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THE NEXT ATTORNEY-GENERAL

The conventional wisdom used to be that there were too many lawyers in Parliament and that they wrote laws to benefit themselves and their kind.

Well, no longer. Today the major parties are scratching around for a suitable Attorney-General after the next election and in the case of each major party a first term import is being spoken of as Attorney-General material. Each has only a handful of lawyers and of those, several are not suitable for appointment by reason of their temperament, experience or political ambitions.

It may be timely then, to reflect on the office of Attorney-General and to consider how it should be filled.

The Attorney-General is supposed to exercise the powers and duties of the office impartially. This means not just not in pursuit of party political aims, but also in detachment from any particular policy goals. The role of the Attorney-General is to emphasise that the rule of law is a value in itself and sufficiently important not to be overridden by particular policy goals.

The qualities required of an Attorney-General, then, are commitment to the rule of law, credibility within the legal profession and sufficient political credibility and strength of character to stand up to (even more senior) colleagues.

It also seems increasingly desirable that the Attorney-General should stand outside the mainstream political process. When David Lange was made Attorney-General after being Prime Minister, he stayed outside Cabinet and held no other portfolios. This was thoroughly laudable. As long as the Attorney-General is associated in the public mind with some other area of policy, it will be difficult to maintain public belief that the role of Attorney-General is not being subordinated to the requirements of that policy. The current Attorney-General, for example, is deeply involved in the Maori reparation policy and in respect of at least three matters, the Taranaki leases, the Maori Land Court appeal over the seabed and the Ngai Tahu Settlement Act, has failed to command universal confidence that he put the rule of law before the requirements of policy.

It is instructive to look at the position in England. It is still possible there to be a barrister in the morning and a member of Parliament in the afternoon. There are also, in a House of 630, many MPs who realise at some stage that they are not going to make Cabinet rank in a conventional political role. From these groups it is usually possible to make a choice of suitable Attorneys.

In New Zealand we have, mistakenly, turned being a politician into a full-time job, so that the incumbents are completely detached from the requirements to earn a living and deal with the pressures to which most of us are subject. This almost inevitably means that an Attorney-General will not have practised law for some time. We also have so few MPs that each sees him or herself as a future senior Cabinet Minister and it is, again, hard to believe that they see the role of Attorney-General in a desirable light.

It is, incidentally, unsurprising that it is hard to get politically oriented lawyers who will stand up for the rule of law when for the last generation in the North Island law schools at least, the message has been very firmly transmitted that there is no separate concept of law, it is simply an instrument of policy and one method of social control.

After these general remarks, let us survey the parties.

National is to lose its current senior lawyers. Spoken of as possible Attorneys are Georgina Te Heu Heu, Wayne Mapp and Richard Worth who is to be a candidate at the election. No one of these is obviously the outstanding candidate at this stage.

Georgina Te Heu Heu has been mainly a public servant, with a period in legal practice before entering Parliament. Wayne Mapp's background is mainly academic and mainly in an area of law of little impact on the practising profession. Both are relatively junior politicians, but Mr Mapp projects a suitable aura of sobriety, reliability and competence and has been well spoken of for his performance on the Justice and Law Reform Select Committee.

Richard Worth clearly beats both in terms of his extensive experience of practice and of the affairs of the profession. He will however be a first term MP and the experience of first term MPs projected into office is not happy and this is especially likely to be true in a role which requires going against the political requirements of the moment.

Oddly enough, of the eight current ACT MPs, three are lawyers. Of those, Richard Prebble, the Leader, is one of the few serving politicians who has made a public point of his commitment to the traditional values of the common law, and even has a chapter about the rule of law in his latest book. Almost certainly, however, he would not wish to take the post of Chief Eunuch in a National/ACT government. Patricia Schnauer has some profile in the profession but is interested in a range of policy issues. Derek Quigley has the personal qualities, the legal experience (though even he has been out of legal practice for a long time) the political weight and the lack of interest in further political preferment that would make him an ideal Attorney-General, but whether he is to stand again is uncertain.

When we turn to Labour, the picture is apparently clearer. The word is that Professor Margaret Wilson is to be given a high position on the list (which is supposed to be selected by a democratic process) and be made Attorney-General. The level of media hype over a future appointee to that office is probably unprecedented.

One searches Professor Wilson's writing in vain for any sign of understanding of, let alone commitment to, the rule of law. It seems clear that Professor Wilson is antipathetic to the traditional values of the legal system and would see it as her aim to change the role of law in society rather than to defend it. Under her, the subjection of law to policy would be complete. The best that current senior lawyers can find to say, privately, is that perhaps the office will prove greater than the individual. This is complacency.

In public there has been no reaction from the legal hierarchy. This is hardly surprising. The Law Society's much vaunted commitment to the rule of law traditionally turns to supineness when the threat to the rule of law comes from the Bench or the person who appoints to the Bench.

There is almost no chance, then, that the next Attorney-General will be a person of commitment to the rule of law, extensive experience of legal practice and of sufficient parliamentary experience and seniority to stand up to threats to the rule of law from his or her colleagues. There is also no sign that the current leadership of either major party understand the importance of the values at stake. The prospect we face is one that should concern all lawyers. ❑

INTERNATIONAL SPOTLIGHT ON DATA PROTECTION

Legal protection of data is the topic of a keynote address to be delivered at the Research Centre for Business Law Conference, *International Intellectual Property in the Common Law World*, at The University of Auckland on 15 and 16 July. Leading US academic, Professor Marci Hamilton will deliver a paper entitled "The Protection of Data – In Europe, in the US, and in the Commonwealth".

The design of an appropriate legal regime for the protection of data has been the subject of recent legislation in both the US and the EU. New Zealand policy makers have yet to move. Professor of Law at the Benjamin Cardozo School of Law in New York, Marci Hamilton is eminently qualified to address this topic and to highlight lessons for New Zealand from overseas experience. She is the author of leading articles on intellectual property law and has delivered a number of important speeches on the topic of database protection. Earlier in her career, Professor Hamilton served as clerk to Supreme Court Justice Sandra Day O'Connor, author of the famous *Feist* decision, and was editor in chief of the *Pennsylvania Law Review*.

Other speakers at the conference include Justice Gummow, of the High Court of Australia, who will deliver the opening address. Justice Gummow has delivered many important judgments in the intellectual property context, including one of the *Interlego* decisions, in which His Honour departed from the Privy Council's approach to the extent of copyright protection in industrial drawings. Mr Justice Pumfrey, of the Chancery Division of the High Court of Justice, England and Wales, will speak on the protection of designs. Renowned intellectual property scholar, Professor Sam Ricketson of Monash University will speak on "Dilution and Confusion – The Bases of Trade Mark Infringement". Ricketson will be well known to New Zealand intellectual property lawyers for his seminal text, *The Law of Intellectual Property*, and his treatise on the Berne Convention. "New Challenges for the Law of Patents" is the title of a paper to be delivered by Professor Jay Thomas of The George Washington School of Law. In addition to being co-author of an important US text on patents, Professor Thomas has experience as a scholar and practitioner in the patents field from Germany and Japan.

The conference is deliberately international in focus. It provides an opportunity for New Zealand intellectual property lawyers to interact with leading international experts in the field. In addition, local practitioners are to provide New Zealand, practice-based commentaries on the key conference papers. For further information, contact Theresa Ryan at the University of Auckland, Faculty of Law, New Zealand: 09-373 7599 x5395. ❑

INCHOATE ABORIGINAL RIGHTS

Richard Ogden, Victoria University of Wellington

teases out the concepts at issue over Maori fishing rights

The majority of the Court of Appeal in *McRitchie v Taranaki Fish and Game Council* (24 November 1998, CA 184/98) has perfectly illustrated the vagaries of appellate decision-making by deciding not on the issue of whether a Treaty or common law Maori fishing right may allow for the fishing of non-indigenous species, but instead on the time when a person or group can be said to have a right. The Court has successfully avoided any meaningful determination on the content of aboriginal or Treaty rights. It has further sought to limit any adverse precedent value of its decision by refraining from a worthwhile analysis of what it had then considered to be the issues. This article will attempt to fill in some of the gaps.

BACKGROUND

Unfortunately for McRitchie the broad, issue was once again the vexed question of Treaty of Waitangi and common law aboriginal rights. Maori fishing rights in sea fisheries had long been protected by statute – as far back as 1877 – while s 88(2) Fisheries Act 1983, the precursor to the Conservation Act, extended this protection to freshwater fisheries and dropped the requirement that such rights be "existing". In the wake of the Sealord Settlement the issue of the extent of freshwater fishing rights has yet to be tackled by either the Courts or Parliament and remains an area of significant uncertainty for all concerned. This case further complicated an already difficult area.

Mr McRitchie was charged under s 26ZI(1)(a) Conservation Act 1987 with fishing for sports fish during open season without holding a current licence. He had taken trout from the Mangawhero River without a licence but according to local kawa. In his defence, Mr McRitchie relied upon s 26ZH of the Act which provides; "Nothing in this Part of this Act shall affect any Maori fishing rights".

In an erudite and thoughtful judgment Judge Becroft of the District Court at Wanganui found the defendant was exercising such a Maori fishing right ([1997] DCR 446). On appeal to the High Court Justices Neazor and Greig reversed his decision on the basis that the governing legislation preceded the introduction of trout into New Zealand and continued to regulate it, denying Maori rights to fish ([1998] 3 NZLR 611). There had therefore never been a Maori right to fish for trout to which s 26ZH could refer.

The issue was one of statutory interpretation – what are the "Maori fishing rights" referred to in s 26ZH? McRitchie asserted first that these rights are the same as Treaty of Waitangi or common law aboriginal title rights and that these include the right to fish for non-indigenous species. Such rights have their content determined at the change of sovereignty in 1840 – before the first relevant legislation, the Salmon and Trout Act 1867, and before the introduction of trout in 1870. Second, this and subsequent legislation did not reach the threshold of "clear and plain intention" required for extinguishment of such common law or Treaty rights, leaving them extant at 1987. These rights are protected in s 26ZH.

The Fish and Game Council submitted that common law and Treaty rights are determined at or before 1840 but asserted that these rights only include the species of fish present in the water at 1840. Trout is therefore not included in any Maori right to fish. Second, they contended that even if introduced species were part of such a right, the Salmon and Trout Act 1867 and subsequent legislation were of sufficiently "clear and plain intention" to extinguish the part of the right relevant to trout. Section 26ZH could not refer to trout since this part of the right had never existed, or if it had, it was extinguished. The respondent conceded there would be a valid defence if trout were indigenous to the Mangawhero River.

MAJORITY REASONING

At this stage any resolution of the appeal seems to necessitate a decision on the content of a Treaty or common law aboriginal title right to fish followed by an assessment of its continuation or extinguishment. However, the majority (Richardson P; Gault, Henry and Blanchard JJ concurring) avoided this issue, instead examining the circumstances which enable a right to accrue. They implied that a right accrues with the ability to exercise it. Even if the Treaty or common law right includes a right to catch non-indigenous fish, this part of the right does not accrue until it is exercisable; "... in respect of indigenous fish the right would have existed from pre-Treaty times, and in respect of introduced fish from the time the fish became present in the water".

Most of the following is necessarily taken as the implied reasoning of the majority. This is unsatisfactory in itself. The main purpose for delivering a judgment is to explain to the unsuccessful litigant why he or she lost. Implicit reasoning and avoidance of the main issues come nowhere close to a satisfactory explanation.

Even if at the change of sovereignty the Maori right to fish included a right to fish for non-indigenous fish, legislation precluded the right attaching to trout on its introduction and therefore it was not a complete right but was inchoate.

Hence the true content of a common law or Treaty right to fish may only include introduced species if at some stage the right extended and attached to the fish. While a common law aboriginal title or Treaty right is determined at or before 1840, it is not a complete right until it can be exercised and the right has attached to the species.

The majority implies that a right cannot exist completely until it is legally and physically exercisable. A solely physical ability to exercise the right would imply that the common law aboriginal title or Treaty right would attach when trout were introduced in 1870 and would need to be extinguished before the 1987 Conservation Act. The Court does not address such an extinguishment argument, implying that a right is not complete until it is legally exercisable. You do not have a complete right until you can have that right confirmed by a Judge, and it does not matter whether the reason you cannot is because of physical incapability or legislative preclusion. This shows no distinction between common law and statutory rights, inferring that a common law right is not to be viewed in isolation from any relevant statutes. In itself this is questionable. Furthermore, this lack of distinction implies that common law aboriginal rights are granted by statute, or at least dependent on some positive involvement of statute. There is precedent to the contrary (*Nireaha Tamaki v Baker* [1901] AC 561 (PC); see also *R v Van der Peet* (1996) 137 DLR (4th) 289, *Mabo v Queensland (No 2)* (1992) 107 ALR 1).

No right arose here because the legislation preceded the introduction of trout and precluded any legal Maori exercise of possible Treaty or common law rights, effectively denying its completeness. Because the legislation preceded the introduction of trout, there is no need to examine whether any right was extinguished, no need for a clear and plain intention, and due to the continuing regulation up to 1987, no way any right could attach or expand. Section 26ZH could not refer to any Maori right to fish for trout because at no stage did one exist. In the practice of statutory interpretation, the fact that the legislation precedes the introduction of trout is not just of weight but is now determinative. It is important to note that under this formulation the regulation preventing attachment of the right would not meet the clear and plain intention test for extinguishment of an existing right, but is sufficient to prevent the attachment of a right and thus have the same prohibitive effect as extinguishment.

MINORITY REASONING

Thomas J declined to determine the content of the common law or Treaty right, suggesting that was a matter for Parliament or a later case, but continued his analysis assuming such rights included introduced species. It is implicit in the dissent that a right to fish is complete and whole at one point and the introduction of a new species does not increase or change the right. It has always been, and remains, a right to fish. His Honour concluded that it would not have been extinguished in any manner and is the right referred to by s 26ZH. The test he used to reach this conclusion is new and noteworthy: "The Courts should not be prepared to sanction anything other than an explicit restriction of [Treaty] rights". Further: "Nothing less than a deliberate intention to extinguish or curtail the rights manifested by unmistakeable and unambiguous language is acceptable". (p 9)

The result in the appeal thus depended on when one perceives a right to arise and to be complete. There are two objections to such reasoning. Firstly, that broad common law rights are in general not partly complete and partly inchoate, and secondly that the rights referred to are aboriginal rights and as such may consist of a right to the fishery which is never inchoate in part.

INCOMPLETE RIGHTS

The reasoning of the majority is both simplistic and complicated. Simplistic because it is trite to say you do not have a right until you can go to a Court and have the Court confirm the legality of your action. There will be no action to confirm until there is a dispute, and there will be no dispute until it is physically possible to do the thing in the first place. It is overly complicated because it says that a right can have a certain content, but that content may not be complete until it is possible to have a Court say it is complete. The right is inchoate until that time. Thus my common law right to go where I please is complete in some respects and inchoate in others, for example going to Mars. A woman would not have a right to an abortion until she became pregnant.

If you do not have a complete right to fish for something then you do not have that right. The absence of a right is a prohibition. Taken to the ludicrous extreme, this is saying you are not allowed to do something until you can physically do it. Rights, however, are not mere restatements of what is or is not physically possible, but norms that direct and limit your actions. At the extreme the law has made a policy choice in favour of restriction over freedom. This formulation is not in keeping with the permissive traditions of the common law and contrary to the principle that you can do what you want unless the law prohibits.

The judgment of Thomas J implies that common law rights, in particular Treaty or aboriginal title based rights, are not partly complete and partly inchoate. A right to fish is a right to fish for all fish, and cannot be reduced by semantics to a right to a particular fish. Such rights reductionism is the danger faced by all Courts when dealing with aboriginal rights issues, which invariably arise in a narrow criminal Court setting, focused on one or two words.

However, even if it is possible that any common law right to fish for anything or to go where you please is complete in some respects and inchoate in others, the majority do not address the sui generis nature of common law aboriginal title based rights.

