organisations", "preferred provider organisations", and "deselection".

The average New Zealand patient attends the doctor and pays the bill on the way out after each consultation. This is the so-called "fee-for-service" system. The essential relationship – legal and clinical – is between the patient and the doctor, although the medical insurance company is of course now beginning to play a much more decisive role in funding health care. This traditional model is virtually extinct in the United States. Shortly after his election, President Clinton endeavoured to get enacted a comprehensive health package but he failed. Reaction to this failure was a monumental switch in the provision of health care, a change which was brought about not by government policy, electoral promise or judicial activism but primarily by market forces and by those with an eye for making money.

MANAGED CARE

"Managed care" had existed for many years but it was a quiescent giant, waiting to explode on to the scene. In 1970 less than ten per cent of Americans received their health care through a managed care plan. By 1996 that had increased to 50 per cent and much of the rapid growth occurred in the last few years. Eighty per cent of employees now belong or will very soon belong to a managed care plan arranged through their employer. It is estimated that by the year 2000 80 per cent of all Americans will be linked to a managed care plan which leaves 40 million people outside the system and uninsured. These people fall back, if they are lucky, on somewhat inadequate government provision.

Few conventional GPs remain: by 1995 more than 83 per cent of doctors had at least one contract with a managed care organisation (MCO). To survive, doctors must today lock themselves into managed care.

So, what is managed care? Given that it has burgeoned largely outside the political process, it is not surprising that it takes many forms. But it is possible to generalise a little. First, the patient instead of signing up with the local doctor or medical centre will enrol with one of the many health organisations. For most, this will be done through the employer, therefore the patient's real choice is limited. The employer will have chosen the MCO, although perhaps after consultation with the staff. The patient may have some choice in the actual health provider but the provider must be linked to the plan.

The patient does not pay a fee-for-service. Instead there is a capitation system: the patient pays up front for the medical services covered by the plan, whether these services are used by the patient or not. In this sense, the payment is not unlike paying insurance. There may be a nominal payment with every visit to the doctor but otherwise, for ordinary health care, there are no further payments.

As with patients, health providers – physicians, hospitals, ancillary services, etc – contract with the MCO and in return for a capitated flat fee have access to the enrollees in the care plan. Typically, the doctor will receive the same income no matter how many or how few patients are seen. This operates as an incentive to reduce the number and length of consultations. It is part of the so-called "cost-containment" objectives of managed care. Other incentives may be put in place: for instance the primary health care physician who refers too many patients to specialists (who of course cost more) may suffer a financial penalty while the doctor who makes fewer referrals may receive a bonus.

DESELECTION

Doctors may contract with the MCO and maintain their independent legal status but a number, which is predicted to grow, become employees of the MCO. The legal consequences may be significant. For the doctor, the key relationship is now not so much with the patient as with the MCO. In this new climate, the fear of losing that relationship is said to be far greater than the fear of a malpractice claim brought by the patient. A doctor may be able to ride through a malpractice claim, but "deselection" as it is known – being dropped by the MCO – may be catastrophic.

Deselection has become one of the leading legal issues in the health sector. A doctor who is an employee can of course

take advantage of the unfair dismissal rules usually built into the employer/employee relationship but the position of other contracting doctors is more problematic. The terms of the contract ought to govern the situation but, because these terms are unlikely to assist the dismissed doctor, this may lead to injustice, especially if the deselection was based on ethically improper grounds. Sympathetic Courts have been trying to find solutions more favourable to the dismissed doctor. One trail-blazing New Hampshire Supreme Court decision held that "[i]f a physician's relationship ... is terminated without cause and the physician believes that the decision to terminate was, in truth, made in bad faith or based upon some factor that would render the decision contrary to public policy, then the physician is entitled to review of the decision" (*Harper v Healthsource* 674 A 2d 962, 966 (1996)). The legal reasoning in this decision may be challenged as the Court decided that the physician falls within neither of the two traditional categories of employee or independent contractor. But it nevertheless illustrates how MCOs are increasingly being exposed to judicial scrutiny.

In another situation which arose in April 1998 in San Diego County, a jury awarded a specialist $1.75 million. Dr Self claimed that his dismissal was because he had advocated the best care for his child patients. The damages were awarded for breach of a relatively new and untried California law protecting doctors from retaliation in such circumstances and also for malicious defamation. Further proceedings will determine a claim for punitive damages. This decision reverberated around the United States, MCOs trying to downplay its significance, others trumpeting it as a "shot across the bow of the ship called managed care".

LIABILITY OF MCOS TO PATIENTS

Paralleling the new wave of deselection litigation, many of the novel medical cases brought by patients are directed at MCOs. A typical situation is where a patient is denied necessary care because the MCO delays in deciding or refuses to cover a particular procedure. Another example is where the doctor does not make a referral to a specialist because of the MCO's cost containment rules. One such horror story involved a young girl who for five years endured headaches and nausea to be given only pain relief. Eventually a school psychologist was so alarmed at the child's "intense, localised headaches, vomiting and blood-shot eyes" that she was sent for tests which revealed a tumour displacing 40 per cent of the brain. It could be argued that blame for the failure to diagnose and treat should simply be laid at the feet of the doctor. But the malpractice appeared to be financially motivated. The doctor might be liable and the MCO might be vicariously liable (US Courts have in earlier years stretched agency law so that a hospital may be liable where a surgeon is shown to be the hospital's ostensible agent and the same legal reasoning might, depending on the facts, be applied to MCOs). Can however the MCO be directly liable because its financial arrangements led the doctor to adopt an overly conservative and negligent approach?

This leads to an allied issue, to what are known as "gagging orders" – clauses in their contract with the MCO which forbid health professionals from telling patients about the financial incentives or from telling them the full range of treatment options (some of which the MCO might decide are too expensive to fund). The US Courts have struggled with gagging. A federal Court in *Shea v Esensten* 107 F 3d 625 became the first to hold that a health plan has an obligation to disclose financial incentives. Failure to do so breaches the duty to communicate material facts which might affect the patient's interests. To be fully informed a patient should know, according to this line of reasoning, what factors impinge on the doctor's advice: a patient who knows that the doctor gets a bonus for making minimal referrals might seek access to a specialist at his or her own expense. This could be regarded as a logical extension of the doctrine of informed consent. On the other hand, the *Shea* decision has not been followed in other cases notably *Lancaster v Kaiser Foundation Health Plan* 958 F Supp 1137 (1997) (the girl with the brain tumour) and *Weiss v Cigna Healthcare Inc* 972 F Supp 748 (1997). The latter held that a MCO must explain financial arrangements if asked but otherwise has no positive obligation to inform. But it also held that gagging policies which prevented the patient from being told the range of treatment options were unlawful and could not be upheld.

The patient's task of pinning liability on the MCO is further complicated by federal legislation which distinguishes between employment related health plans and others. The legislation, which applies only to employment related plans, shields MCOs from malpractice suits brought under state law and forces patients to rely on the rather skimpy federal remedies provided in the legislation. But here again the Courts, in the face of seemingly unjust outcomes, have been narrowing the scope of this legislation and enabling a few claims to proceed unhindered. One such case currently proceeding in New Jersey involves "drive-through births" – the MCO required discharge of a newborn baby within 24 hours but the baby died the day after discharge, despite the parents' phone calls about the baby's condition.

THE BENEFITS OF MANAGED CARE

Enough has been said to illustrate the legal ferment facing the US health system. Much of it can be explained by the extraordinarily rapid shift to managed care in the last five years. But it is accepted that there is now no going back on managed care – the old style doctor/patient relationship appears to be gone forever. Managed care has brought a number of benefits with it, and at least for a while consumers have been satisfied with many of the results. At the widest level, although health care in the United States has now passed the US $1 trillion mark, the rate of growth in health expenditure has noticeably slowed. Many put this down to the operation of managed care, but the very "healthy" US economy may be playing a part as well.

Cost containment policies appear to be reducing the amount of wasteful treatments – a patient will be sent for an expensive procedure or be prescribed drugs only if really necessary. There has been concern over the years about iatrogenic harm to patients, ie harm caused by wrong or unnecessary medicine. Managed care should reduce this. So at the patient's level, managed care may result in more appropriate health care. And on the financial side, the patient ought to have fewer worries – the patient can go to the doctor as often or as little as desired and the costs for ordinary care will be covered.

THE DOWNSIDE

But three problems stand out.

First, as already mentioned, there has been a radical change to the doctor/patient relationship. Both parties now look over their shoulders to the MCO. Despite continuing fiduciary and other legal obligations to the patient, the doctor is now tempted to under-treat rather than over-treat.

There is a genuine and rising concern that patients may not get the treatment they need or will get it too late. This is the corollary of cost containment. It is not easy to get the right balance between too much and too little medicine

Secondly, the health system is heavily commercialised. This observation will come as no surprise but it is reinforced by managed care. There is a distinct trend for non-profit MCOs to convert into "for-profit" organisations, despite evidence that the former provide better health services to patients. Managed care organisations are driven largely by profits, efficiency and business principles. It could be argued that there is nothing wrong with this and that parties should simply be free to contract as they please. But buying health services is a little different from buying products such as a washing machine. It could be a matter of life and death. President Clinton has therefore proposed a patients' Bill of Rights and even Republicans accept that some kind of patient protection legislation is necessary. Many states have already passed miscellaneous reforms, eg Texas, Connecticut and Missouri provide consumers with the right to go to independent boards in order to challenge MCO decisions.

Another side to the commercialisation of health is business failure. One study showed that 40 per cent of all new "health maintenance organisations" (a common structure for managed care) went bankrupt between 1985 and 1992. In 1997 50 per cent of MCOs made a loss. The result is higher premiums, reduced services and deselection of doctors. The more this happens the less attractive the whole approach will appear.

The third observation is that while most Americans are now signed up to an MCO, millions remain outside the system and fall through the cracks. Many of these people are poor health risks – in a competitive market an MCO is not going to be willing to take on people who are likely to need expensive treatment. Many come from minority groups. This mirrors the fact that the poor in America are disproportionately from ethnic minorities and doctors serving these groups, themselves more often than not coming from that same minority, are also unlikely to be signed up by an MCO. The result is that managed care tends to be a white middle class phenomenon.

MANAGED CARE NEW ZEALAND?

So, how is all this relevant to New Zealand? We have flirted with turning health into a business. We have radically revised the remedies available to patients by creating the office of the Health and Disability Commissioner. We have an ongoing concern about the health of minorities, especially mental health, and Maori and Pacific Island health. We are as keen on cost containment as the next country. The underlying issues in New Zealand are not so very different, although the practical solutions may be dissimilar.

Given the continuing involvement of the state as a key player particularly in the provision of acute hospital care and given the accident compensation scheme which should survive in some form despite pleas from certain quarters for privatisation, full-blown managed care is unlikely in New Zealand. There appears however to be no legal reason why a modified form of managed care might not be developed here. Already integrated medical services combining public and private provision and calls for "bulk-funding" augur novel structures for the provision of medical services.

If a version of managed care were to hit New Zealand, we might well be better prepared than the United States. Our history of treating health as a matter of national social policy means that patient protection is already, at least in part, provided for. A managed care organisation would for instance be bound by the Health Information Privacy Code to comply with rules about confidentiality and disclosure of information. Accident compensation means that complications in suing for malpractice would hardly arise, although in extreme cases punitive damages might be available and proceedings for pure psychological harm could escape the accident compensation bar on damages. There might be questions as to whether an MCO had a fiduciary relationship with a patient (British jurisdictions have been more hesitant than American Courts in importing fiduciary notions into health law), and consumer legislation such as the Consumer Guarantees Act might well apply.