RIGHTS TO A FISHERY

The majority finds the legislative history conclusive with no room for other considerations, failing to analyse the effect of s 4. Section 4 requires that: "This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi". It felt that it needed pay s 4 no heed because the right, whatever its interpretation with regard to species, would not have attached to the trout and as such could not have existed.

For Thomas J the legislative history is not conclusive and, assuming a complete right to take trout, s 4 carries ultimately persuasive weight on the issue of extinguishment. For the second issue it takes the emphasis away from rights to fish for a particular species and places it on considerations of control of the fishery and of the river. Maori fishing rights are then interpreted and seen not in isolation, but in a broader sense, described holistically and referring not to the action of fishing but the control or share of the fishery itself. (See further RP Boast "Maori Fisheries 1986-1998: a reflection" VUWLR forthcoming; *United States v State of*

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COMMERCIAL USE OF ROYAL IMAGES

Noel Cox, Barrister, Auckland

explains the background to a recent dispute

In March the Public Trust was forced to withdraw a planned advertising campaign built around the images of the late Diana Princess of Wales and of His Royal Highness Prince William. At virtually the last moment they were advised that use of photographs of Members of the Royal Family under 18 years in this way was prohibited.

How could this situation have come about? In short, because the regulations governing the use of Royal Images in New Zealand are in urgent need of updating.

In the United Kingdom, to avoid the commercial exploitation of the Royal Family, the Lord Chamberlain's Office has established certain rules which govern the use of photographs, portraits, engravings, effigies and busts of the Queen and Members of the Royal Family.

These rules prohibit the use of Royal Images for advertising purposes on certain specific items such as coins, stamps, medals, trademarks, designs, articles of dress and furnishing fabrics. Images of Members of the Royal Family under the age of eighteen may never be used commercially (except in family group photographs on postcards).

Certain restrictions also apply to photographs. Written permission is needed to show the image of the Queen or a Member of the Royal Family with any of the Queen's subjects. Royal Images are, however, allowed to be used on articles for sale which are "of a permanent kind, free from advertisement, in good taste", and "which carry no implication that the firm concerned has received Royal Custom or that the article has been purchased by a Member of the Royal Family".

Certain items of stationery, for example, "portrait prints, formal greetings cards and calendars", are also free from restriction, provided that they carry no advertisement. Except when promoting a book, newspaper article or television or radio programme about a Member of the Royal Family, Royal Images are generally not allowed to be used for advertising purposes in any medium. For special occasions such as coronations, weddings and jubilees, rules may be relaxed for the production and sale of commemorative objects.

Questions about the use of the Royal Arms, Royal Crowns, Royal Cyphers and other Royal Emblems are answered by the Lord Chamberlain's Office.

In New Zealand, rules very similar to those in the United Kingdom are in force. The Commercial Use of Royal Photographs Rules 1962 (SR 1962/81) are notices approved by Her Majesty the Queen. Each begins with the same explanation:

> Notice is hereby given that Her Majesty the Queen has been graciously pleased to approve the following rules governing the incorporation of photographs (including portraits and representations) of Her Majesty the Queen or Members of the Royal Family in the design of articles for sale.

Two earlier and very similar rules (1955/87 and 1959/77) were not expressly repealed, but the 1962 rules must be presumed to be the pertinent rules.

The Commercial Use of Royal Photographs Rules 1962 (SR 1962/81) regulates the use of Royal Photographic Portraits. The use of photographs of Her Majesty the Queen or of Members of the Royal Family in articles for sale is permitted provided the articles made conform to good taste, and are of a permanent nature (cl 2(1)(a) and (b)). They must also be free from advertisement or the implication of Royal Custom (cl 2(1)(c)). Royal Photographs may be sold as portraits, reproduced on postcards, greeting cards, calendars (including trade calendars, provided they are free from advertisements) (cl 3).

Royal Photographic portraits may not be used on medals or coins, articles of dress except scarves and head scarves, household linen or like articles or material or furnishing material (cl 4(a), (b) and (c)). Nor may they be used on any paper or other material which may be used for wrapping or packaging purposes, or adhesive tape (cl 4(d)). They may not be used on any kind of adhesive seal (cl 4(e)), or any article which is used to assist the sale of any other article, such as cigarette cards (cl 4(f)).

Royal Photographs may not be used for advertisement purposes in the press, or on television, radio or cinema. There are, however, certain exceptions (cl 5).

The dust cover of a book written about a Member of the Royal Family may bear a picture of that Member. A reproduction of the dust cover may be issued for advertisement purposes in the media or in a circular or on a placard. Other pictures of Members of the Royal Family appearing in the book may not be used. If the dust cover does not bear a picture of the Member of the Royal Family who is the subject of the book, then it is allowable to reproduce in an advertisement one photograph of that Member (cl 5(a)).

The cover of a magazine may bear a picture of the Member of the Royal Family who is the subject of an article in the magazine. The picture and the wording used to describe the article should conform to good taste. No advertisement should be incorporated in the design of the cover. A reproduction of the cover, but no other pictures in the article, may be used for advertisement purposes in the media,

but not earlier than a few days before the issue of the magazine. If the cover of the magazine does not bear a picture of the Member of the Royal Family who is the subject of the article, then it is permitted to reproduce one photograph of that Member in an advertisement (cl 5(b)).

When a newspaper is publishing an article on a Member of the Royal Family it may advertise the article in the media, or by circular, or on a placard. One picture of that Member may be included in that advertisement. However the advertisement must conform to good taste, and may not be issued earlier than a few days before the article is published (cl 5(c)).

Books, magazine articles and newspaper articles on a Member of the Royal Family may be advertised on television in accordance with the above rules; but no dramatised or illustrated presentation or series of still pictures is permitted, and any sound commentary must be confined strictly to facts relevant to the book or article (cl 5(d)).

The above rules are subject to the usual questions of copyright (cl 8). Nor do they affect the regulations restricting the use of the Royal Arms, the Royal Standard, the Royal Crown, the Royal Cypher, or other Royal Emblems. These remain subject to the control of the Secretary for Internal Affairs (cl 10), and the Flags, Emblems, and Names Act 1981.

These rules are obsolescent in that they prohibit use of photographs of the Prince of Wales and Princess Anne, except for portraits, postcards, calendars and greeting cards (cl 6). It also provides that for the present photographs of Prince Andrew may not be used (cl 7). They are clearly in need of updating.

There were a few changes between the rules of 1955, 1959, and 1962. In 1959 cl 4(a) was added. This prohibited the use of medals or coins bearing the Queen's effigy. A rewritten cl 3 now allowed selling Royal Photographs as portraits. Portraits of the Prince of Wales and Princess Anne were now allowed on greeting cards (cl 6). The term photograph was now defined as including portraits (cl 8).

In 1962 a new cl 4(a) simply prohibited medals or coins bearing any Royal Photograph or Portrait, not just those bearing the Queen's effigy. The major addition however was the detailed cl 5, which outlines the prohibition on the use of Royal Photographs for advertising purposes in the press, television, radio, or cinema, and the exceptions to the rule. Although the prohibition is now expressly extended to these media, the introductory clause was not updated, and still refers to "the design of articles for sale", though the purpose of advertising may be to publicise a television programme!

No changes have been made since 1962, leaving the Commercial Use of Royal Photographs Rules 1962 (SR 1962/81) hopelessly outdated. Worse, it is ill publicised and all but forgotten. Nor does it cover the situation in which the Public Trust found itself. For the rules of the Lord Chamberlain's Office expressly state that images of Members of the Royal Family under the age of eighteen may never be used commercially (except in family group photographs on postcards).

The legal effect of the Commercial Use of Royal Photographs Rules 1962 (SR 1962/81) lies not in their being printed in the Statutory Regulations series, nor in their being published in the *New Zealand Gazette*. The Sovereign has control of the use of Royal Images as an aspect of the Royal Prerogative. The Public Trust was caught by a rule which was stated in the British rules, but not in those in New Zealand. Clause 10 states that:

> In case of doubt about the application of these rules or for permission to use the Royal Arms, the Royal Standard, the Royal Crown, the Royal Cypher, or other Royal Emblems, reference should be made to the Secretary for Internal Affairs, Wellington.

Although the New Zealand rules are silent regarding the use of images of Members of the Royal Family under 18, the position of the Secretary of Internal Affairs will undoubtedly reflect the same reasoning which is manifest in the Lord Chamberlain's rules. But to make a television commercial which features a Member of the Royal Family would appear to breach cl 5 of the 1962 rules, which prohibits the use of Royal Photographs for advertisement purposes in the press, or on television, radio or cinema.

Three versions of the rules were issued in the ten years after the accession of Her Majesty the Queen. Although modern advertising practice is generally consistent with the 1962 rules, dangers lurk for the unwary, as they do not reflect the full extent of the control exercised by the Crown.

Absurdly, they would prohibit the use of any photographs of the Duke of York, something which, if complied with, would have rendered coverage of his visit to New Zealand late last year rather difficult. Ignorance of the law is no defence. But when the law is clearly obsolete it is surely time for either repeal or revision of the offending regulations. ❑

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Washington (Phase II) 759 F 2d 1353 (1984), and *Muriwhenua Report* of the Waitangi Tribunal on the Muriwhenua Fishing Claim (WAI 22–1988).)

The majority may argue that since s 26ZH refers to "Maori fishing rights" and not "Maori rights to fish" it is clear that the statutory defence relates to actions and not to a fishery. However, if the "Maori fishing right" is described as a right to fish for any reason, the right is in the nature of a fishery or a share.

Such a right is not partly inchoate, since a fishery, or share, is never partly inchoate. It is always a complete fishery or a complete share. Section 26ZH would then allow the appellant to claim that s 26ZI(1)(a) did not apply to the fishery, or at least his hapu's share of it. An otherwise unlawful taking of trout would be allowed if that trout were part of the appellant's fishery.

The result does depend on how you conceive a right, regardless of the majority's inference that it does not matter – an "intrinsically unsatisfactory" situation.

CONCLUSION

One of the dangers of examining Treaty or aboriginal title rights to fish in a narrow, activity-based, criminal situation is that undue emphasis will be placed on the appellant catching a fish rather than on the rights which provide for a defence. As a result the possible interpretations of "Maori fishing rights" considered by the majority implicitly exclude the broad "fishery" formulation given above. By implicitly denying the possibility of such a formulation the majority shows it believes a Treaty or aboriginal title right to fish to be limited to the action of fishing. It has inferred that Treaty and aboriginal title rights to fish may be inchoate until fully physically and legally exercisable. Rights reductionism continues to fester in the New Zealand Court of Appeal. ❑

WORLD TRADE BULLETIN

Gavin McFarlane of Titmuss Sainer Dechert and London Guildhall University

finds a threat to our beef exports

BEEFING UP THE QUARREL

The bitter dispute between the European Union and the United States over bananas was scarcely out of the headlines before another transatlantic storm had blown up. This one has the potential to be even more damaging, both in economic terms, and in the strain which it places on diplomatic ties. This time the row is over beef hormones, and this also is a saga which has been with us for a considerable period of time. The background in Europe is one of long running concern about the employment of hormones to encourage growth of animals destined for human consumption. There were early reports of illness caused by oestrogen, which was eventually banned by the EC. By 1980, the EC was contemplating banning all hormone products in the rearing of animals for consumption, unless for therapeutic purposes. But Belgium, Ireland and the UK argued for the retention of natural hormones as agents for growth, and Ireland and the UK advocated the retention of some synthetic hormones. Meat producing states such as the US, Argentina, Canada, New Zealand and Australia expressed concern about the effect of any ban on their export markets.

Meat producing states such as the US, Argentina, Canada, New Zealand and Australia expressed concern about the effect of any ban on their export markets

By September 1982 the Lamming Report considered that certain hormones would not present harmful effects to the consumer when used under appropriate conditions, but certain others needed further evaluation. It concluded that proper programmes were needed to control and monitor the use of anabolic agents, and that it was necessary to continue further scientific investigation. Eventually in 1985 the Commission passed directive 85/649/EEC, which banned the use of all the substances concerned for growth promotion purposes, and established detailed machinery for authorised therapeutic use. It was annulled on procedural grounds after challenge in the ECJ, but re-introduced and eventually adopted as council directive 88/146/EEC. There were subsequent reports of growth promoting hormones being used illegally, and a committee of inquiry was set up which led to the Pimenta Report, adopted by the European Parliament in March 1989. This firmly endorsed the view that the ban on hormones for growth promotion had to remain in place. This was seen as the only means by which consumer confidence in the meat sector could be re-established. The majority of national veterinary experts among the member states believed that implementation of the control system would be eased by a total ban. There were grave doubts expressed about the conditions for using natural hormones, and the committee did not consider it realistic that these could be complied with. The use of hormones had the risk of inexperienced application, and wrong dosage. Injection of dosage without supervision carried risks for both the animal and the consumer. There were issues about long-term cumulative and interactive potential carcinogenicity. The committee was also of the opinion that the Commission should promote animal welfare in agricultural production.

By February 1989 the European Parliament had adopted the Collins Report. This considered licensing systems for the regulation of veterinary medicines. These required new products to satisfy the criteria of safety, quality and efficacy. The committee thought that these were all very well for therapeutic drugs, but that growth promoting hormones were another matter, and these criteria were not enough. The inclusion of a fourth test was discussed, that of satisfying an objective socio-economic and environmental impact assessment. This was not included in the final report. A 1995 EC Scientific Conference felt that at the doses needed for the promotion of growth, residue levels of the synthetic hormones zeranol and trenbolone, the residue levels are well below the levels regarded as safe. There are, at present, no indications of a possible human health risk from the low levels of covalently- bound residues of trenbolone. In March 1987 the US questioned the EC prohibition, and during bilateral negotiations claimed that the EC directive was unsupported by scientific evidence. The dispute was not resolved at that time. In January 1989 the United States imposed 100 per cent retaliatory duties on certain products exported from the EU, in consequence of which the Commission asked for a panel to be set up under the then GATT rules. The US did not agree, as the procedure of that time allowed. Later that year an agreement between the US and the EU provided for some imports of US meat which was certified not to have been produced with hormones, and in consequence Washington withdrew some categories of goods from the list of those subject to retaliatory duties. Subsequently, after the conclusion of the Uruguay Round and the introduction of the new dispute resolution procedure under the auspices of the World Trade Organisation, the there were requests for a dispute resolution panel to be set up. At this point, the United States withdrew in their entirety the retaliatory duties.

THE DELIBERATIONS AND JUDGMENTS OF THE PANEL

The original request for a panel was made by the United States, but Australia, Canada, New Zealand and Norway

reserved their rights to participate in the proceedings as third parties. Eventually complaints by both Canada and the United States were heard by identical panels. By this time, the earlier directives had been replaced by directive 96/22/EC, which continued the ban on the administration to farm animals of substances having a hormonal or thyrostatic action. This extended to the synthetic hormones trenbolone acetate and zeranol for any purposes, and the natural hormones oestradiol-17b, progesterone and testosterone for the promotion of growth or fattening of livestock. After hearing extensive and detailed evidence, the US and the Canada panel reports circulated on 18 August 1997 arrived at the same conclusions. These were: (1) The EU had acted inconsistently with the requirements of art 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("the SPS Agreement"), by maintaining sanitary measures which were not based on a risk assessment; (2) By adopting arbitrary or unjustifiable distinctions in the level of sanitary protection it considered appropriate in different situations which resulted in discrimination or a disguised restriction on international trade, the EU had acted inconsistently with the requirement in art 5.5 of the same agreement; (3) By maintaining sanitary measures which were not based on existing international standards without justification under art 3.3 of the same agreement, the EU had acted inconsistently with art 3.3 of that agreement. The EU gave notice of appeal to the appellate body, and as they were entitled to do at that stage, Australia, New Zealand and Norway filed separate third participants' submissions.