But perhaps the most important feature in the shape of future health care in New Zealand will be the Health and Disability Commissioner, an office which has still to be fully tested but which flexed its muscles with the ringing condemnation of the facilities at Christchurch Hospital. The Commissioner along with the patients' Code of Rights provides ready-made patient protection against whatever onslaughts the health market may bring in the future. The functions of the Commissioner and those of consumer advocates (see ss 14 and 30 of the Health and Disability Commissioner Act 1994) are broadly defined and would sweep managed care organisations within their orbit. The application of the patients' Code to MCOs is a little less straightforward. The Code applies to health care providers defined at length under s 3 which extends well beyond registered and licensed providers to "[a]ny other person who provides, or holds himself or herself or itself out as providing, health services to the public ... " (s 3(k)). Such a person need not, it is suggested, actually provide the medical treatment. It is surely enough to arrange for the provision of such treatment, or to convey the impression to patients (ie, by holding out) that health services will be provided under the health plan. This means therefore that MCOs would be subject to the code. This further means, for example, that if negligent treatment can be sheeted home to the MCO, then the patient can complain to the Commissioner about the MCO and may be entitled to the remedies provided for in the legislation.

CONCLUSION

I have set out part of the tableau of health law and practice in the United States. It is premature to judge managed care American style. It has led to some streamlining and some cost containment. But health is still expensive in the United States and administratively top-heavy – the proliferation of management, be it through private enterprise or through New Zealand's happily abolished regional health authorities, has not made medical care cheaper. The economics and politics of managed care may be properly tested only when the US economy takes a downturn from its present high, when a few more health businesses have failed and gone into bankruptcy, and when the Courts and legislatures have settled a few more legal parameters.

Public disquiet about health and managed care is evident in the United States. The MCO is remote and impersonal, and people have a lurking feeling that the new structures are more interested in profits than patient care. The dichotomy between business ethics and medical ethics is acute.

Managed care is an enormous medical experiment. It plays with people's lives. I came away from the United States with the sense that New Zealand should be wary before following the same course. ❑

DISMISSAL ON NOTICE AFTER *AORAKI*

Bill Manning, Phillips Fox, Auckland

examines the limits of dismissal on notice after Aoraki

THE FREE BARGAINING MODEL

The starting point of the Court of Appeal's decision in *Aoraki Corporation Ltd v McGavin* (CA 2/97; 15 May 1998) is the recognition that the Employment Contracts Act represents a "model of free contractual bargaining" (at p 14, majority judgment). In particular the Court focused on those provisions of the Act which emphasise that responsibility for the content of an employment contract is that of the parties themselves.

This "free-bargaining" approach was, however, tempered by the recognition that the nature of the employment relationship differentiates employment contracts from conventional commercial contracts. This is reflected in the statutory modification of the normal common law rules, particularly the interpolation of the personal grievance procedures, and the concepts of unjustifiable dismissal and unjustifiable action.

The Court was unanimous that there exists in every employment contract mutual obligations of confidence, trust and fair dealing. The majority considered that the duty was a function of the statutory application of justifiability or "moral justice" to the employment relationship (at p 23). For Thomas J it was a function of the "special characteristics [of employment contracts] intrinsic to public law" (at p 8).

That much of the decision was little more than a restatement of the Court's earlier jurisprudence. (*Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275; *Principal of Auckland College of Education v Hagg* [1997] 2 NZLR 537.) What remained however was to flesh out the content of the duty, and to reconcile the inevitable "tension between a pure contract approach and social and economic concerns inherent in the relationship" (majority, p 14).

REASONS FOR DISMISSAL

In *Aoraki* the Court went some way toward doing that, but one important point of principle remains to be addressed. It is the question of whether, in the light of *Aoraki*, an employer is entitled to dismiss on notice in accordance with the contract, without any reason for doing so.

Until now, the generally accepted view – supported by a body of case law which has developed over the last 15 years or so – is that the power to terminate on notice, even where expressly provided for in a written contract, is qualified by the mutual obligation of confidence, trust and fair dealing, with the result that:

- It is unjustifiable (and possibly, also wrongful at common law) simply to terminate employment on notice, without reason. Something more is required. The employer must have a reason for doing so, and what is more, the reason must be sufficient (although the reason can be administrative, rather than arising necessarily from some shortcomings on the part of the employee). (See eg *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378, 383 (CA).)
- The dismissal must be carried out in a manner which is procedurally fair.

As the first issue – that of adequacy of reasons to dismiss – is always a question of fact and degree, it necessarily entails the exercise of judgment and thus a degree of legal and financial risk. The second issue, that of procedural fairness, entails a transaction cost (executive time spent in investigating the matter and in seeing the process of consultation through; legal costs etc), which can be very significant. It also entails legal and financial risk. The combination of cost and risk has meant that employers have been averse to terminating employment simply on notice. They have tended to limit their options to terminating either for redundancy or for cause (although both options, particularly that of dismissal for cause, also entail significant elements of cost and risk).

PROCEDURAL LIMITS

What then is the effect of *Aoraki* upon the employer's right to terminate on notice?

Two points may be made with some confidence. First, it is clear that the duty of confidence, trust and fair dealing would apply to the manner in which a dismissal on notice is effected. Such a dismissal would still have to be effected in a "fair and sensitive way". So for example, an employer would not be entitled simply to "frog-march" the employee out the door, having given pay in lieu of notice, unless there were good reasons for doing so (legitimate concerns about access to confidential information etc). Nor would the employer be able to effect the dismissal in a manner which unnecessarily embarrassed the employee. To take an extreme example, no doubt it would be in breach of the duty of fair dealing were the employer simply to announce the employee's dismissal to staff, without first having informed the employee and (ideally) agreed with the employee upon the manner in which the termination should be communicated to staff.

Secondly, if the employer should breach its duty of confidence, trust and fair dealing by the manner in which it effects a dismissal on notice, the remedies available to the employee are limited to the consequences of the employer's procedural failure. If that is the employer's only failure, then the employer's remedies do not extend to compensation for loss of the job itself. Thus the employee is not entitled to

compensation for lost income or benefits which he or she would have earned had employment continued. In essence all that the employee is entitled to recover is compensation for the hurt and distress caused by the manner in which the termination was effected (independently of the natural distress one suffers upon the loss of a job).