THE APPELLATE BODY

The Appellate Body in its judgment made a number of adjustments and modifications to the earlier conclusions of the Panel. The Panel's conclusion that the EU had acted inconsistently with the requirements of art 5.5 of the SPS agreement was reversed. But overall it upheld the finding of the Panel that the measures taken by the EU were inconsistent with the requirements of art 5.1 of the SPS agreement. It recommended that the WTO Dispute Settlement Body request the European Communities to bring the measures which it had found to be inconsistent with the SPS Agreement into conformity with its obligations under that agreement. The time limit which was set for complying with this ruling has just expired during the month of May; but Brussels had already given previous notice that it did not intend to comply. The Commission argued that it was carrying out further scientific research, and that it intended to produce new evidence which would justify the stand which it had consistently taken, and which would allow it to continue its prohibition on the importation of beef which had been treated with hormones. But it acknowledged that there was no chance of the findings of this new research being ready before the expiry of the time limit, and Europe has emphasised that this ban on importation will remain in place during the interim. As was expected, negotiations between the respective trade representatives of the two sides, in particular Leon Brittan and Charlene Barlevsky have got precisely nowhere. Inevitably this refusal to meet the deadline has met with a strong riposte from the Americans. Washington has already sought permission from the WTO under its rules for the imposition of retaliatory sanctions against European exports, and the value which has been put on these comes to over £250 million. So a new list of European products, many of which are unrelated to beef production are going to suffer, in the same way as the products which have become subject to sanctions as a result of the banana episode, entirely without the fault of the people involved in these industries.

COMMENT

the process of litigation becomes blurred by political posturing and bluster, and the litigation becomes headline news in all branches of the media

So far, there have not been many signs of a thaw in this new problem. Brussels is extending its ban even to US beef which is said to be hormone free, on the basis that such material does not always come up to the certification, and that in practice "hormone-free" US beef includes an element of meat which actually been treated with hormones. There has been an offer from Brussels of payment of compensation as a compromise. This would to some extent remove the threat of direct sanctions from the industries which would have become subject to them; but such compensation would have to be found from Brussels' own resources. Ultimately it would be the European taxpayer who would be footing the bill. Alternatively duties currently paid by some US importations into the EU other than beef could be lowered. But Washington would not be obliged to accept either of these approaches under EU rules, and may be disinclined to do so. From the American standpoint, the effect of sanctions imposed on other industries is to make the people involved in such industries complain to their own governments. This was the case with the Scottish cashmere industry during the banana war, and it quickly became an embarrassment for the UK government. Washington would hope that a new round of extended sanctions would put increased pressure on Brussels, as complaints funnelled in from governments in member states trying to mollify their domestic industries.

The recent history of international trade disputes across the Atlantic does not make the prospect of an early or mutually satisfactory conclusion to this dispute very likely. This is all the more regrettable when the main participants are themselves cooperating in armed conflict, the outcome of which is not yet clear. The WTO dispute resolution procedure is a novel form of litigation, and as this column constantly stresses, it is growing at a very rapid rate. But its distinguishing feature is that it is wholly conducted at intergovernmental level, so that governments and politicians become immediately involved. So the process of litigation becomes blurred by political posturing and bluster, and the litigation becomes headline news in all branches of the media. It is fair to say that press coverage of the banana dispute in the UK exceeded reporting of even the most lurid criminal cases. Consequently the system of trade dispute resolution itself comes in for severe criticism, of a kind which general civil litigation in the domestic arena escapes. But here machinery of the WTO litigation does mostly what is expected of it. It processes complaints, hears evidence, and produces judgments. Inevitably those judgments are not convenient to one side or the other. So inflammatory statements are made by political figures, and there is always a rush to sanctions and other retaliatory action. But it is not the dispute system itself which is at fault, rather those who are administering the consequences of its deliberations. ❑

ELECTRONIC PUBLICATION OF LAW

Donna Buckingham, The University of Otago

finds a vital activity is just growing like Topsy

In 1960 this journal published a series on the history of law reporting, observing that:

> The common fault of those to whom law reports are dedicated is to accept them as casually familiar things, which like Topsy, "just growed". ([1960] NZLJ 294.)

That comment prefaced an analysis of the role of law reports and a plea for greater understanding of the process of their production since, together with legislation, they provide what the anonymous author termed the "practitioner's Bible". Nearly 40 years on, the need for that awareness is again topical, as a direct result of the digital age. The only difference – it now arises in relation to the publication of both case law and legislation.

The present statutory regime of legal publishing and the consequent evidentiary recognition of such material is silent on the issue of electronic sources of primary law. It is reasonable to infer that changes to the present regime are contemplated. A committee of the High Court judiciary is producing a report on the use of electronic statutes in proceedings, which would specify standards for acceptable data. The Department for Courts is developing standards for the preparation, distribution and citation of electronic judgments, as part of the Judicial Information and Research Resources Project. The Parliamentary Counsel Office will presently be considering submissions on its discussion paper of September 1998, Public Access to Legislation, which deals specifically with electronic legislation.

This is an opportunity to revisit the underlying rationale of the present system – that what is reliable ("official" or at least "authorised") is admissible. This basic premise has been satisfied by attempting to ensure textual congruence between the original work product of the law maker and the published product. The principle of integrity of duplication has been prompted by the need to recreate the primary source, either wholly or in part. The judicial decision, for example, was rekeyed by the commercial typesetter, so there was no physical relationship between the original (authentic) and the official or authorised published version (presumed authentic).

Now digital technology allows electronic dissemination of the actual work product of our law makers. This demands a change in focus in the underlying rationale. The current arrangements for case law and legislation are reviewed and an avenue of change is suggested.

CASE LAW

The Courts insist that counsel cite the best report of a case that is available. This, in practice, has given authority to "the rule of primary citation". It requires that the first citation of a case must always be from the "official" series of law reports, published in each jurisdiction with the authority of the Council of Law Reporting ("The Citation of Reports" [1957] NZLJ 286).

The New Zealand Council of Law Reporting Act 1938 regulates the publication and sale of reports. The Act was passed to allow for incorporation and reconstitution of the council, established in 1882, one year prior to the launch of the *New Zealand Law Reports*. Section 12 charges the council with the duty to "initiate" or "arrange" the preparation, publication and sale of reports of judicial decisions.

Section 12(3) establishes the publication rights of the New Zealand Council of Law Reporting and gives official status to the *NZLR* series, at present published by Butterworths under a long-standing commercial relationship which began as early as 1915. (See 1960 [NZLJ] 342 for a history of the *NZLR*.) It is unlawful for others to publish reports which contain decisions of the Court of Appeal, High Court or Land Valuation Tribunal, without the consent of the council of the New Zealand Law Society. That Society may give permission on the sole ground that the Council of Law Reporting has failed to publish or arrange publication of adequate reports of those decisions within a reasonable time and at a reasonable cost.

Alternative printed report series launched since 1938, with s 12(3) consent, are at most "authorised" services and presumably only acceptable where no "official" report is available. Yet an "authorised" printed report is often accepted in practice. Acceptance is presumed to lie both in the source (a commercial publisher operating within a system of authorisation) and in the medium (since traditionally printed text is not amenable to modification). By contrast, electronic case law services do raise the question of authenticity and hence acceptability, since their physical production and appearance can be manipulated by the user.

Other jurisdictions

Faced with the prospect of computer assisted retrieval of the full text of judicial decisions, the House of Lords ruled that unreported decisions should have a strictly limited place in appellate argument. (See *Roberts Petroleum v Bernard Kenny Ltd* [1983] 2 AC 192. This position is little altered – see *Practice Statement* [1998] 1 WLR 825 and critique at [1998] NLJ 1520.) In 1987 the writer sought an indication

of the attitude of the New Zealand judiciary to unreported judgments from other jurisdictions, retrieved via LEXIS (the world's largest full text legal database). The informal view was that such transcripts could be accepted, where there was no available official source of the decision, but only upon counsel's assurance that the copy represented the judgment as retrieved from the on-line service.

There is no reason to believe that this approach has changed. Anecdotal research indicates that electronic copies of unreported decisions emanating, for example, from the English Courts are often accepted unquestioned. Certainly if evidentiary difficulties have arisen, they have not been widely reported. It therefore appears that electronic case law from outside the jurisdiction is usually accepted as authentic (and admissible) as a matter of practical necessity.

New Zealand case law

In 1986 the New Zealand library of LEXIS was launched with the imprimatur of the New Zealand Council of Law Reporting, containing electronic versions of decisions published in the *New Zealand Law Reports*. Those decisions, retrieved on line from *LEXIS*, presumably bear the same "official" status as their printed counterparts. Butterworths has also produced a CD ROM of the *NZLR* from 1958, which has a linked Internet service for updates. The publisher states in its *In Brief* newsletter, (1998, Issue 1) that the CD ROM version has Council of Law Reporting authority. The Parliamentary Counsel Office also accepts that this different medium does not derogate from the "official" status of the case law this service contains. (See para 6.4.1 Public Access to Legislation, Parliamentary Counsel Office discussion paper, September 1998.)

If the change in medium does not necessarily change the status of the information published in an "official" series, then that principle could also be extended to "authorised" services. For example, the *Environmental Law Reports of New Zealand*, *New Zealand Family Law Reports*, *Employment Reports of New Zealand*, *Criminal Reports of New Zealand*, and *Procedure Reports of New Zealand* all offer electronic versions of their print based services.

However, there are also primary law services which have no traditionally published equivalent. For example, the full text of recent Court of Appeal judgments is available from the web sites of Status Publishing (http://www.status.co.nz) or Brooker's (http://www.brookers.co.nz). While "publication" is not defined in the New Zealand Council of Law Reporting Act 1938, s 5(d) Acts Interpretation Act 1924 would allow an interpretation which takes into account technological change. Therefore the Act has the potential to regulate the electronic publication of law, where an electronic service is not linked to any pre-existing printed series. However this has not occurred, which may suggest the publishers of such services do not take a liberal view of "publication" under the Act. Status Publishing declares that it is not an "authorised version" and that the latter will prevail where there is a discrepancy. Brookers' service makes no such disclaimer but is in the same position.

Gault J reportedly said, at the 1998 Law Librarians' Conference, that a transcript drawn down from Status is acceptable if the decision is not reported elsewhere. This is understandable, given that the electronic judgments emanate from the Court's own digital holdings. The same view could be taken of Brooker's publication of Court of Appeal judgments, since it shares the same source.

LEGISLATIVE MATERIAL

Domestic legislation

"Official" publication of statutes and regulations is regulated by the Acts and Publications Act 1989 which authenticates a particular publication. The Evidence Act 1908 then accords correlative evidentiary status. The former statute was enacted in contemplation of the Government Printing Office becoming a State Owned Enterprise. Section 4 provides for the "printing and publication" of legislation (by the Chief Parliamentary Counsel under the control of the Attorney-General). Section 7 states that the Attorney-General may give directions as to the "form" in which copies of Acts and regulations "shall be printed and published". The repetitive conjunctive formula suggests that the drafters did not have electronic publications in mind (understandable in 1989 when there were no such commercially available services).

GP Print Ltd presently holds the publishing contract for the printing and publishing of legislation under a s 4 arrangement. Therefore its printed publications attract the benefit of ss 29 and 29A of the Evidence Act 1908 which deem legislative material "printed or published" under the authority of the government to be a correct copy, until the contrary is proved. While ss 29 and 29A appear to contemplate the production of conventionally published copies, they could apply to all electronic publications if a wide view is taken of "printed or published". However those provisions recognise the end product of a process of authorisation and do not provide authority for the process itself.

Numerous general or specialist electronic legislation services now exist. For example, GP Print itself (through GP Legislation) offers a general legislation service, at its eponymous web site (http://www.gplegislation.co.nz) or via the Knowledge Basket (http://www.knowledge-basket.co.nz). The collection includes Acts and Regulations fully or partially in force since 1837 and can be browsed (though not word searched) at no cost. The web page which hosts this initiative states that the database is fed directly from its typesetting system, "hence accuracy can be assured". The service is effectively an historical record, the legislation is neither annotated nor consolidated.

Both Status Publishing and Brooker's offer general legislation services which are textually amended, fully annotated, regularly updated and optionally linked to case law databases. This represents the fulfilment of much on the "wish list" of practitioners at the beginning of this decade, when the potential of electronic publications became apparent as a way of managing the demands of our textual method of amending legislation. With their regular updating, such services offer a current virtual "reprint" series.

None of these services carry "official" status: para 4.3 Public Access to Legislation, Parliamentary Counsel Office discussion paper, September 1998. The Parliamentary Counsel Office asserts (para 4.3.6) that "electronic versions of legislation produced by private companies have no official status and cannot be relied on as an accurate statement of the law in legal proceedings. It is also possible for errors to occur in these versions. These errors arise principally because the information is captured from a printed version, usually by electronic scanning or manual rekeying of the text". (The assertion is ironic in the case of GP Legislation, since its text is drawn from the typesetting sources which constitute the "official" printed version.)

While material from the general electronic legislation services is not evidentially acceptable, this has not prevented its use by members of the judiciary in the course of adjudi-

cation. *R v H* (CA 212/97, Richardson P, Henry and Elias JJ) is an example of unauthorised digital legislative material being "pasted" into a decision. In *R v H* the statutory provisions governing the application for an interception warrant are reproduced at p 8 of the original judgment. At the end of the statutory text lies a screen reference to "Status Compendium", part of the editorial service Status Publishing offers upon its legislative data.

Foreign legislative material

The Auckland District Law Society's view, based on s 39 Evidence Act 1908, is that it is not presently possible to reduce its printed holdings of foreign statutory material. To be admitted as prima facie evidence of the laws of a country, s 39 requires what is produced to be both a "book" and printed or published under the authority of the government of that country. At least one of these conditions cannot literally be met by electronic legislative holdings. Section 40 of that Act does allow resort to non-official legislative sources but the Court is not bound to accept these as evidence. However, prima facie, even this section cannot be used to admit electronic material since the qualifying threshold is that the source be a "printed book".

CONCLUSION

Under the 1938 Act, the "official" status of the *NZLR* series is unaffected by whether the publication medium is print based or electronic. The publisher of an "authorised" print based report series could, at least in principle, regard its electronic counterpart as potentially holding the same "authorised" status. Where an electronic publication has no print heritage and while the Act could be interpreted widely enough to regulate the position, it seems that some publishers have launched services without recourse to an authorising body. These services are therefore "unauthorised".

In relation to statutes, it appears that no electronic versions are "authorised" under the Acts and Regulations Publication Act 1989, including GP Legislation's own holdings, drawn from its typeset sources.

It is predictable that if lawyers use electronic means to locate and search primary sources, they will wish to use that format in the conduct of proceedings. Searching electronically and then physically locating and relying on the print based "official" or (at the very least) "authorised" source is the proper approach. But it is surely a counsel of perfection.

Equally predictable is the expectation that legal publishers will create further full text services, as the demand for general or specialised databases continues to grow. Ideally, there must be some congruence between the use in practice of electronic publications and their acceptability in legal proceedings. If some match is not achieved, legal consumers will be forced to continue to spread their library resources among a mixture of electronic and hard copy services. To survive the exigencies of legal practice, they will need the electronic version to locate that which they seek to use in the acceptable printed form. This duplication makes little sense, yet it is the logical corollary of the present system which grants a status to particular publications.

Is there a way to reconcile actual use and legal acceptability? Shifting focus from the process of publishing to that which is published is the suggested solution. The need for an authentication process in pre-digital days was based on the inability to distribute the primary material in the form in which it was produced by the law making body. Of necessity, the conduit of dissemination was a publisher who reset or remade the text as part of that process. Authorisation was necessary to control accuracy. Now data can be streamed digitally from creator to publisher, obviating the need to replicate the text of the law in a separate medium.

For example, if commercial providers construct a database by drawing judgment files from the Courts' own digital holdings, the end user has the very product of the body which expresses the law. Even if the material is enhanced editorially, legal consumers are accustomed to distinguishing between those parts of a printed publication which represent the law and those which do not. In fact electronic publishing with colour, hypertext links and pop up functionality is a superbly efficient environment in which to signal clearly the difference between material from the law maker and that which is commentary. Arguably similar considerations apply in the case of statutes and regulations. The present official publisher, GP Print Ltd, already makes available electronic versions of the text of Acts and Regulations in ASCII form. (See http://www.pco.parliament.govt.nz for information on this and the question of copyright permission.)

Some electronic publications already represent an "authentic" (albeit unofficial) record. Their construction is based on the actual digital resources of Parliament or the Courts. If what is published can be digitally traced to the law maker as creator, then reliability should depend on the electronic publisher simply warranting that the data has been captured and relayed with its text intact. Both the judiciary and other legal consumers would then be less vulnerable to the possibility of a Court either misleading itself or being misled. Where material is to be used in proceedings, an assurance of the absence of any modification, by publisher or user, is all that may be required.

This suggested change in focus does not mean the demise of an "official" series of law reports or "official" versions of legislation. Preserving some of the present regime will ensure that both case law and legislation will continue to be printed in conventional form. (This is not a facile comment, since there are already some instances in overseas jurisdictions where the electronic version of some legal material will never have a printed counterpart. That situation is likely to become more acute with the increasing use of web based technology.)

Focus upon the data published, rather than the identity of the publisher, does not of course take into account the realities of commercial competition and the not inconsiderable dilemma that, at least in relation to legislation, the source of the digital material would emanate from the "official" publisher from time to time. Neither does the suggested change accommodate technical objections which publishers might raise – for example, that their existing delivery software means they would prefer to scan or reset primary material. However, commercial agendas and preferences should not drive a reformulation of the process under which the legal community approaches the publication of its stock in trade.

The present regime is based on the imperative of print based publication and the consequent need to authenticate the end product by reference to the original law making document. Today the latter document can literally also be the former. Any review should therefore reassess whether distinguishing between "official", "authorised" and "non-authorised" publications can continue to provide the founding premise of a modern regime of publication. The first principle of authentication and therefore admissibility must be embedded afresh in the digital context. ❑

CONSULTATION OBLIGATIONS

Richard Best, Bell Gully Buddle Weir, Wellington

takes us beyond **Wellington International Airport**

Adherence to consultation obligations is of critical importance to public administrators. Although they may survive judicial review challenges to the discretionary elements of their decision-making, such as the choice to be made between conflicting expert viewpoints, the desirability of their policies and even (in the absence of specific statutory enumeration) whether certain matters ought to have been taken into account or to have been excluded from consideration, a Court is more able and more likely to intervene where fundamental consultation obligations have not been met and, at least in some cases, may be more willing to grant interim relief pending substantive hearing. At the same time, administrators need to be aware of the limits of their obligations so that their day-to-day operations are not unduly hampered by concession to excessive consultation demands. In this regard one cannot improve upon the words of Mary Scholtens "Efficient Decision-Making: The Treasurer Over Your Other Shoulder" (Paper presented at the 1998 AIC Administrative Law Conference 3):

> Decision-makers (including their advisers) who lack confidence because of perceived uncertainty of the relevant rules, may, I suggest, suffer from excessive caution; mindful of the mantra that their processes must be fair, their decisions within the often invisible boundaries of their discretion and not so unreasonable that had they known what they were doing, they wouldn't have done what they did. It is a formula calculated to distract the most conscientious salaried administrator operating under a strict mandate to act lawfully.

Administrators also need to be wary of being "set up" by frequent and sometimes strategic demands for more information and more time. Not only may such demands protract consultation timeframes, often to the detriment of competing public and economic interests, but they may also increase the risk of innocent verbal or written slips by consultors, seized upon by creative counsel as evidence of predetermination, breach of legitimate expectation or the like, but uttered due to sheer frustration or exhaustion. Of course in cases where possible outcomes are likely to provoke controversy consultation processes can, perhaps should, be undertaken in conjunction with legal advice from those immune to exhaustion, but that will not always be possible.

The leading New Zealand case on consultation requirements is the Court of Appeal's decision in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671, the principles in which are commonly applied by practitioners and Courts alike. However, the Court in *Wellington International Airport* did not purport to, and did not, provide an exhaustive discussion of the principles. Greater understanding of them, and therefore greater adherence to procedural obligations by administrators, for the benefit of both consultees and themselves, requires reference to additional authority.

This article provides a synopsis of consultation principles for busy administrators and those new to the arena of public administration. Given the flexibility of notions of procedural fairness and the almost infinite number of authorities, it is not possible to provide an exhaustive set of principles. What follows is simply non-exhaustive guidance. More detailed discussion may be found in, for example, Taylor and Radich *Judicial Review* (1991 and 1997 Supp); de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5 ed, 1995); and M Fordham *Judicial Review Handbook* (2 ed, 1997).

NATURE AND PURPOSE OF CONSULTATION

Consultation is an element of procedural fairness (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL)). Although consultation is often given a significance of its own distinct from the traditional notion of natural justice, it can be seen as but another label which describes, in general terms, the content of natural justice/fairness in the context of administrative as opposed to judicial decision-making (see eg G D S Taylor and P J Radich *Judicial Review* (1991) paras 13.57-13.62 and the *Supplement* to that text (1997) para 13.57). Traditional natural justice terminology is not always apt in the context of public decisions made outside Courts or tribunals.

Consultation provides a measure of protection to the rights, interests and/or liabilities of those likely to be affected by administrative decision-making. If effective, it improves the likelihood that decision-makers will act reasonably, fairly and according to law and should ensure that higher quality decisions are made (R Fardell and M Scholtens *Administrative Law in a Deregulated Economy* (NZLS Seminar, 1993) pp 2 and 13).

What "consultation" means or requires in any given case depends upon the particular context. As Lord Bridge stated in *Lloyd v McMahon* [1987] AC 625, 702 (HL):

> [T]he so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will

affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

It is therefore impossible to provide precise guidance as to what consultation entails in a given case without knowledge of all the relevant circumstances. However, general rules may be stated.

WHEN CONSULTATION IS REQUIRED

Whether consultation is required usually depends on whether a duty of consultation arises from past practice, a promise of or representation that there will be consultation or from the requirements of a statute. Consultation obligations may also arise given the nature of parties' relevant interests and the extent to which they may be affected by an adverse decision (see, for example, *Smith Kline Beecham (NZ) Ltd v Minister of Health* [1992] NZAR 357 (HC); de Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5 ed, 1995) pp 377-379 and 403-407; Taylor and Radich *Judicial Review Supplement* para 13.57; *Nicholls v Health and Disability Commissioner* [1997] NZAR 351, 369-370 (HC)). Consultation obligations arising at common law can, of course, be negated by statute.

A distinction may need to be drawn between imposed consultation obligations and mere voluntary consultation in an age of open government in the broader context of law reform. In *Christchurch City Council v A-G* (4 September 1998, HC Wellington, CP 76/98, pp 20-21) Gallen ACJ said: "When government or indeed any other decision-making entity seeks consultative input in the formulation of future policy or action, there is no justiciable issue unless the process itself in some way affects the rights or integrity of individuals or has the immediate potential to do so" (see also *Board of Airline Representatives NZ Inc v A-G* (8 December 1998, HC Wellington, CP 391/98, 7)). A full Bench of the Court of Appeal dismissed on narrow grounds an appeal from Gallen ACJ's decision (*Christchurch City Council v A-G* (2 March 1999, CA235/98)). Unfortunately the Court did not take the opportunity to discuss the important issue addressed by Gallen ACJ. The Court said (4-5):

> It is unnecessary in the circumstances to discuss the questions of justiciability and related matters which were debated in argument. Even if there is here something amenable to intervention by the Court, we can see no tenable basis for such intervention ....

Our focus has been different from that of Gallen ACJ, so we will not discuss his judgment and the submissions based upon it. We are in no doubt that he rightly struck out both causes of action. The council's concerns must be addressed to a different audience.

So the present law would appear to be that where, for example, a whole chain of decisions needs to take place, such as Cabinet's consideration of and decision on submissions, Cabinet's decision to place a matter of law reform before Parliament and Parliament's ultimate intervention by way of legislation, usually no justiciable consultation issue arises because before such intervention no rights, interests or liabilities will be affected. In such situations issues as to the constitutional propriety of judicial intervention may also arise (see the cases just cited) and argument as to the content of voluntary consultation may more appropriately be made through submissions to the relevant select committee. Counsel should be wary of mounting judicial review applications in these situations because at least some Judges are becoming impatient. For example, in *Kai Tohu Tohu o Puketapu Hapu Inc v A-G* (5 February 1999, HC Wellington, CP 344/97, pp 18-19) Doogue J said:

> I would note that this is yet another case where the Court has been asked to intervene in what is essentially a political process without any proper foundation of law being put before it for the Court's intervention ....
>
> The Minister graciously did not seek costs in the event of his succeeding ....

Awards of solicitor-client costs, even against counsel personally, are not unimaginable.

PROVISION OF SUFFICIENT INFORMATION

The party under a duty to consult must provide consultees with a reasonable amount of information as consultees must know what is proposed before they can be expected to give their views (*Wellington International Airport* (pp 674-675)). Reasonable information is sufficient information to enable the consulted party to tender its views. Sufficient information does not mean ample information, but at least enough to enable the relevant purpose to be fulfilled. Sufficiency is therefore a relative and flexible concept dependant upon the context and purpose for which the consultation is required (*R v Secy of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 WLR 1, 4, 6-7 (QB)). Consultees, or those entitled to natural justice, need not be quoted "chapter and verse" (*Re Pergamon Press Ltd* [1971] Ch 388, 399-400 (CA)) and there is certainly a limit to the amount of information that it is reasonable to require an authority to spell out in a consultation document (*R v Secretary of State for Transport, ex p Richmond-upon-Thames London Borough Council (No 4)* [1996] 1 WLR 1460, 1474 (CA)). Consultees are not entitled to every conceivable piece of relevant information (*R v Barnet London Borough Council, ex p B* [1994] 1 FLR 592). Rather, it is the substance or gravamen of the issues or proposals of which they should be aware (*Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 137 ALR 103, 122-123 (FCA)). Subject to confidentiality concerns (discussed below) and administrative workability, as a rule of thumb, if there is uncertainty as to whether consultees should be provided additional information, it would be prudent to provide more rather than less. Doing so may avoid both costly and acrimonious disputes and the suspension of decisions.

The amount of information which should be provided to a consultee and the amount of consultation generally to be undertaken may properly depend on the existing knowledge and position of consultees. So, for example, less consultation may be required when the consultees are well-informed, knowledgeable and sophisticated parties in contrast to uninformed members of the public (*Darling Casino Ltd v Minister for Planning and Sydney Harbour Casino Pty Ltd* (1995) 86 LGERA 186, 200-201 (Land and Environment Court, NSW)); a consultee who knows the substance of documents not disclosed to it cannot later assert that those documents should have been disclosed (*Rajan v Minister of Immigration* [1996] 3 NZLR 543, 547 (CA); *Ali v Deportation Review Tribunal* [1997] NZAR 208, 220 (HC)); and there is no legal duty to point out the obvious (*Richmond-upon-Thames (No 4)*).

However, the mere availability to consultees of relevant information from conventional sources and from competent legal advice does not vitiate a duty to consult because consultees may need a positive opportunity to express their views (*Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 133 ALR 74, 101 (FCA)).

PRELIMINARY VIEWS AND DRAFT REPORTS

There is no general requirement for feedback on matters of mere opinion or recommendation made by an official or body that go to the decision-maker. In *Mann v A-G* [1994] NZAR 456 (HC) an immigration official drew certain conclusions from known facts, which conclusions formed the basis for his recommendation as to whether the applicant should be granted refugee status. Among other things, the applicant argued that the pages of the departmental file, which went to the Minister, should have been made available to him for comment. Temm J disagreed (pp 461-462):

> I do not see any of the comments on p 26 as being prejudicial to the plaintiff in the sense that it is something that is inimical to his argument for refugee status and which he ought to be given the opportunity of correcting. What is complained of in p 26 is that an official, having surveyed the facts as he believed them to be (and apparently they were correctly set out), has drawn certain conclusions leading to the recommendation that he made on p 27. If the argument for the plaintiff is upheld, it would mean that every time an official drew conclusions from facts in a case of this kind, for the purposes of making a recommendation, his conclusion would have to be conveyed to a person in the plaintiff's position, which would then lead to an argumentative response, which would inevitably lead to a further conclusion; and on principle, anyway, if the first assessment and conclusion had to be made known to the plaintiff, so would the second. This would be administratively nightmarish and leads me to conclude that, where an official is drawing conclusions from correct facts for the purposes of making a recommendation to a Minister on an issue of permanent residence, then, provided the conclusions or assessments are fair and reasonable, they are not to be regarded as being prejudicial solely because they do not support the case being made by the applicant for permanent residence. In those circumstances, the extent to which the plaintiff relies upon the failure of the Immigration Service to disclose to him the assessment made by the immigration officer is not a ground for intervention by way of judicial review.

Similarly, there is no general obligation on a consultor to inform consultees as to the workings of the consultor's mind or to put to them any tentative views the consultor has formed. Procedural fairness does not require that every step in the decision-making process be made only after consultation with consultees (*Powerlift (Nissan) Pty Ltd v Minister for Small Business, Construction and Customs* (1993) 113 ALR 339, 361 (FCA); *Hoffmann-La Roche (F) & Co AG v Secy of State for Trade and Industry* [1975] AC 295, 369 (HL)).

Again, there is no ubiquitous obligation to provide draft reports to consultees or to those with a right to be heard regarding allegations against them. However, in certain circumstances it may be prudent to do so if there is a risk of a reviewable error. The point arose in *Royal Australasian College of Surgeons v Phipps* (30 November 1998, CA 70/98), in which Mr Phipps sought judicial review of the College's report which was critical of him. The Court of Appeal said (22 and 32):

> The obligation of the reviewers was first to inform Mr Phipps of the particular allegations which he had to meet and second to provide him with a fair opportunity to respond to those allegations. The obligation need not be met in any particular formal way. This is an area of broad principle, not precise rules, turning on the nature of the power being exercised and all the circumstances .... It could be met before, during and after the interviews with Mr Phipps. No single method is prescribed. As Chisholm J indicated, the subject matter of the review, especially when taken with the complexity of some of the cases and the possible consequences of the report, made it especially important that the process enabled Mr Phipps to be made aware of all significant issues which might give rise to an adverse finding ....
>
> We return to the issue of the failure to provide a draft of the report. The reviewers did suggest to [HealthCare Otago] that they provide Mr Phipps with an opportunity to comment on a draft, but [HealthCare Otago] declined that request. As noted disclosure of the draft is now the policy of the college. It could well have removed some, even all, of the issues argued in this case. But, as Mr Collins rightly recognised, such an opportunity is not required by the general principle of fairness. Rather it is the combination of the established failure to give notice that must be assessed.

The three scenarios need to be contrasted with those where a decision-maker receives and relies upon substantive advice which exceeds mere opinion such as the advice of a medical or scientific committee. Such advice should be supplied to consultees for comment before a final view is formed and decision made (eg *R v Secretary of State for Health, ex p United States Tobacco International Inc* [1992] 1 QB 353, 370-371 (DC)).

VIEWS OF OTHER CONSULTEES

Generally one consultee is not entitled to be given the views of other consultees. In *Greenpeace New Zealand Inc v Minister of Fisheries* (27 November 1995, HC Wellington, CP 492/93) Gallen J rejected an argument that there is a duty to disclose to one consultee what another consultee has said. Greenpeace had argued that had certain information from the Fishing Industry Board been provided to it, it would have been able to contradict it. Gallen J disagreed (16):

> Consultation is not only different from negotiation, it is also different from an adversarial process.
>
> The Minister was not, in this case, required to reconcile the differing points of view. However, he was obliged to make an informed decision, one which was made in the light of the responses of those persons or organisations identified as appropriate to make such responses. I do not see that the Minister was required to give all persons from whom a response was sought, the opportunity to comment upon the responses of others. There was no suggestion that the applicant would have changed its stance on being confronted with Dr Punt's views. The applicant's complaint here, is rather that it had no opportunity to controvert those views. That is closer to negotiation, not to say contention, than consultation.

Taylor LJ took a similar view in *US Tobacco*.