As *Aoraki* exemplifies, except in extreme cases, such compensation tends to be relatively modest. In calendar year 1997 95 per cent of awards made by the Employment Tribunal for "distress damages" were for less than $11,000. Seventy-three per cent were under $6000. Over the same period, 73 per cent of such awards made by the Employment Court were under $10,000. Leggat, "Compensation for non-financial losses" [1998] *Employment Law Bulletin* 62.

On this scenario then, the employer's legal and financial exposure for getting a dismissal on notice wrong, may be quite modest.

However that begs the question as to *Aoraki's* impact on the *substantive* right of an employer to dismiss on notice without reason. Can it be done?

A SUBSTANTIVE LIMIT

Against the background of his recognition of the free contractual bargaining model in *Aoraki*, Richardson P said:

> The contract rules .... To [imply a term requiring the payment of redundancy compensation] would alter the substantive rights and obligations on which the parties agreed; it would change the economic value of their overall agreement; and it would erode the statutory emphasis on the free negotiation of employment contracts .... The mutual obligation [of confidence, trust and fair dealing] is directed to fair treatment in the employment and there is no basis in principle for converting it into a specific variation of the contractual arrangement so as to impose substantive obligations ... which the parties did not agree to undertake (at p 27).

If the Court declined to infer a substantive duty to pay redundancy compensation where the contract is altogether silent on the issue, then on what logical basis might the Court infer that the employer's right to dismiss on notice is qualified by a duty only to do so for good reason? A fortiori, on what basis might it do so where the unqualified power to dismiss on notice is expressly stated, particularly if the power is said to be exercisable "for any reason whatsoever"? In principle at least, it is difficult to reconcile the language quoted above, with an implied qualification on the power to dismiss on notice, especially where the contract expressly provides for the power.

In this context, another decision of the Court of Appeal, *Andrews v Parceline Express Ltd* [1994] 2 ERNZ 385, warrants rather more attention that it has received to date. (It was not referred to in *Aoraki.*) *Andrews* was a common law action concerning termination of a contract for services on one month's notice, without reasons having been given. In the absence of a written contract, the Court held that reasonable notice was six months. For the Court Tipping J considered that there was no legal foundation for implying a term into the contract whereby:

> a clear and express power to terminate on so many months notice is to be subject to a limitation that it be exercised reasonably .... The scheme of the contract was to provide separately and distinctly for termination without cause and then for termination for cause .... There is no basis for any implication to the contrary (at p 392).

It followed in that case that the plaintiff was entitled only to distress damages which did no more than compensate him for the unlawful shortness of the notice given; not for the loss of the contract itself. (General damages of $10,000 were awarded.)

Andrews was considered by McGechan J in *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484. Although His Honour was critical of *Andrews*, he felt obliged to apply the spirit of that case. (His Honour declined to distinguish *Andrews* on the grounds that it concerned a contract for services rather than a contract of service.) McGechan J concluded:

> I have no doubt that in our present case there were clear and distinct implied powers to dismiss for cause ... and on reasonable notice without cause. On that basis, applying *Andrews*, there is no room for an implied term requiring fair process – warning and opportunity to answer – in relation to dismissal on notice without cause. (at 494)

In another wrongful dismissal case, *Ross v Dunedin Visitor Centre* (1988) 2 NZELC 95,755 Tipping J had to consider the phrase "without prior notice" in the context of a clause entitling the employer to dismiss an employee guilty of grave misconduct. His Honour held that:

> It is impossible, against those clear contractual words, to imply a duty to give a fair hearing or otherwise act fairly in a procedural sense .... The employer is not obliged to give any prior notice and can simply advise the employee that the contract is terminated (at 95,767).

Ross is distinguishable from cases involving dismissal on notice, and it may not sit comfortably with more recent cases already noted in which the Court of Appeal has given procedural content to an implied duty of confidence, trust and fair dealing. Be that as it may, *Ross* demonstrates a judicial aversion (by one of the majority Judges in *Aoraki*, and one of the Judges in *Andrews*) to the implied qualification of express contractual powers.

Drawing *Aoraki*, *Andrews*, *Stuart* and *Ross* together, a persuasive case can be made that there is no room for allowing the duty of confidence, trust and fair dealing to cut across the substantive right of an employer to dismiss on notice. That proposition is all the stronger where the right to dismiss on notice is stated expressly in the employment contract, particularly if the contract states that the power might be exercised for any reason (or for no reason at all). But on the strength of *Andrews* and *Stuart*, the employer's power to dismiss on notice is not fettered even where the power is implied rather than express.

For all that, it is doubtful that the Court would go so far. *Andrews*, *Stuart* and *Ross* are all distinguishable. There the Courts were addressing issues of wrongful termination at common law, rather than unjustifiable dismissal under the Employment Contracts Act. A consistent theme in decisions over the last 15 years or so has been the distinction between the concept of wrongful dismissal at common law, and unjustifiable dismissal under statute.

Thus in *Ogilvy & Mather (NZ) Ltd v Turner* [1994] 1 NZLR 641, 644 Cooke P, referring to the line of authorities starting with *Auckland City Council v Hennessey* [1982] ACJ 699, said:

> the statutory personal grievance remedies by way of monetary awards are not tied to what would have been recoverable at common law .... The need for an approach wider than that traditionally or formally taken

> by the common law to issues between master and servant is a major rationale of the statutory jurisdiction. Unjustifiable dismissal includes a dismissal that is wrongful at common law, but it is a wider concept

In *Telecom South Ltd v Post Office Union* [1992] 1 NZLR 275, 285-286 (cited with approval in *Ogilvy & Mather*), Richardson J had said of the unjustifiable dismissal jurisdiction:

> The statutory inquiry necessarily involves a balancing of competing considerations. Those mutual obligations must respect on the one hand the importance to workers of the right to work and their legitimate interest in job security, and on the other the importance to employers of the right to manage and to make their own commercial decisions as to how to run their businesses .... Whether a dismissal is justifiable can only be determined by considering and balancing the interests of worker and employer. It is whether what was done and how it was done, including what recompense was provided, is just and reasonable to both parties in all the circumstances including, of course, the reason for the dismissal.