Confidentiality

Sometimes confidentiality obligations may conflict or appear to conflict with consultation obligations to provide sufficient information to consultees. To the extent that general propositions may be either taken from the cases or otherwise made, they may be stated as follows:

- there is no general rule as to whether confidential information may be disclosed as a requirement of natural justice/consultation. Whether such information should be disclosed and, if so, how much information should be disclosed, is a case-specific question (*Pergamon Press*; *Ansett Transport Industries Ltd v Minister for Aviation and others* (1987) 72 ALR 469 (FCA));
- in particular, there is no general rule that one party to an investigation should be given all of the material submitted by another for a purpose relevant to a decision for which consultation is a prerequisite (*R v Monopolies and Mergers Commission, ex p Elders IXL Ltd* [1987] 1 All ER 451, 461 (QB)) nor is there a general rule that the decision-maker is obliged to inform a consultee of his or her draft or preliminary views (which may contain more or less confidential information) and provide the consultee with an opportunity for comment (*Ansett Transport Industries* 499). Whether there is any such requirement will depend on all the circumstances (see further *R v Shropshire Health Authority, ex p Duffus* (16 August 1989, *The Times*, QB)). Sometimes it may be possible to disclose the gist of the information supplied by another without revealing confidential information whilst enabling the consultee sufficiently to comprehend and respond to the matter (*Ansett* pp 498-499);
- in determining whether and if so what information should be disclosed, it is appropriate to take a purposive approach, looking at any relevant statutory framework (if there is one) and/or the purpose of the common law requirement in question (*Elders IXL*; *Ansett*; *Welgas Holdings Ltd v Commerce Commission* [1990] 1 NZLR 484, 489 (HC));
- when the participants in a given industry are all highly skilled, deeply informed, commercially oriented and competitive, the zones of strictly confidential commercial information requiring protection by the decision-maker may be relatively small (*Welgas Holdings* pp 488-489). However, that is not to say confidentiality obligations will be completely overridden; they may be qualified. Further, the fact that given information may not in fact be confidential does not mean it must be disclosed; whether it should be disclosed will depend upon the extent to which the consultee has already been given sufficient information to enable it to make informed comment;
- when material not otherwise available to a consultee is of significant importance to the decision-maker's final decision, it may properly be disclosed to the consultee, even if some of that information was provided by a competitor and is therefore or might otherwise be considered confidential (*James Aviation Ltd v Air Services Licensing Appeal Authority* [1979] 1 NZLR 481 (HC) (in this case a report prepared by the Civil Aviation Division of the Ministry of Transport); and see B Horrigan (Ed) *Government Law and Policy: Commercial Aspects* (Federation Press, Sydney, 1998) pp 202-203);
- when official yet confidential information is made available in good faith pursuant to a request under the Official Information Act 1982 because the decision-maker decides, for example, that the balancing exercise required by s 9 of that Act favours disclosure, as sometimes occurs during consultation processes, "no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from the making available of that information" (s 48(1)(a)).

OPPORTUNITY TO STATE VIEWS

Once sufficient information has been provided to consultees, the consultor must give those consultees a reasonable opportunity to state their views (*Wellington International Airport; Association of Metropolitan Authorities* 6; *Port Louis Corporation v Attorney-General of Mauritius* [1985] AC 1111, 1133 (PC)). Obviously consultation timeframes should be set (although not in stone) at the outset of the consultation process. Again, what is "reasonable" will depend on the circumstances of the case. Consultation timeframe extensions will often be sought but decision-makers need not always accede to them. The Courts may consider the decision-maker to be best placed to know how long should be allowed for consultation (provided, of course, at least the bare minimum required has been provided) such that reasonable refusals of consultation timeframe extensions will be upheld. In the *Association of Metropolitan Authorities* case the Court said (at 6):

> both the form or substance of new regulations *and the time allowed for consulting*, before making them, may well depend in whole or in part on matters of a political nature, as to the force and implications of which it would be reasonable to expect the Secretary of State, rather than the Court, to be the best Judge. [Emphasis added.]

And in *Port Louis Corporation* the Privy Council said that "[i]t would not be reasonable to allow a situation to develop in which all initiative and all control of timing would pass from the government" (1133).

What would be sufficient information or time in one case may be more or less than sufficient in another, depending on matters such as the relative degrees of urgency and the nature of the proposed action (*Association of Metropolitan Authorities* at 7). However, urgency alone is unlikely to absolve a decision-maker from complying with a consultation obligation as there will likely be few situations in which a decision-maker could not have "got its act together" sooner. The situation may be otherwise in cases of emergency (see *Taylor and Radich* 274).

CONSULTATION OPPORTUNITIES

Consultees should be seen as being obliged to utilise reasonable opportunities to state their views if they wish to take part in the consultation process. A party that refrains for tactical or other reasons from putting forward its case cannot later complain (*Wellington International Airport* 680, 682-684; *Hamilton City v Electricity Distribution Commission* [1972] NZLR 605, 643 (SC)).

CONSIDERATION OF CONSULTEES' VIEWS

Although consultation does not mean "negotiation" or "agreement" it clearly requires more than mere prior notification. The decision-maker must genuinely consider con-

sultees' views with an open mind (*Wellington International Airport* 674-676; *Auckland City Council v Auckland Electric Power Board* (16 August 1993, HC Auckland, CP 26/93, 25); *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203, 207-208 (CA); *R v Secy of State for Health, ex p London Borough of Hackney* (25 April 1994, QB, Lexis transcript)).

However, an "open mind" is not the same as a blank mind or one "untrammelled by any prior thought on the issues in question" (*Auckland Electric Power Board*). A decision-maker is not required to approach consultation from a position of judicial neutrality. As Cooke P put it in *Devonport Borough Council* "the fact that new arguments do not persuade one to change views previously formed does not mean that one has approached the new arguments with a closed mind" (207-208). It is "quite legitimate to conduct consultations by reference to a preferred option, provided that the decision-maker keeps an open mind and is prepared to depart from that option in favour of another if persuaded by the cogency of the responses" (*London Borough of Hackney*). In this regard, the onus is on the applicant "to prove to the civil standard that at the time of considering the ... submissions and formulating the final [decision] ... the [decision-maker] did not genuinely consider the issues, but merely went through the motions, while not remaining amenable to argument" (*Auckland Electric Power Board* at 26; see also *South Taranaki Energy Users Association v South Taranaki District Council* (26 August 1997, HC New Plymouth, CP 5/97, 64)).

SUMMARIES OF SUBMISSIONS

Consultation processes may produce numerous and voluminous submissions which working parties, committees or the decision-maker's staff may summarise for the decision-maker. Although the compilation of such summaries may be a legitimate exercise it is critical that those summaries accurately reflect the nature and breadth of individual consultees' submissions. Those who prepare such summaries should not simply dismiss or ignore aspects of submissions and thereby exclude them from the summaries simply because, in their view, those aspects carry little or no weight. That is a matter for the decision-maker. Whilst the provision of inadequate summaries should not invalidate a decision if the decision-maker actually considers the submissions received, a decision-maker's reliance upon inadequate summaries alone is likely to result in a finding of procedural unfairness from which a declaration of invalidity or more may follow (see eg *Smith Kline Beecham*; *Tobacco Institute of Australia Ltd v National Health and Medical Research Council* (1996) 142 ALR 1 (FCA)). Obviously the adequacy of summaries is a case-specific question which may depend on the nature of the decision-maker and those responsible for their compilation (see further Taylor and Radich 281-286).

CHANGED PROPOSALS

If proposals consulted upon are subsequently changed to such a degree as to in reality become fresh proposals, fresh consultation may be required. The question whether in any particular case proposals are so changed as to require fresh consultation is essentially a question of degree and largely a matter of first impression. However, the Courts have warned against too liberal a use of their power of judicial review to compel consultation on any change to a proposal, because there would be a danger the process would prevent any change either in the sense that the authority will be disinclined to make any change because of the repeated consultation processes which this might engender or in the sense that no decisions get taken because consultation never comes to an end (*Shropshire Health Authority* 6, 9, 10).

COMPLIANCE IN SUBSTANCE NOT FORM

The question of compliance with a consultation requirement is a question of substance, not one of detail or form (*Association of Metropolitan Authorities* 6-7, 13; *Darling Casino* 200; *Minister for Urban Affairs & Planning v Rosemount Estates P/L* (14 August 1996, NSWSC, AustLII transcript); *Phipps*).

It is the quality and not the quantity of consultation that matters. Mere "weight of numbers" arguments deserve no particular moment for (as already noted above) it is the substance that counts (*South Taranaki Energy Users* 67).

STATUTORY OBLIGATIONS

The foregoing principles will often apply equally to statutory consultation duties. However, statutory consultation requirements may be more or less encompassing depending on the statutory language, purpose and context (see and compare *New Zealand Private Hospitals Association v Northern RHA* (7 December 1994, HC Auckland, CP 440/94); *Bishop v Central RHA* (11 July 1997, HC Palmerston North, M47/97); *He Putea Atawhai Trust v Health Funding Authority* (8 October 1998, HC Auckland, CP 497/97), all concerning s 34 Health and Disability Services Act 1993; and *Researched Medicines Industry of NZ Inc v Pharmaceutical Management Agency Ltd* [1998] 3 NZLR 12, 18 (CA)). The word "consultation" in a statutory provision may or may not be used in the same sense as the word is generally used for common law obligations. The statutory interpretation exercise will therefore assist in determining the content of the consultation requirement (*Hamilton City v EDC*; *South Taranaki Energy Users* 46).

Statutory consultation obligations often refer to consultation with such persons as the decision-maker "considers appropriate". Such provisions do not give decision-makers an absolute discretion as to whom they will consult. In *R v Post Office, ex p Association of Scientific, Technical and Managerial Staff* [1981] 1 All ER 139 (CA), the Court said the decision-maker there challenged was required to consider whether a particular organisation was appropriate to be consulted but if it decided fairly and reasonably that a particular organisation was not appropriate the Courts would not interfere with that exercise of its discretion. Similarly, in *Bishop* McGechan J referred to the applicants as those with whom consultation "obviously would be thought appropriate" (22).

ENDING THE PROCESS

Finally, administrators should not permit consultation processes to grind their decision-making to a halt. There is a point where the process afforded will have been reasonable in the eyes of the law and at which it may therefore be ended. Admittedly there is no homogenous judicial view as to what is "reasonable". Common sense and a modicum of empathy for affected parties should assist. As others have suggested, administrators might also usefully ask, of any oral or written communication to consultees and of any decision as to sufficiency of information or timeframe, "how might that be perceived by one of Her Majesty's Judges?" ❑

ARBITRATION: ARBITRATORS' EXPERTISE AND NATURAL JUSTICE

TRANSACTIONS

with

Brian Keene

Trustees of *Rotoaira Forest Trust* v *Attorney-General*

CL 47/97 HC Auckland Fisher J 30 November 1998.

The Arbitration Act 1996 enacted salutary changes to the law of arbitration. It clarified appeal rights and reinforced the consensual nature of the arbitral process. It largely adopted the UNCITRAL code thus harmonising local arbitration with wider international practice. There were however one or two local peculiarities one of which is the provision in art 3(1)(b) of the Second Schedule to the Act which provides that unless the parties agree otherwise they will be taken to have agreed that an arbitral tribunal may draw upon its own knowledge and expertise.

At one level the power to use expertise is unsurprising and even mundane. However powers rarely come without concurrent responsibility. In this case as well as using an expertise, the arbitral tribunal must comply with art 18 First Schedule obligations that each party be treated with equality and be given a full opportunity of presenting that party's case. If the arbitrator, using his own expertise, takes a view of the case different from the parties and not covered by them in evidence or submission, may he simply reach his own conclusions and deprive them of the chance of presenting their submission on the topic?

This was the very point at issue in *Rotoaira Forest*. Ironically the complex and clumsy transitional provisions of the 1996 Arbitration Act meant that the appeal procedure was governed by the new Act but the arbitration was conducted under the 1908 Act and its amendments hence art 3(1)(b) was inapplicable. So, although noted in passing the issue was decided on the old law based on the principles of natural justice and not explicitly addressed in the terms of the judgment. However the tension between the use of the arbitrator's expertise and those principles requiring that parties be given a fair hearing exactly parallel the likely future debate between arts 18 First Schedule and 3(1)(b) of the Second Schedule of the 1996 Act.

The issue came before Fisher J on an application to set aside the award. The case was complex with evidence running over 30 sitting days. It involved the computation of compensation payable as a stumpage percentage by the Crown to the trust pursuant to a forestry lease. Each party had presented evidence on this topic and there seemed no complaint about the opportunity of each party to have fairly tested by evidence in reply, cross-examination and documentation the other parties' thesis.

The arbitral tribunal comprised two arbitrators, one an experienced forester and the other a legal academic together with a QC as umpire. The arbitrators found it unnecessary to call upon the umpire and published their award which rejected both the trusts and the Crown's model for calculating the compensation.

After a review of the rather sparse case law on the topic, Fisher J enunciated the following summary of the legal principles:

(a) Arbitrators must observe the requirements of natural justice and treat each party equally.

(b) The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.

(c) As a minimum each party must be given a full opportunity to present its case.

(d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.

(e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.

(f) The last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.

(g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that

arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.

(h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.

(i) It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.

(j) Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

Upon review of the facts Fisher J found that a reasonable person (read counsel if appropriate) in *Rotoaira*'s position could be expected to foresee the possibility that the panel might adopt an approach different from the contentions of either of the parties and in line with the model applied in the awards. Upon this basis the award stood and the application to set aside failed.

One might argue from this result that the Courts seem inclined to give arbitrators chosen for their expertise a fair latitude to apply it. Such a conclusion is reinforced when one recognises that principles (e) and (f) above are said by Fisher J to apply "in the absence of express or implied agreement to the contrary". An arbitration conducted under the 1996 Act contains, unless otherwise agreed, such an agreement by virtue of art 3(1)(b) of the Second Schedule. Had that Act applied to the instant arbitration the trust's argument would have been clearly less tenable, and the arbitral tribunal's rights even more robust.

Is this a good thing? Most commercial advisers and advocates understandably seek to have as much foreknowledge as possible of the scope of any dispute to be referred to arbitration. Traditionally this is given by the terms of the arbitration clause and the pleadings which define those issues. To find that the arbitral tribunal may go beyond the scope of these may often be viewed as both dangerous and unwelcome albeit quite correct in law according to the 1996 Act.

In the light of *Rotoaira* draftsmen of arbitration clauses and submissions to arbitration may need to carefully consider in each case whether to exclude the arbitral tribunal's right to use his own expertise. This may best be done by astute draftsmanship of the original arbitration clause in the commercial contract as it is that which constitutes the "*Arbitration Agreement*" as defined by s 2 of the 1996 Act.

TRUSTS AND "FAIRNESS"

Blair v Vallely

Wild J, HC Wanganui, 23 April 1999, CP 8/98

(See also p 209) The obligations of trustees in exercising discretions are broadly stated to be those of fairness, reasonableness and impartiality. Fairness, particularly in the context of family trusts, can be an ephemeral concept. It may be influenced both by issues within the confines of the trust as well as wider considerations. Is the intent of the trust that the trust property be distributed in an equal way between individual beneficiaries and classes of beneficiaries? Is it rather to allow trustees to balance the respective advantages in life achieved by the beneficiaries and so distribute the benefits of the trust to cushion the unfairness of the world? How is a trustee to answer these questions in the context of an individual case? These issues were addressed in *Blair*.

The trust in question was set up by the father of the six beneficiaries. It was to terminate at the end of April 1999. There were wide powers of distribution of both income and capital together with powers of advancement. Over its term three of the six children had prospered in life in part only because they had been able to access substantial benefits associated with the farming enterprise that was the trust's core asset. Three others had received little or nothing. These three tended to be less well-off than the three farming brothers. Leading up to the April 1999 termination of the trust the trustees were faced with the questions:

(a) Should they make an interim distribution during the life of the trust or simply await a distribution of the trust corpus on an equality basis; and

(b) If an interim distribution was justified, how should that be structured so that, together with the equal distribution on the termination of the trust, fairness was achieved?

Their decision was to review the operation of the trust in context of the family over the 20 years or so of its operation. They decided to make interim distributions adjust for imbalances of benefits, both tangible and intangible, received by each of the beneficiaries. One of the two trustees was also a beneficiary thus raising conflict of interest and impartiality issues.

To put flesh on the bones, an example of the benefits which the trustees sought to balance was the opportunity of one beneficiary to lease the family farm, and thereby economically graze and later acquire a fair market value in an adjoining block owned by the trust. This block was later sold at a very substantial profit. Another was the view held by the trustees that the opposition by one beneficiary to converting trust property into a dairy unit occasioned a loss to the trust thereby devaluing the share available to all beneficiaries.

The Court reminded itself of and applied the following principles:

(a) Courts may only examine the reasons for the exercise by the trustees of such discretions if those reasons have been stated to the beneficiaries or the trustees otherwise agree. Here the trustees had concurred and welcomed the Court's examination and review of their proposed exercise of power.

(b) As the deed of trust gave the trustees an absolute and uncontrolled discretion the Court's power of review was not broad ranging but limited. It was defined as being based upon unreasonableness of the trustees which was seen as a species of the ultra vires doctrine. The donor of the power gave trustees their powers on the implicit basis that they would exercise them reasonably and no other. Wild J adopted the test propounded by Tipping J in

Craddock v Cowhen (1995) 1 NZSC 40,331; 40,337.

It must be emphasised a decision in the present field [reasonable exercise of trust power] will not be regarded as unreasonable unless it is such that no reasonable trustee could rationally have made it in all the circumstances. The Court will not intervene simply because it would or might have made a different decision. To be impugned a decision must be one which can fairly be said to be beyond the bounds of reason.

(c) The trustees' obligation to act in good faith in exercising discretions extended to a duty not to act capriciously. That was defined as encompassing an obligation to give relevant matters honest and genuine consideration, to act rationally and not perversely and to exclude the irrelevant.

(d) A trustee's duty of impartiality obliges an even handed approach between the parties' interest under the trust so that the trustee has acted in the interests of all and not any particular beneficiary or class of beneficiary.

(e) The trustees' duty not to allow their own interests to conflict with the duties to the trust and its beneficiaries was said to be a requirement springing from the trustees' obligation to loyally serve the interests of the trust and not be distracted by personal interest. Whether they have succumbed was, to a large extent, a question of fact and degree. The test originally propounded by Lord Upjohn in *Boardman v Phipps* [1967] 2 AC 46, 124 and adopted by Thomas J in *Jones v AMP Perpetual Trustee Co NZ Ltd* [1994] 1 NZLR 690, 711 was whether:

The reasonable man looking at the relevant facts and circumstances of the particular case would think there was a real possibility of conflict.

Against the background of these legal principles the Court first considered the proposed adjustments for tangible benefits received by individual beneficiaries during the lifetime of the trust. The Court commended the trustees' painstaking work in piecing together the various benefits received over the lifetime of the trust and adjusting for the intangible benefit of the time value of these. Such approach was reasonable and correctly reasoned. It was upheld.

The Court's view, however was quite different on the intangible adjustments proposed by the trustees. These arose out of the trustees' assumptions or instinctive beliefs that the farming brothers had gained wealth by, for example, leasing and use of the trust assets at the expense of the non-farming beneficiaries who had to make their way in the world in other ways. However the adjustments did not have a sound economic basis. Beneficiary A leased the farm property for a period and made considerable profit. However he paid market rental. There was insufficient evidence that these benefits came from association with the trust property or were at the expense of the other beneficiaries. The settler's intention of the beneficiaries overall benefiting equally from the trust was held to be evident. It overrode any such adjustments. The indirect benefit adjustments, unless proven to be a betterment from the trust, were struck down. The Court describing the major adjustment as "unreasonable, irrational, mistaken and incorrect".

The Court then considered whether the one trustee who was also a beneficiary had a relevant conflict of interest. In the end, having struck down the intangible benefit adjustments the issue strictly speaking did not require final ruling. However the Court made the following useful comments which may be of assistance in guiding practice in future cases.

(a) The presence of a clause in the trust deed permitting a trustee to act notwithstanding a personal interest in the trust was a relevant mitigating factor.

(b) Also significant is the early recognition of the conflict of interest and a proper distancing of the conflicted trustee from influence which may promote his interest as beneficiary ahead of the wider interests of all beneficiaries.

(c) On the facts of the particular case the Court found that the conflict had not in fact marred the judgment of the conflicted trustee.

(d) However on the "real sensible possibility of conflict" test cited earlier had the intangible benefits adjustment not been struck down by the Court then, notwithstanding a lack of actual influence, the conflicted trustee may still be responsible.

Blair could be treated as just another case applying standard principles of trust law to a particular situation. There is some truth in that analysis. However it is a cameo of the very real tensions which can exist in administering family trusts. Its reasoning merits close attention by professional trustees and practitioners. Like the 1996 decision re *Mulligan* (deceased) [1998] 1 NZLR 481, it arguably states no new law but applies broad based principles to sheet home that the administration of trusts is in no sense a casual commercial affair in which the trustees may largely deal with circumstances which arise on an issue-by-issue basis without standing back and reviewing the overall fairness of the treatment of beneficiaries. As the trustees in *Mulligan* can testify, it can be expensive to get these things wrong and an indemnity from co-trustees or out of the asset of the trust cannot be taken for granted.

Finally it is interesting to speculate on the attitude of the Court had the trustees in *Blair* decided to simply do nothing by way of interim adjustment prior to the termination of the trusts. The financial result would have been that the balance of the corpus of the trust would have been divided equally between the beneficiaries. Arguably, given the Court upheld certain tangible benefit adjustments as reasonable, the unadjusted result may well have qualified as unreasonable. Does the grant of a discretionary power to make such adjustments entail an obligation to review relevant factors and make the adjustment should fairness require it? May the trustees simply decide to take no action – a course which both the daunting amount of effort involved and self-protection may encourage – or must they act? *Blair* does not provide an answer. However that does not mean that at some time in the future professional trustees or practitioners will not have to answer to a Court on that issue.

CONTRACTUAL REMEDIES ACT AND VITIATION

A guarantee is not a contract of utmost good faith. There is no general duty on a creditor to disclose material facts affecting the guarantee. There is however a limited obligation on the creditor to disclose to the intending guarantor unusual aspects of the relationship between the creditor and the debtor.

In *Scales Trading Ltd v Far Eastern Shipping Co Public Ltd* (CA 85/98, 18 December 98) the Court of Appeal considered whether breach of this duty remains a ground for vitiation of a contract of guarantee under equitable principles, or whether it amounts to a misrepresentation now covered by the Contractual Remedies Act 1979 ("The CRA") and subject to its cancellation provisions.

Additionally, the Court addressed what powers the Court has when it sets aside a contract. Is vitiation an all or nothing exercise, or can the Court vitiate the contract on terms that have the effect of enforcing the contract in part?

The relevant facts in *Scales* can be described briefly. The respondent, FESCO part owned ACFES, a Russian trading company. The first appellant SCL was a New Zealand company trading through two subsidiaries, GHSL (the second appellant) and STL.

Through the 1990s ACFES purchased shipments of apples and other products from STL. From as late as 1994, STL began issuing inflated invoices to ACFES, at the latter's request. ACFES paid the inflated invoices, and gave instructions to STL to pay the margin created between invoice and true cost to third parties on ACFES' behalf. The trial Judge found that the purpose of the false invoices (to STL/SCL's knowledge) was to facilitate deception of the Russian Foreign Exchange authorities. FESCO knew nothing of the arrangement.

ACFES fell behind in payments. In consequence STL/SCL negotiated an agreement under which FESCO guaranteed payments due by ACFES under past contracts, and contracts for the 1995 year. STL subsequently assigned its interest in the guarantee to GHSL. SCL and GHSL issued proceedings to enforce it.

These were met by FESCO pleading in defence STL's failure to inform it of the "margin". Primary reliance was placed on vitiation for non-disclosure, using the CRA as a backstop position only.

FESCO's case was so structured for two reasons. First, the "vitiation" course avoided questions of the benefit and burden as they bore upon cancellation on the contract under s 7 of the CRA. Second, it was clear that FESCO would have accepted a guarantee liability for the true debt situation (excluding the margin). FESCO's submission was that vitiation for non-disclosure of unusual facts is absolute with no ability to allow partial recovery under the guarantee. The "vitiation" line was attractive compared with the discretionary nature of CRA (and Fair Trading Act) remedies under which the Court could cancel the contract on condition that FESCO pay that lesser liability.

The Court agreed with the trial Judge that the false invoicing was an unusual factor that needed to be disclosed. On the CRA issue, the Court referred to English and Australian authorities which base the guarantee disclosure principle in the context on an "implied representation" that nothing unusual exists. The trial Judge had held that as this was a "representation", the law as to misrepresentation under the CRA applied. The Court of Appeal expressed a preference for that view, which it supported by the fact that the language of s 7 was wide enough to extend to non-disclosure, and that Parliament had not listed the principle in the savings section (s 15). However, no final decision on the point was necessary because the Court held that the same position was reached whether a CRA or equitable route was taken.

This was because there had on the facts been a substantial increase in the burden of the contract to FESCO under the CRA in any event. FESCO understood that it was guaranteeing a normal trading relationship when in fact it was guaranteeing a relationship which involved a Russian exchange fraud. Apparent association with such a practice could have severe consequences on the guarantor.

Moreover, preferring the High Court of Australia in *Vadasz v Pioneer Concrete SA Pty Ltd* (1995) 130 ALR 570) to the English Court of Appeal in *TSB v Camfield* [1995] 1 WLR 430, it was held that the Court does have a power to order what was in effect "partial" vitiation of a contract. The Court viewed this flexible approach as in accord with the thrust of the New Zealand contract and fair trading legislation, and allowed the Court to do justice in the spirit of equity.

FESCO was entitled to cancel or treat the contract as vitiated. A condition of the cancellation or the extent of such vitiation was that FESCO pay the lesser liability. That is, the guarantor was required to pay such sum as it would have bound itself to pay if the misrepresentation had not been made.

The Court's view on the CRA issue is sensible in practical terms. In a case where there is both misrepresentation and non-disclosure, it would be odd if two sets of principles were to apply. It should be noted however, that the common law would continue to apply in relation to deeds of guarantee. Moreover, difficulties may arise as to how to assess damages for this type of misrepresentation under s 6 of the Act, if the non-disclosure does not justify cancellation.

It ought not to be assumed that non-disclosure in the context of contracts of utmost good faith for example insurance would also be subject to the CRA. The Court distanced itself from that proposition on the basis that the duties owed are different and more general (see also a similar distinction drawn in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 (affirmed on other grounds [1991] 2 AC 249 at 788-789)). One would have thought that in both cases the obligation arises from an implied duty to disclose. It is therefore difficult to see why, in principle, they should be treated differently.

It may be unwise to assume that there is now any greater scope for silence of itself as a representation. The only reason that there can be said to be an "implied representation" in the guarantee cases is surely that there is a duty to speak up implied by law. In the absence of a common law base for such an assertion, it seems unlikely that a duty to disclose would be found to exist.

As to the vitiation point, the development of a principle of "partial" vitiation by enforcing the guarantee in part comes close to allowing the Court to effectively reform the parties' transaction. It is inconsistent with the basis of rescission that treats the contract as never having existed. However, it is suggested that the increased flexibility is desirable and goes hand in hand with other developments in equity which seek to mould remedies to adapt to the case at hand, and seek to achieve a just apportionment between the parties (eg *Day v Mead* [1987] 2 NZLR 443).

The vitiation issue is not an arid one whether or not non-disclosure in formation of guarantees is subject to the CRA. Contracts arising in consequence of breach of fiduciary duty, undue influence, economic duress (and arguably "unconscionability") all continue to be subject to the equitable principles of vitiation. ❑

UPDATES TO YOUR MATERIALS

STUDENT COMPANION

edited by
Richard Scragg

RIGHTS AND FREEDOMS

Andrew Butler

Human Rights Amendment Bill 1998

The government introduced a Bill in August 1998 to amend the Human Rights Act 1993. The aim of the legislation was to abolish the Human Rights Commission's Consistency 2000 reporting requirement, add a number of clarificatory amendments to the Act to remove any doubts as to the ability of certain government departments to make justified distinctions based on prohibited grounds and to remove the "sunset clause" the effect of which is that from the year 2000 the Human Rights Act is no longer subordinate to legislation or regulation. A Supplementary Order Paper (SOP) was introduced in November 1998 which seeks to amend the Amendment Bill in order to clarify exactly how the Human Rights Act would interact with other legislation and regulations. Under the regime set out in the SOP, the Human Rights Act would not limit or affect other legislation, would not limit or affect pre-2000 regulations and would prevail over any post-2000 regulations, unless those regulations are authorised or permitted by their parent Act. The Bill was scheduled for a second reading in late 1998 but was removed from the list as it appeared that the Bill's second reading would be defeated. The Bill does, however, remain on the Government's Order Paper.

Consistency 2000 Report

The Human Rights Commission was required by s 5(1)(i) to (k) Human Rights Act 1993 to report on any inconsistencies between legislation and governmental policy and practices and the anti-discrimination provisions of the 1993 Act in order to apprise government of action that should be taken to ensure compliance with the Act prior to the demise of the "sunset clause" (above). The report begins with the words, "This is the report that the government did not want". It records that, first, owing to a lack of resources and uncertainty as to the status of the report, the Consistency 2000 project is only "partly complete". Thus, the HRC was only able to make determinations on a number of statutes and regulations, not all of them, as originally planned. Similarly, not all governmental practices and policies were subject to review or determinations by the HRC. Second, a significant number of enactments and practices and policies were, nonetheless, the subject of determinations and a substantial number of inconsistencies were found. Many of these (eg exclusion of same sex couples by use of "husband" and "wife", age of responsibility) were recurring, demonstrating the worth of a broad-based review of all legislation. Third, a number of generic issues were examined by the HRC to assist in planning for the future (as well as assessing legislation and practices of the past). In particular, the HRC calls for a review of the definition of the family unit for social welfare and other public purposes, a full review of the definitions of disability in legislation and public policy and for consideration to be given to the interaction between the Treaty of Waitangi and s 73 Human Rights Act (affirmative action). The report is a valuable resource and is available at: http://www.justicegovt.nz/pubs/reports/1998/hrc_consistency.

Section 7 Bill of Rights Act Report on Crimes (Bail Reform) Bill 1999

This member's Bill proposes that a person who is facing a criminal charge and who has been previously convicted of ten or more imprisonable offences and either (a) one of those previous convictions related to an offence committed while on bail or (b) the person charged has previously breached bail conditions, is automatically presumed to be a danger to the public and is ineligible for bail unless she/he can show on the balance of probabilities that she/he will not commit further offences if released on bail. It also proposes a mandatory three-day notice period for applications for release on bail by such persons.

The Attorney-General regarded the Bill as inconsistent with s 24(b) Bill of Rights Act (right to be released on reasonable terms unless there is just cause for continued detention). First, the proposal ignored the potential sentence to which a person charged would be subject if convicted of a subsequent offence committed while on bail. In many cases, that sentence would be less than the length of detention on remand. This would amount to a miscarriage of justice: *Gillbanks v Police* (1994) 1 HRNZ 358 (HC). The blanket notice requirement was also inconsistent with s 24(b) because it deprived the Court of a capacity to take into account individual circumstances.

Lal v Residence Appeal Authority (CA 53/97, 25 February 1999)

In determining eligibility for a residence permit the Immigration Service operates a points system and has regard inter alia to "Qualifications" and "Work experience" allocating points for each where relevant. The appellant, a Fijian national, was a tailor with many years' experience in both Fiji and New Zealand. He had no formal qualification, however, such as a trade certificate, and also received no points for his experience. He claimed that he held no trade certificate because in Fiji no system of certification existed for tailors, most tailors being trained through an apprenticeship. He claimed that the preference for formal qualifications indirectly discriminated against him on the ground of national origin contrary to s 19 Bill of Rights Act. In effect, it was submitted, the policy worked a different treatment on tailors of Fijian national origin because most of that group would have trained in Fiji and would have been

unable to obtain a trade certificate because no such certificate was available in Fiji.