In enacting the Employment Contracts Act, the legislature adhered to the concept of unjustifiable dismissal introduced by the Industrial Relations Act 1973 and retained in the Labour Relations Act 1987. In so doing, the legislature must be taken to have endorsed the relatively expansive approach to the concept of unjustifiable dismissal manifest in decisions of the Courts to that point. (See eg *BP Oil NZ v Distribution Workers Union* [1989] 3 NZLR 580, 582.) On that analysis, the free contractual bargaining model introduced by the Employment Contracts Act did not displace the statutory concept of justifiability which, according to modern jurisprudence, underpins the employment relationship.

How then might the Court balance the interests of master and servant in the context of a dismissal on notice? Recognition of an unfettered right to dismiss on notice would have the virtue of delivering to the parties not only responsibility for their own negotiated terms, but also much greater certainty about the enforcement of those terms. Such certainty would serve to substantially reduce, if not eliminate, employers' legal risks. It would also reduce the transaction costs which employers currently face in effecting dismissals, by reducing the need for legal advice and representation, and for the intervention of mediators and the Court system.

Those considerations however must be counter-balanced against what Thomas J described in *Aoraki* as "the abuse or arbitrary exercise of the power [of dismissal] in the hands of the employer". If an employer has the right, both at common law and under the Act, to dismiss on notice without any or any adequate reason, why would an employer dismiss on any other basis, whether for cause or for redundancy? In effect, such an unfettered power would provide employers with the opportunity to terminate employment contracts at will, that is for any reason, or for no reason at all. Admittedly, the power would be qualified by the duties to give notice of termination in accordance with the contract (or pay in lieu), and to carry out the dismissal in a fair and sensitive manner. Yet in substance, the very foundation upon which the security of an employee's job has come to be based, would be removed.

At least where the contract is silent about the employer's power to dismiss on notice, or perhaps even where the contract does no more than provide expressly for the power to dismiss on notice, it seems unlikely that the Court of Appeal would be willing to hold that the power is not qualified in a substantive way by the duty of confidence, trust and fair dealing.

Some clue to the thinking of the Court in this respect is to be found in *Aoraki* itself. There Richardson P held that the Employment Court "was entitled to find that there was some room for complaint" in the employer's failure to give adequate reasons for the plaintiff's dismissal (at p 35). Admittedly the President articulated such failure as a breach of procedural rather than substantive fairness. However it does suggest that the provision of reasons may be regarded as a necessary element of a justifiable dismissal on notice. Logically that implies that the existence of reasons, and the adequacy of those reasons, are necessary elements also.

More problematic is the situation where an employer exercises an express contractual power for example to "dismiss on notice for any reason whatsoever", or for that matter, "to dismiss on notice without being obliged to give reasons for doing so". Such clauses would severely test the "tension between a pure contract approach and social and economic concerns inherent in the relationship". Logically, given *Aoraki's* starting premise of a model of free contractual bargaining, it is difficult to see how the Court might escape the ordinary and natural meaning of the parties' own contractual language, other than perhaps by resorting to the harsh and oppressive contracts jurisdiction under the Employment Contracts Act (s 57) (although that of course is limited in its scope).

As McGechan J observed in *Stuart*, the issue of whether and to what extent a contractual right to dismiss on notice may be fettered, awaits further appellate clarification (at 494). In light of *Aoraki*, the need to address the issue is more pressing than ever. ❑

CRIMINAL LEGAL AID IN THE COURT OF APPEAL

John Rowan QC, Wanganui

assesses the fallout from Nicholls

INTRODUCTION

The judgments in *Nicholls v the Registrar of the Court of Appeal* [1998] 2 NZLR 385 have wide-ranging importance. They deal comprehensively with a number of issues relating to legal aid in the Court of Appeal, grapple with the relationship between our international obligations and our legal aid system, and with administrative law points relating to the ability to review decisions of the Registrar or Judges of the Court of Appeal.

This article introduces the cases, the detailed factual backgrounds to which are best set out in the dissenting judgment of Smellie J at [1998] 2 NZLR 385 at pp 447 to 455 and are also summarised in *Brooker's Legal Services* para LS 7.14A so it is not intended to repeat them here.

However in the course of his judgment in the Court of Appeal Tipping J (with whom Eichelbaum CJ and Smellie J agreed on this point) under the heading of "Observations", set out reasons why the responsibility for granting legal aid in the Court of Appeal should be removed from the Court. This article explores that issue, including advancing the arguments as to why the Court of Appeal should continue to be involved in the process. It also critically examines the decision of Richardson P and Gault J (for the Court) refusing special leave to appeal to the Privy Council. It suggests that that decision was wrong in principle.

GENERAL OVERVIEW

Under the Legal Services Act 1991 ("the Act") applications for criminal legal aid are made to the Court that is to hear the proceedings or appeal. Grants of legal aid are made by the Registrar under s 7 of the Act. Before making a grant a Registrar has to be satisfied that it is desirable in the interests of justice and secondly that the applicant does not have sufficient means. Under s 7(2) the Registrar is injuncted to have regard to the gravity of the offence and in respect of any appeal its grounds, and finally any other circumstances that in the Registrar's opinion are relevant. Section 15 of the Act provides special provisions relating to appeals to the Court of Appeal. Under s 15(1) the Registrar, in determining whether it is desirable to make a grant, is required to "consult with a Judge" of the Court of Appeal and take the views of that Judge into account in making his or her determination. Section 16 of the Act provides for review of the Registrar's decision. In the case of appeals to the Court of Appeal the application for review is made to a Judge of the Court of Appeal or a Judge of the High Court.

Since the introduction of the new legal aid regime the Court of Appeal has developed its own internal procedures for dealing with applications for aid for appeals and the review of refusals of grants. The Court did not follow the requirements of the statute which provide for consultation with "a Judge" but instead after analysis of the file by a Judge's clerk and the completion of a criminal appeal sheet (not seen by the Registrar) the file was referred not just to one but to three permanent Judges of the Court. If any one Judge was of the view that aid should be granted then that was sufficient but the effect was that the Registrar knew that applications had been considered by three Judges. There was the briefest written reporting of views. Review was by a further Judge not involved in the earlier process and there were some internal reporting documents and letters to the applicant which were unfortunately worded.

Tikitiki was convicted of rape and appealed against his sentence of eight years. His application for aid to appeal the conviction was declined. He did not apply for a review of the decision under s 16 of the Act.

Nicholls was convicted of murder and appealed his conviction. His application to appeal the conviction was also declined. However, he then sought a review under s 16 of the Act. That review was unsuccessful.

Proceedings were then issued under the Judicature Amendment Act 1972 for judicial review of the decisions of the Registrar and of the single Judge of the Court of Appeal on review in the case of Nicholls. The case commenced in the High Court. It was to have been heard by a full Court but was in the event heard before Ellis J, who, after making a number of observations, referred it to the Court of Appeal under s 64 of the Judicature Act 1908.

In the Court of Appeal because the two cases involved several members of the permanent Court and one acting Judge it was heard before Eichelbaum CJ, Tipping J (appointed permanently after the applications were determined), and Smellie J (a senior Judge of the High Court on a temporary warrant). The Court divided. The majority, Eichelbaum CJ and Tipping J, declined the applications but Smellie J (who otherwise agreed with the majority that at law a decision of a Judge of the Court of Appeal on review under s 16 was not itself reviewable) firmly dissented. In the exercise of his discretion under the Judicature Act he would have refused Mr Tikitiki's application on the merits.

The case involved a wide-ranging attack on the procedures adopted in the Court of Appeal.

Each of the proceedings challenged the Deputy Registrar's decision to refuse aid on the grounds that:

(a) It breached the Court's obligation to interpret the Act consistently with the New Zealand Bill of Rights Act

and with New Zealand's obligations under the International Covenant on Civil and Political Rights;
(b) It failed to take relevant factors into account;
(c) It took irrelevant factors into account;
(d) It was ultra vires as the decision was not that of the Registrar or Deputy; and
(e) No consultation as required by the Act took place.

Mr Nicholls also argued that the reviewing Judge:

(a) Failed to give reasons;
(b) Did not consider whether the grant was in the interests of justice; and
(c) Made a decision which was oppressive in its effect.

The applicants sought orders quashing the decisions refusing aid and a declaration that the system of legal aid operated in the Court at the time of the applications was unlawful. Their applications were refused (Smellie J dissenting in part).

These cases were unusual because of the quite disparate but nevertheless closely reasoned judgments which came to different conclusions while recognising flaws in the processes used in the Court of Appeal. Standing back from the judgments a pattern emerges. Smellie J concentrated on the factual circumstances, accepted the legislation as workable, and sought to give full meaning to the issue of consultation. In doing that he found a failure to consult and that led to his dissent. Both Eichelbaum CJ and Tipping J took a narrow view of the legislation, endorsed the procedure of assessment by the Judges in the Court of Appeal as necessary and appropriate, stressed the reality that the Judges had control, criticised the legislation and focusing primarily on legal rather than practical issues came to the conclusion that the consultation, though minimal, was sufficient. Eichelbaum CJ dismissed the awkward internal criminal legal aid procedures adopted by the Court of Appeal and the inappropriate file stickers for the Registrar to sign or letters as matters of form rather than substance. Eichelbaum CJ's judgment, while containing major statements on the relationship between New Zealand legislation and the International Covenants on civil and political rights as interpreted particularly by the European Courts, is in essence pragmatic on the legal aid issues.

Tipping J's judgment endorsed the issue of the Registrar as a delegate of the Court and then neatly moves around some obstacles to that view in the legislation itself. His approach was not the subject of argument by counsel.

SHOULD THE COURT OF APPEAL DEAL WITH LEGAL AID?

In a section of his judgment headed "General Observations", Tipping J opines that the criminal legal aid regime for appeals to the Court of Appeal should be changed and the process of legal aid applications removed from the Court of Appeal. Eichelbaum CJ aligns himself with Tipping J's observations, as does Smellie J.

Shortly Tipping J's views will be summarised but perhaps in order for a full view to be taken on this important matter an appreciation should be carried out of the advantages and disadvantages of the present scheme. When that is done a real case can be made for retaining the wisdom and immense practical experience of the Judges of the Court of Appeal in the process which would be significantly weakened if they were removed from it.

Let us begin with a summary of Tipping J's views. Tipping J commences by noting that under the present system there is the potential for not less than four Judges of the Court of Appeal to consider a criminal legal aid application, three as part of the initial consultation, and one on review. He says:

> In passing it might be said that the concept of one Judge reviewing what has effectively been the decision of three adds oddity to oddity.

On that point the immediate comment that needs to be made is that the statutory scheme in s 15 of the Act directs the Registrar to consult with "a Judge" of the Court of Appeal. It is the Court of Appeal itself, that has adopted a three Judge consideration process as part of its internal criminal legal aid procedures.

The second observation made by Tipping J is that given that three Judges are involved in the consultation process and then if required a fourth on review, only three other Judges who have not formed an opinion for legal aid purposes are available to sit on the appeal untrammelled by previous opinion. As he says this makes the decision on aid the effective decision on the appeal itself and it is hardly surprising that there are sometimes allegations of pre-judgment causing unnecessary and unhealthy dissatisfaction with the judicial system. Tipping J says that when sitting in the High Court he took the view that an application to review the Registrar's decision to decline aid should not be considered, save in unavoidable cases, by the same Judge as was listed to hear the appeal itself. That, it is submitted, is a proper approach. Bearing in mind that the majority of these cases are heard by the criminal appeal division, which generally has only one permanent Judge of the Court of Appeal (leaving aside the Chief Justice frequently presides on such appeals) the point is valid but of course compounded by the internal decision to involve three Judges in the initial consultation process.