The Court of Appeal rejected the appellant's claim. The Court held that stipulation of a trade certificate enables a government to set an objective standard by which to ensure that applicants for residence based on their employability have the requisite skills. Such qualifications will necessarily form an integral part of an immigration regime and will naturally command a higher number of points than experience alone. Moreover, the Court rejected the argument that there was national origin discrimination: "It is not the fact that he is a Fijian national which gives rise to the difficulty ... but the fact that Fiji as a country does not provide the facilities for issuing a trade certificate. This omission ... is not discrimination due to (the appellant's) national origin". Insistence on a more individualised form of assessment would erode the effectiveness and objectivity of the points system.

The Court's rejection of the national origin discrimination claim is disappointing as there clearly was at least a prima facie case of indirect discrimination. The reality is that preference for applicants with formal qualifications gives a great advantage to persons from Westernised countries where third-level and vocational education is available to a large proportion of the population. This preference is not intentionally directed at excluding Fijians or others from countries with more limited qualification-recognition regimes but from *North Health* (1997) 4 HRNZ 37, 62-3 (HC) we know that lack of an intention to discriminate is no defence to a claim of indirect discrimination. Rather, the test is whether the effect of the condition or requirement is to discriminate. Clearly, as compared with tailors from say Ireland or Germany, Fijian tailors are treated differently because they lack a formal qualification. That said, it is predictable that the Court would uphold the points system and, even if the Court had made a finding of indirect discrimination, some of the reasons advanced by the Court would probably justify different treatment between applicants of different national origins. Hence, the outcome of *Lal* is probably correct but the Court's approach to indirect discrimination signals a narrow understanding of the concept and contains the potential danger of permitting patterns of discrimination to be hidden by "objective" measures of ability.

Choudry v Attorney-General (Court of Appeal, CA 217/98, 9 December 1998)

In *Choudry*, the Security Intelligence Service (SIS), acting under an interception warrant obtained from the Minister in charge of the SIS, forcibly entered C's apartment and installed an electronic bugging device. C sued the Crown (in trespass and for *Baigent* compensation) claiming that the entry and interception were unlawful because they were not authorised by the New Zealand Security Intelligence Service Act 1969. The Crown sought to strike out the claim on the ground that the entry and bugging were implicitly authorised by the Act. The Court of Appeal refused to strike out C's claim and affirmed the fundamental principle of the common law that a statutory search and seizure regime will not be interpreted to permit forced entry to private premises unless Parliament has clearly provided for such a power or such a power is a necessary implication from the words of the statute. The 1969 Act did not in its terms manifest a legislative intention to permit the gathering of intelligence from communications taking place on private premises and did not contemplate the breaking and entering of private premises.

In response, Parliament has enacted an amendment to s 4A of the 1969 Act permitting SIS personnel forcibly to enter private premises and to install and remove bugging devices (Security Intelligence Amendment Act 1999). A second amendment before Parliament (New Zealand Security Intelligence Service Amendment (No 2) Bill), however, would curb some of the more questionable features of the current legislation, by limiting the definition of "security", by providing that SIS powers cannot be used to interfere with legitimate protest and by requiring the involvement of a retired High Court Judge in the issuing of interception warrants.

DPP v Jones (House of Lords, 4 March 1999)

The defendants were part of a group peacefully protesting in the vicinity of Stonehenge. They were on the grass verge and were not obstructing the highway itself or causing a public nuisance. The officer in charge formed the view that the group constituted a trespassory assembly under the Public Order Act 1986, and asked them to move on. The defendants refused and were arrested. A trespassory assembly occurs where a person exceeds the limits of that person's or the public's limited right of access to a particular place. The issue for Their Lordships was described by Lord Irvine of Lairg LC as being "an issue of fundamental constitutional importance: what are the limits of the public's rights of access to the public highway? Are these rights so restricted that they preclude in all circumstances any right of peaceful assembly on the public highway?" By a majority (Lord Irvine of Lairg LC, Lords Clyde and Hutton; Lord Slynn of Hadley and Lord Hope of Craighead dissenting) the Lords held that any reasonable and usual mode of using the highway is lawful provided that it is not inconsistent with the general public's right of passage. Lord Irvine concluded that "the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway". Lord Irvine also refused to set any abstract maximum size or duration for a lawful assembly on the highway: each case needs to be determined on its merits. Both Lord Clyde and Lord Hutton were keen to emphasise the importance of looking at all the facts. While both were prepared to allow the defendants' appeal it was underlined that a peaceful and non-obstructive public assembly on a highway will not always be a reasonable user of the highway. The majority, however, clearly rejected the Crown's argument that the only right the public are entitled to exercise on the public highway is the right of passage and rights ancillary thereto.

The decision is an important one in emphasising that the public highway can be a proper location of a static, peaceful assembly, so long as it is non-obstructive. This decision is of potential importance in determining the scope of s 16 Bill of Rights Act (freedom of assembly).

FAMILY LAW

John Caldwell

B v M (Family Court, Wellington, FP 085/492/96, 24 February 1999, Judge Ellis)

In this case, the parents of two children, aged 13 and 7, were described by the Judge as hard working people who had established careers for themselves independent of their responsibilities as parents. In the early years following separation, the children had principally been in the care of the mother, but had enjoyed regular and flexible contact with the father. The father, however, in a series of applications to the Court, sought definition of his access that would confine access to times when he was free of work and other commitments. The mother opposed these applications. She argued that they were premised on the assumption that she would be required by default to accept responsibility for the children at all other times, irrespective of her work commitments. She sought access on wider terms so that the burdens of caring for the children (including during times of illness) would be more equitably shared.

His Honour, noting that there was no statutory definition of "access", observed that access, for a guardian, was a defined opportunity for the parent who did not have the child in his or her possession and care to exercise the general rights of guardianship. His Honour further observed that the Guardianship Act 1968 neither defined the responsibilities of guardianship, provided a framework for enforcement, nor required the responsibilities to be equally shared. By way of contrast, His Honour pointed out that the principles of the Child Support Act 1991 tended to promote the view that responsibility for children should be shared between the parents. The Judge said he was persuaded by the mother's argument that there was a financial and emotional inequity in expecting her to limit her personal and work life because of the father's unwillingness to share the care of children at times that did not suit him. His Honour consequently gave some serious consideration to importing into the Guardianship Act some effective financial sanction that would require the father to exercise access at designated times. This could be done by attaching a condition as to penalty to an access order. Ultimately, though, His Honour concluded that it would be inappropriate for a Court to initiate such a change in direction under the Guardianship Act.

Judge Ellis awarded access more or less on the terms that the father wished, but declined to allow the father the legal right to opt out of an occasional Friday evening access. His Honour said that if access proved inconvenient on a particular Friday evening, then the father would have to accept responsibility for making alternative arrangements for child care.

Here the Court has attempted to compel a parent to exercise the responsibilities of access in terms that went beyond those sought by the parent. Additionally, the Judge's comments on financial penalty provisions may result in further judicial developments and initiatives dealing with the reluctant access parent.

S v New Zealand Central Authority (High Court, Christchurch, AP 36/98, 2 March 1999, Panckhurst J)

In this appeal from the Family Court, the High Court considered both the meaning and application of "habitual residence", as a threshold condition for jurisdiction under the Guardianship Amendment Act 1991, and the significance of a child's objections to return pursuant to that Act.

In March 1997 the mother and father had agreed that their nine-year-old boy would live in Sydney, and much of the argument in this case hinged on the respective understandings of the parties concerning that agreement. The mother maintained that the agreement was reached to provide her with a period of "time-out" for her benefit; the father contended that the move was intended to be a permanent shift.

In May 1997 the boy moved to Sydney, and enrolled at school there. The mother visited Sydney in December 1997 and May 1998. In July 1998 she provided a return ticket for the child to visit New Zealand on holiday. The mother, however, claimed that the provision of a return ticket was a ploy, as by that time she was intent on the boy coming back to New Zealand. In August 1998 the mother decided to keep him in New Zealand. The Central Authority, on behalf of the father, sought return of the child to Australia.

On these facts the jurisdictional question arose as to whether the boy had been "habitually resident" in Australia. Panckhurst J, hearing the appeal from the Family Court, which ruled in favour of the father, lamented the difficulties of resolving such an issue on the papers without the benefit of cross-examination of the parties. His Honour observed that the intention of the parties was clearly of critical importance in determining the boy's habitual residence. The fact and duration of residence in a country, could not be decisive where a child had come from a settled long-term background.

The Judge disagreed with the Family Court Judge who had intimated that the mother had the evidentiary burden of establishing a fixed term agreement. Rather, the mother only had to establish by evidence that her contention was a live issue. Having done this, then the father, through the Central Authority, had to establish on balance that the boy had been habitually resident in Australia. Here, the Judge concluded, hesitantly, that the father's burden of proof had not been discharged, as there was some evidence from a general practitioner to support the mother's story.

His Honour commented, obiter, on the significance of a child's objections to return, pursuant to s 13(1)(d) Guardianship Amendment Act 1991. The Judge stated that he found s 13(1)(d) to be out of step with the general scheme of s 13(1), allowing the Court a limited power to decline return. His Honour pointed out, for instance, that s 13(1)(d) does not, in contrast to the specific tests of the earlier paragraph, specify the quality or level of objection required. Panckhurst J also stated that if the ground were made out, then the discretion of s 13 would have to be seen as limited. In His Honour's view, only two issues would be relevant in the exercise of discretion: first, the philosophy of the Convention; and, second, the welfare of the child, but only in relation to having the custody case determined in one country or another. Here, His Honour was proscribing more stringent limits on the exercise of discretion than are to be found in some of the overseas cases.

LAND LAW

Julia Pedley

Granadilla Ltd v Berben (Court of Appeal, CA 191/98, 10 March 1999)

This decision is noteworthy for the further clarification given by the Court of Appeal to the interpretation of the "prudent lessee test". Granadilla Ltd, the lessor, had commenced proceedings in the High Court to set aside an umpire's award fixing the ground rent payable on a perpetually renewable 14 year lease of land. Proceedings were commenced on grounds that the umpire had erred in law in the award. Goddard J, at first instance, concluded that the umpire had not erred to any degree, let alone to one constituting an error of law.

Granadilla appealed to the Court of Appeal. Granadilla's submissions focused on three issues. First, that by considering the fair rent largely from the lessee's perspective, instead of equally from the perspective of both the lessor and lessee, the umpire had misinterpreted the "prudent lessee test", thus showing a clear bias towards the interests of the "prudent lessee". In support, four main grounds were advanced: that the umpire had almost exclusively considered the position of the lessee; that the "prudent lessee test" was treated as different from the willing lessor/willing lessee test; that the umpire erred in law by following the guidance given in both *In re A Lease, Wellington City Corporation to Wilson* [1936] NZLR s 110, and *Feltex International Ltd v JBL Consolidated Ltd* [1988] 1 NZLR 668; and that the umpire was wrong to say that the prudent lessee "would allow to his Lessor a fair but not excessive return on the capital value of the land having regard to all the circumstances of the Lease".

It is long established in New Zealand that in determining a fair annual ground rent a valuer must ascertain what a prudent lessee would give having regard to the term and conditions of the lease; *Sextant Holdings Ltd v NZ Railways Corp* (1993) 2 NZ ConvC 191, 556. Delivering judgment of the Court, this was affirmed by Blanchard J who in citing *Wellington City Corporation* (supra) added, "that for every abstract prudent lessee there obviously must be an abstract willing but not anxious lessor who has the premises on offer and must be assumed to be willing to take a ground rent which a reasonable but prudent lessee thinks proper to give". Significantly, in *Granadilla*, the Court found that "the ques-

tion is not so much what rental would give the lessor proper interest upon the value of the land but, rather, what rental would a prudent lessee give for the land for the term and subject to the conditions of the lease". Consequently, a valuer is concerned only with those matters which would affect the judgment of the prudent lessee with regard to the offer of rental to the lessor.

In response to Granadilla's criticism of the umpire's direct referral to the dictionary definition of "prudent" and absence of referral to the definition of "willing", the Court considered that this was a selective criticism on the part of the lessor, and in the context of the issue the term "prudent" equated to "willing but not anxious".

Reference was made by the Court to what the umpire had described as the "classic approach" to fixing ground rents on renewals of perpetual leases, as contrasted with the "traditional approach". Having regard to the circumstances which led the umpire to be disposed to the latter of the two approaches in reaching the award, looking at the whole of the award the Court did not find that the position of the lessor had been neglected by the umpire.

The Court went on to hold that, when considering the matter from the perspective of the hypothetical willing but not anxious lessor, "it is what that party can reasonably expect to be offered which must be assessed, not what that party would like to receive". The Court was not persuaded that the umpire had misinterpreted the prudent lessee test.

Two further issues were also put forward for the Court's consideration. These alleged that the umpire had erred in law, first, by failing to have regard to all relevant market evidence and, secondly, by taking too narrow an interpretation of "comparable leases" by excluding a consideration of rents in terminating leases.

The lessor's arguments were rejected by the Court, on the basis that it is for the valuer alone to decide what market evidence is or is not comparable. Blanchard J then went on expressly to agree with Goddard J that *Modick R C Ltd v Mahoney* [1992] 1 NZLR 150, *Re Dickinson* [1992] 2 NZLR 43 and *Sextant Holdings* (supra) do not impose "a requirement on an arbitrator to place prime weight on allegedly comparable transactions which are in fact inconclusive".

Thus the Court held that it was open to the umpire to take whatever view of the evidence he chose. In forming his opinion that the evidence adduced by the lessor could only be given limited weight, as it was neither directly nor truly comparable, the Court found no error of law in the approach taken by the umpire. Accordingly the appeal was dismissed.

EMPLOYMENT LAW

Graham Rossiter

Sky Network Television Ltd v Duncan (CA 284/97, 1 December 1998)

It is well known that disobedience of an employer's orders may constitute serious misconduct which will justify summary dismissal of the employee. In *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, 287, it was said that "if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service ... one act of disobedience can justify dismissal only if it is of a nature which goes to show, in effect, that the servant is repudiating the contract as one of its essential conditions ... therefore the disobedience must at least have the quality that it is 'wilful', it does, in other words, connote a deliberate flouting of the essential contractual conditions".

The nature of the disobedience that may justify summary dismissal of an employee has recently been considered by the Court of Appeal with reference to a personal grievance. In this case, Duncan was employed by Sky as a promotions director and had from 1991 to 1994 worked ordinary day shift hours. In October 1994, changes in Sky's coverage and consequent operations meant that it attempted to roster Duncan to work shifts outside the normal working hours and on weekends. The employee wrote to Sky advising that he was not prepared to accept the changes. He was subsequently dismissed for wilful disobedience. At no time did either party invoke the dispute procedure provided for in the employment contract.

The Employment Court upheld the finding of the Employment Tribunal that the dismissal was unjustified. The approach taken by the Employment Court was substantially affirmed by the Court of Appeal. In particular, it was said that –

(i) wilful disobedience connotes some deliberate design or purpose to derogate from the employee's duty and has an overtone of the "knowingly improper". There needs to be something that amounts to the deliberate flouting of the terms of the employment contract to provide justification for a dismissal.

(ii) as in any case of alleged misconduct, the correct test is not simply whether there has been disobedience but rather whether the employee's conduct justified his dismissal. In electing to dismiss without considering the disputes procedure (where the employee had a bona fide belief in the correctness of the position he was adopting) Sky had failed to show that its treatment of the aggrieved party was fair.