Next Tipping J points to the irony that it is the permanent Judges of the Court of Appeal which are responsible for the legal aid applications (numbering 332 in 1997) but most of these appeals are determined by the criminal appeal division.

Tipping J questions whether the Judges of what is effectively for almost all cases New Zealand's final Court of Appeal should be considering for legal aid purposes the viability of arguments on relatively minor matters.

Next he points to the time taken up for the Judges and their clerks in legal aid matters. He considers that it should not be difficult to design appropriate procedures analogous to the civil legal aid regime with challenges to first instance decisions heard by appropriate appeal authority as in civil cases.

Then, while noting that there is no present foundation for the view that grants are influenced by the work load of the Court he says that the removal of legal aid procedures from the Court would remove any suggestion that legal aid was being used to control the Court's work load.

Finally such external examination would enable the decisions, original or on review, to be susceptible to judicial review.

The Judge then considers the effect of the automatic grant of legal aid in each case (contended for by the applicants relying particularly on the European jurisprudence but rejected by the Court) and then makes the suggestion that as a condition of the grant of aid a duty be placed on counsel to advance only such points which were fairly capable of argument, work which is properly the function of counsel rather than the Court, and finally he notes that appellants

against sentence would always have to remember the Court's power to increase the sentence on appeal under s 385(3) of the Crimes Act 191.

A response to those comments perhaps properly involves three stages. First, a recognition that there are five parties directly involved in a grant of (here criminal) legal aid, all of whom have different and sometimes conflicting interests.

- the Legal Services Board, which provides the funds and can issue instructions under s 96 to the Registrar but importantly not in relation to an individual case; s 96(2) or to limit the Registrar's discretion under ss 7 or 15 (see s 96(3));
- the applicant, who may be representing him/herself;
- defence counsel, who may or may not have been trial counsel, who has the responsibility for preparing and filing the notice of appeal and formulating (and arguing) the grounds;
- Judges of the Court of Appeal who are required to be consulted and advise on whether it is in the interests of justice that the application be granted; and, if requested, conduct the s 16 review; and
- The Registrar who has the role of:
  - deciding on means;
  - obtaining and collating materials;
  - consulting with the Judge or Judges; and
  - dealing with the applicant and/or his/her counsel or solicitor.

Court of Appeal Judges bring the following skills and knowledge to the process:

- thorough knowledge of appellate processes;
- expertise of involvement in other classes of case where litigants seek leave to appeal;
- knowledge of principal appellate judgments and guidelines as to sentencing and areas of criminal law which are due for development or review because they are uncertain, or new, or require resolution of different decisions of lower Courts;
- ability dispassionately to review rulings, summings up, and evidence in lower Courts;
- ability to perceive matters of law or practice which may have not been apparent to trial Judge or trial counsel;
- ability to review conduct of counsel at trials;
- ability to assess strength of grounds against material on trial files;
- ability to review and balance gravity and mitigating factors on sentencing;
- ability to take a wider over-arching view of sentencing principles over a range of fact situations involving the same (and similar classes of) crime.

As to the disadvantages, several have already been highlighted by Tipping J but perhaps to be added to them are the following:

- The Judges' role on consultation is only part of the process; and
- Under the present legislation the Judges in the Court of Appeal may be subject to review under s 16 by a High Court Judge (though this does not happen in practice).

When the advantages are listed and put in the scales against the same job being done by a legal aid sub-committee (of volunteers) and reviewed by a review authority (even if it was a specialist body) the loss to the system by removing the grants of aid from the Court of Appeal is immediately obvious. The wisdom and practical experience of persons up to date and in the best position to objectively assess matters is taken away. The optimum result individually for appellants and collectively for society can only be achieved when all the above parties to the legal aid process fully play their parts. Further, removing legal aid from the Court to a sub-committee suggests that the sub-committee is in a better position than Judges of the Court to assess and adjudge the interests of justice for applicants in the light of the Bill of Rights and international legal standards.

Counsel are not immune from criticism. To advance their clients' interests they need to persuade the Court that aid should be granted. If generalised notices are filed they should be followed as soon as possible by particularised grounds focusing on the few, generally only one or two, points that have the best chance of success. Counsel have a real advantage if they have been involved in the trial because they should know the issues that have been important and which sometimes involve questions of procedure or tactics during the trial. Counsel also need to fight against the tendency to have the quality of their work limited by the very meagre legal aid guideline fees (at present one hour for preparation and one hour for travelling time on preparing points on appeal). In appropriate cases they can and should ask for more under the grounds of special circumstances. The Wellington District Legal Services Sub-Committee, which has the task of dealing with criminal appeals, is generally not unreasonable in this regard.

It is also necessary to cover the situation where appellants file their own applications without the benefit of assistance from counsel.

SOME SUGGESTIONS

- The Department of Courts should seriously consider appointing a legally qualified Deputy Registrar/Case Manager whose job it is to manage criminal legal aid files for the Court of Appeal;
- The initial consultation by the Registrar/Case Manager needs to be with only one Judge as the legislation provides;
- The review procedure should remain available;
- The present standard remuneration for preparing points on appeal of one hour preparation plus one hour travelling time, while a step in the right direction, needs to be increased especially for conviction appeals to encourage practitioners to provide further and better assistance to the Court in setting out their grounds, cross referred to the notes of evidence, summings up etc;
- Practitioners, especially if they were not trial counsel, should not hesitate to use s 7(5) and apply for aid in excess of the guidelines to prepare the grounds properly, especially in complicated or "cutting edge" cases;
- The Deputy Registrar/Case Manager should be authorised and encouraged to refer self-filed applications to suitably qualified and experienced counsel for advice so as to assist the Court. A suitable guideline fee should be fixed for this service taking into account the need for counsel to review the trial file and consult with trial counsel and the applicant.

CIVIL OR CRIMINAL PROCEEDING?

In reality the *Nicholls* decision was not an appeal but the first instance hearing.

Wide ranging arguments (and Tipping J's own researches) led to very extensive and complex judgments. All

of this presaged an appeal to the Privy Council and allowed consideration by a body removed from the dust of the conflict where well-developed and refined arguments would have been demanded. That will not occur (unless special leave is granted) because in the third stage of this saga the application for leave was refused. The judgment on that application was delivered on 17 June 1998. It recorded that following the previous judgment Mr Nicholls was advised by the Registrar by letter that he might be granted legal aid if he made further application and a provisional fixture was made for 30 June when his new counsel was available. Curiously, and despite common ground by all of the Judges that there was no merit in his appeal, and indeed perhaps a risk that the sentence might be increased, Mr Tikitiki was by letter from the Department of Courts offered an ex gratia payment for representation at his hearing, set down for 25 June. Both appeals have been dismissed.

The application for leave was opposed by the Solicitor-General. The first ground of opposition was that the Court of Appeal has no jurisdiction to grant leave, this being a criminal matter. The Court, which comprised the President and the next most senior permanent Judge, Gault J, accepted this submission. It has to be said that that decision may not stand close scrutiny. It is unarguable that the New Zealand Courts have no jurisdiction to grant leave in criminal matters. The central question, however, is whether the present judicial review proceedings are to be characterised as criminal.

The key passage of the judgment in the Court of Appeal is at pp 3 and 4 of Their Honours' judgment. It reads:

> An appeal from a refusal of habeas corpus in a criminal proceeding (*Fryer*) and a dismissal of judicial review proceedings determining whether a person charged with overstaying had the right to elect trial by jury (*Chiu v Richardson (No 2)* [1983] NZLR 522) are criminal matters. We have no doubt that the present judicial review proceedings challenging the refusal of criminal legal aid are to be characterised as criminal matters. They are directed to the interpretation and application of the provisions of Part I of the Legal Services Act 1991 concerning criminal legal aid in criminal proceedings in this Court (s 4) and in particular to ss 7 and 15 relating to the grant of criminal legal aid by the Registrar, and s 16 providing for review by a Judge of this Court of a criminal legal aid decision of the Registrar. Clearly, in terms of the scheme of the Act it is criminal legal aid rather than civil legal aid which is dealt with separately in Part II. Clearly, too, it is a matter directly and immediately connected with criminal proceedings in this Court ....

It appears, however, that the Court was not referred to the Memorandum for the Registrar from Cooke P dated 8 July 1992 *Wilson v Police* (1991) 7 CRNZ 699 which is reported in *Brooker's Legal Services* at p 5-3. That Memorandum raises two issues that undermine the Court of Appeal's reasoning in *Nicholls*. First, the Court of Appeal in *Nicholls* did not deal with the appeal as a criminal appeal. The proceedings started as a civil proceeding for which civil legal aid was granted and were determined as such. Secondly, in his Memorandum Cooke P said:

> In the field of legal aid, however, the terms and scheme of the Legal Services Act 1991 show that the test is not the subject-matter of the proceedings but their form or nature. The definition in s 2 of "criminal proceedings" includes within the expression some proceedings whose form might possibly give rise to argument as to whether they are criminal proceedings. This tends to confirm that the test is procedural. But in any event s 4 and the other provisions of Part I make that clear. Similarly Part II clearly relates to civil proceedings and again it is clear that the form or nature of the proceedings, not the subject-matter, is the test.
>
> Accordingly the submission that there is no difference between "in criminal proceedings" and "in criminal matter" cannot succeed; there is a true distinction. The question of legal aid in connection with the application for special leave to appeal to the Privy Council in this case falls to be dealt with under the civil legal aid provisions in Part II of the Legal Services Act.

Accordingly the submission that there is no difference between "in criminal proceedings" and "in a criminal matter" cannot succeed; there is a true distinction. "The question of legal aid in connection with the application for special leave to appeal to the Privy Council in this case falls to be dealt with under the civil legal aid provisions in Part II of the Legal Services Act". Their Honours clearly treated the present proceeding as a criminal matter (which it may well be) but as Cooke P observes this is not the test.

The Court of Appeal also accepted the second ground of the Solicitor-General that there is no live issue remaining, aid now being available to the applicants. On that the Court of Appeal said:

> Even if not characterised as a criminal matter outside R 2(b) it is clear that the proceedings no longer raise any live issue. Legal assistance for early fixtures is now available. Indeed, it is ironical that the applicants would be seeking legal aid to pursue an appeal to the Privy Council against the earlier refusal of legal aid for proceedings in this Court. Mr Ellis said that Mr Nicholls and Mr Tikitiki were content to remain in prison serving their sentences and forgoing the early hearing of their appeals so that other persons who had been in similar circumstances might benefit from a decision of the Privy Council. But the possible effect of the decision of this Court of 4 May 1998 as a precedent in other cases is an insufficient basis for continuing an appeal which is no longer raising a live issue as between the parties (*Sun Life Assurance Co of Canada v Jervis* [1944] AC111; and *Finnigan v New Zealand Rugby Union Inc* (No 3) [1985] 2 NZLR 190 at 197 and 201).

The difficulty with this approach is that the majority judgments of the Court of Appeal dismissed the application for review. It is only the subsequent administrative decision of the Registrar to allow a fresh application and the ex gratia offer by the Department of Courts to Tikitiki that permitted the cases to be set down for hearing. The appellants, whose positions would not have been affected in any event, still being early in their sentences, and the best Nicholls could hope for being a reduction from murder to manslaughter; were content to continue serving their sentences while the appeals were heard. Eichelbaum CJ and Tipping J were firm in their judgments to reject irregularities as matters of form not of substance. Perhaps focusing on the substance of the decisions in the Court of Appeal with their discussion of major issues of principle (several not treated in this note because of space; one by Tipping J not the subject of argument) and the strong dissent by Smellie J should have led to a different approach.

It is understood that the applicants for review are seeking special leave to appeal to the Privy Council. The result of that application will be awaited with interest. ❑