INSOLVENCY

Lynne Taylor

Tranz Rail Ltd v Meltzer (High Court, Wellington, M451/98, 18 December 1998, Baragwanath J)

In this case the focus was on the interrelationship between ss 292 and 296(3) of the Companies Act 1993. Section 296(3) incorporates the same alteration of position defence that was previously found in s 311A(7) of the Companies Act 1955 and which remains in s 58(6) of the Insolvency Act 1967. A creditor seeking to rely on this defence must establish that (1) it received a payment in good faith and (2) altered its position in (3) the reasonably held belief that the transfer to it was validly made and (4) that it would be inequitable to order recovery from it in full. Baragwanath J held that two payments received by the plaintiff creditor were of preferential effect. This necessitated a finding that the transactions were outside the ordinary course of business on the basis of an assessment from the point of view of a reasonable person in the creditor's position (see *Countywide Banking Corporation v Dean* [1998] 1 NZLR 1). Baragwanath J held that "good faith" in the context of the Companies Act 1993 meant simple honesty. Good faith and alteration of position were found to be established in this case by reason of the creditor's unchallenged belief in the normality of the transaction together with its actions in making further supplies to the debtor after receipt of the payments sought to be set aside. Baragwanath J then turned to the more difficult issue of when a creditor will be found to have a reasonably held belief in the validity of the transaction. His solution was to state that the issue had to be assessed from the point of view of the particular creditor. He summarised the test in s 296(3) as being whether on broadly moral grounds the creditor, according to its own experience and capacity, had behaved sensibly or recklessly. A further matter to be taken into regard in this assessment, said Baragwanath J, were the consequences of the creditor's actions on the debtor company. On the facts before the Court it was held that the creditor's conduct was not such that it warranted an order for full recovery. Recovery was denied to the extent of the value of the further supplies made after receipt of the payments sought to be set aside. ❑

RECENT CASES

ALTERNATIVE DISPUTE RESOLUTION

edited by
Carol Powell

Trustees of Rotoaira Forest Trust v A-G

HC Auckland, 30 November 1998, Fisher J (See also p 197)

In this case the High Court revisits and provides a useful summary of the case law on the principles of natural justice and how they apply to arbitration hearings. Here the plaintiff endeavoured to argue that he was not given the opportunity to be heard on an argument relating to the appropriate stumpage model to be used when undergoing a rent review under a lease of forestry land. The model adopted by the arbitrators had not been specifically put forward as an appropriate model by either party although there had been reference to the model in a rebuttal argument raised by the plaintiff. The Court found that while the argument had not been foreseen by the plaintiff, it was foreseeable by a reasonable plaintiff and as such the rules of natural justice had not been breached.

The plaintiff trust owned land at Rotoaira which it agreed to lease to the Crown for forestry purposes. The lease provided a rent review clause based on a percentage of the stumpage received from the sale of the timber. The clause enabled either party to call for a review of the percentage of stumpage payable under the lease and provided that where the parties were unable to agree on any proposed change the dispute would be settled by reference to arbitration.

The parties were unable to agree on the stumpage percentage at the expiration of the first 20 years and the dispute was referred to arbitration.

Part of the submissions concerned possible stumpage models. The trust contended for a residual model and the Crown advocated a contributions model in which the lessor's contribution was measured in terms of land market value.

The Crown referred to the formula in the lease, known as the "Grainger" formula, by which the value of the contribution of a lessor's land relative to the value of a lessee's contribution to a possible joint venture forest investment could be calculated. The Crown contended that the "formula" referred to in the lease required a contributions approach.

In criticising the Crown's market value approach the trust argued that it gave inadequate recognition to the true contribution of the lessor. The trust contended that a land expectation value would be a more valid reflection of the lessor's contribution.

The arbitrators rejected the trust's residual model and also rejected that aspect of the Crown model which measured the lessor's contribution by reference to current market land value. The arbitrators preferred the original Grainger approach, although in the absence of any pre-defined formula a more general approach was required in assessing the land and expectation value upon which the lessor's contribution was assessed.

The trust sought to set aside or remit the award for breach of natural justice, alleging a lack of opportunity to be heard as to the land expectation value basis for a contributions model and its associated inputs.

In dismissing the application to set aside the award and the appeal, Fisher J reiterated long-standing law that arbitrators must observe the requirements of natural justice and treat each party equally. The Judge found that the detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly drawn from the appointment of arbitrators known to have special expertise.

Argument centred on whether the plaintiff had been given the opportunity to be heard on a particular argument, rather than a factual issue. The Court found that the question was whether a reasonable litigant would not have foreseen the possibility of reasoning of the type revealed in the award, and that with adequate notice it might have been possible to persuade the arbitrator to a different result. Where there has been significant surprise it would usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

Applying those principles the Court found that the model adopted by the arbitrators to measure the land value was not what the trust had in fact expected. However, it was what the reasonable litigant in the trust's place would have expected. Viewed objectively the award model was a reasonably foreseeable outcome and there was a sufficient evidentiary foundation for the values inserted into it.

Vaucluse Holdings Ltd v Lindsay

HC Auckland, Williams J, CP 318/97, 8 February 1999

The issue of confidentiality in mediation is seldom raised before the Courts and there is a large amount of academic conjecture about what circumstances would compel a Court to go behind the confidentiality provisions of a mediation agreement. Mediators are always pleased to see the Courts accord respect to the mediation process and its funda-

mental attribute; confidentiality, whenever the issue is raised.

The defendant sought an order that a mediation agreement made between the plaintiff and himself be admissible in the trial of the action.

The background was that Vaucluse entered into an agreement to purchase Lindsay's shareholding in Fruehauf Pacific Ltd. The agreement contained the usual warranties as to the accuracy of the accounts for the company which had been audited and the sale price was based on the audited accounts.

Within a few weeks the accountants advised both parties that the accounts contained substantial errors and that the company's net asset position was less than stated in the settlement accounts.

After negotiations a compromise was agreed, evidenced by an exchange of letters and based on a further set of accounts audited by the same accountants. The compromise provided for an abatement in the purchase price according to the amount by which the company's tax-paid earnings fell below a certain figure.

Vaucluse claimed that the accountant made further significant errors when auditing the new accounts which entitled it to a refund of the share purchase price. The action between the parties was for that sum and the proceedings were based wholly on the settlement agreement and not on the original warranty provisions of the agreement for sale and purchase.

The parties referred the dispute to mediation which was conducted with Sir Duncan McMullin as mediator. The parties had entered into a standard form of mediation agreement which contained a confidentiality agreement whereby the parties agreed that "unless otherwise compelled by law [they would] preserve total confidentiality in relation to the course of proceedings in this mediation and in relation to any exchanges ... concerning the dispute passing between any of the parties and the mediator or between any two or more of the parties during the course of the mediation".

At the mediator's request the parties prepared a statement of their respective positions. The statement prepared by Vaucluse was headed "For the Purposes of Mediation Only Confidential & Privileged". It set out the position of the parties at some length including the fact that Vaucluse was relying on warranties set out in the original agreement for sale and purchase. The settlement agreement of March 1995 was not mentioned.

Subsequently, during summary judgment proceedings filed against Mr Lindsay, a dispute arose as to when Vaucluse gave notice of its claim being under the settlement agreement rather than the warranty provisions of the agreement for sale and purchase. In part there was a disagreement as to whether the basis of the claim was changed prior to or during the mediation. The application for summary judgment failed at first instance and on appeal.

Mr Lindsay then made an application that the mediation agreement be introduced into evidence, to demonstrate that, at least up until shortly before the mediation began, Vaucluse's claim was based on alleged breaches of warranties in the agreement for sale and purchase, not the settlement agreement, despite the fact that it was the settlement agreement which had formed the basis of its claim throughout the life of the proceedings.

On that basis the Court took the view that there was no need for the mediation agreement to be put into evidence. The Court took the view that the plaintiff's witnesses could be asked about the change of the basis of its claim and the timing of that change, without the mediation being mentioned and that it would not be a breach of confidentiality of the mediation agreement or the mediation itself for those witnesses to be asked to confirm the omission of any reference to the settlement in the correspondence between the parties and the parties' lawyers.

The Court's view was that the same conclusion should be reached on the broader point of principle.

The judgment provides a useful summary of the New Zealand and Australian case law on confidentiality in mediation and other "without prejudice" discussions. The Court confirmed the principle that a document which is discoverable and admissible is not rendered inadmissible by virtue of its existence being disclosed during a mediation. In this case the document in question was not otherwise admissible and if for no other reason than that the parties had agreed that it should be kept confidential it should be immune from discovery.

AWARD FOR MEDIATION INITIATIVE

Mediation Month has won the Special Event or Project category of the PRINZ (Public Relations Institute of New Zealand) Awards 1999, and was runner up for the Supreme Award. That means *Mediation Month* has been judged as one of the two most successful public relations initiatives in the country during 1999.

Mediation Month was an Auckland District Law Society initiative, funded by the Legal Services Board and the NZ Law Foundation and was held in May last year. Polly Schaverien of Network Communications (NZ) Ltd, who managed the project communications received the awards at a ceremony held at Te Papa in Wellington on 29 May 1999. When accepting the awards, Polly Schaverien congratulated the Auckland District Law Society, together with the sponsors for having the courage to promote mediation through a comprehensive initiative such as *Mediation Month*.

NEW ACCREDITATION SYSTEM IN EFFECT

LEADR's new mediator accreditation scheme provides people with certainty they are choosing a trained professional. The accreditation scheme that came into effect in March this year provides members – and the public – with a benchmark for professional mediation standards.

In the past, a person could get on to a panel of mediators and stay there indefinitely, without gaining practical experience or taking part in refresher training. Determined to retain a benchmark for professional standards, LEADR's accreditation process requires mediators to update their training every year, to remain on the LEADR panel. Approved courses will be run on a regular basis to provide panel members with access to continuing education opportunities.

This is a positive move forward for mediators throughout New Zealand. Accreditation standards will help to protect the profession – and the public – from poor mediation practice.

MEDIATOR PROFILE
ANNA QUINN

As the youngest of eight children Anna showed signs of a budding intermediary from an early age. Anna initially studied law at Canterbury and her course included a paper on Negotiation, Mediation and the Law taught by Jane Chart. The creativity and flexibility of the mediation process immediately appealed to Anna.

Anna then went on to practise as a solicitor in the commercial litigation department of Buddle Findlay Wellington for four years. After a stint in London working for a major City firm – Masons, specialising in construction law – Anna returned to Buddle Findlay's Auckland office. She continued her practice in litigation with some diversification into compliance, risk management and corporate work.

During this time she developed her skills and knowledge in the area of mediation undertaking the Harvard Law School program on Dispute Resolution and training with LEADR.

In 1995 Anna took up an opportunity to spend a year in New York, where she joined the Manhattan and Brooklyn Mediation Centres as a mediation specialist. During this time she worked as a co-trainer and programme developer for the Mediation Training Program for Manhattan Civil Court Judges, she revised and updated the training manual for the centre and worked as a member of the training team and as a volunteer mediator. In her training role she undertook observations of trainee mediators for certification and experienced mediators for re-certification.

She also undertook development and coordination work on a number of mediation pilot programmes for New York civil Courts and prepared a mediation programme response to a report commissioned by Chief Judge Kaye on the use of dispute resolution in the Courts throughout New York State. She worked on the development of the policy and screening guidelines for the mediation of domestic disputes and custody and undertook a visitation mediation client satisfaction survey.

She was also able to enhance her skills taking the opportunity to train with Robert A Baruch Bush, Sally Ganong Pope, Lela Porter Love and undertaking the State of New York Executive Department, Division of Human Rights Mediator Training Program and the New York State Dispute Resolution Association Victim and Offender Mediation Training.

She returned to New Zealand in 1996 and chose to continue her career in dispute resolution and mediation in particular, because in the large majority of cases "it made sense" to her that the parties have control over whether and how they resolve their disputes. She set up her dispute resolution company Anna Quinn and Associates Ltd and was appointed the executive officer of LEADR New Zealand Inc, a position she held for two years. During this time she has continued an interest in restorative justice and participated in a workshop in Public Conversation and undertook "Real Justice" Restorative Justice training and the Te Oritenga Restorative Justice Facilitator Training.

Anna continues as a trainer for LEADR and as the executive director of her own company undertaking mediation and dispute resolution work in a wide variety of disputes involving anything from commercial to community issues. She is on LEADR's advanced panel of mediators having conducted over 30 mediations.

Anna's style as a mediator is flavoured by her high energy levels which provide her with heightened listening skills and the ability to "tune into" and "engage" all sorts of people in conversation. She believes that the mediation process is fundamentally the parties' process and as such she does not express opinions or make decisions on the issues. Her process gives the parties (and their advisers) respect, acknowledging that they are best placed to decide how and what to resolve; and facilitates communication between those in dispute to enable them to communicate so they have the opportunity to resolve the issues.

ARBITRATORS' AND MEDIATORS' INSTITUTE OF NZ

The Arbitrators' and Mediators' Institute of NZ is holding two important workshops on Arbitration in the next two months. The first is on the topic of Arbitration Preliminary Meeting and Award Writing and will be held on Saturday 19 June at Waikato University. The speakers will be Mr Derek Firth, Mr Peter Jones and Mr Bill Draper. This workshop is aimed at giving arbitrators practice and guidance at conducting that all-important Preliminary Meeting, and setting up the proceedings which follow. A preliminary meeting is the first face-to-face contact between the parties and their counsel and the arbitrator in his or her capacity as the arbitrator. The arbitrator wants to be sure of getting it right!

The second part of the workshop will deal with writing the award. Again it is hands-on practice, followed by critique and discussion. Specific atten-

tion will be given to the provisions of the Arbitration Act 1996 as these relate to the award.

The workshop will be an opportunity for arbitrators with little experience to develop their skills and confidence, and for more experienced practitioners to hone their existing skills and develop their knowledge.

At the second event Judge AAP Willy, will be speaking in Christchurch on 6 July on Arbitration Procedures Under the New Act. Judge Willy is the author of Butterworths' *Arbitration in New Zealand* published in 1997.

For further information, the Arbitrators' and Mediators' Institute of NZ can be contacted at fax: 04-385-7224 or e-mail:
institute@arbmedinst.org.nz

LEADR NEW ZEALAND UPDATE

AUCKLAND

The Auckland Local Committee held a successful function at the University Marae on 25 March 1999. The guest speakers were Morris Te Whiti Love, director of the Waitangi Tribunal and Joanna Kalowski from the National Native Title Tribunal in Australia. Mr Love outlined an initiative to expand the use of ADR in the settlement of intra-iwi and inter-iwi disputes arising in the Treaty settlement process. The proposal involves an independent organisation providing a facilitation and dispute resolution service. Mr Love noted that there are over 700 claims filed and it was appropriate to explore possible ways to reduce the overall costs and delays currently being experienced in the claims process.

Joanna Kalowski is a brilliant speaker who is dedicated to her work on the National Native Title Tribunal. Her description of mediations in which she had been involved addressing some of the appalling injustices suffered by Aborigines were most enlightening and at times, quite moving as she described the efforts being made to bring people together.

By way of contrast, the Committee organised a co-mediation refresher course on 29 May led by Paul Hutcheson. There was keen interest from members wishing to update their practical mediation skills.

WELLINGTON

The Wellington Local Committee is now providing articles to the local Law Society newsletter, *Council Brief*. The articles aim to raise consciousness among practitioners about LEADR and about alternative forms of dispute resolution generally. *Council Brief* has been very helpful in encouraging the development of these articles. The committee plans to continue this throughout the year, and to make contact with community and other professional groups to improve awareness and access to the mediation process.

The High Court in Wellington is commencing a case management system that includes encouraging parties to attempt to resolve disputes by ADR before putting the matter before the Court.

The Wellington committee is interested in the Auckland initiative to provide co-mediation training and is keen to replicate similar seminars in Wellington, particularly as they have been endorsed as refresher courses for the purposes of accreditation. ❑

WHAT'S HAPPENING

1999

June 1
AMINZ breakfast seminar

June 17
AMINZ seminar
Preliminary meetings/award writing seminar

June 22
LEADR refresher mediation course
Wellington

June 23-26
LEADR 4 day workshop
Wellington

July 6
AMINZ seminar
Arbitration procedures under the new Act seminar

July 13
AMINZ breakfast seminar

July 30
AMINZ annual conference

August 10
AMINZ breakfast seminar

August 12
Mediation Training Centre workshop
Fundamentals of mediation
Auckland

September 14
AMINZ breakfast seminar

September 22
Mediation Training Centre workshop
Fundamentals of mediation
Hamilton

September 30
AMINZ seminar
Mediation ethics

October 6-9
LEADR 4 day workshop
Auckland

October 10
LEADR refresher/accreditation day
Auckland

October 12
AMINZ breakfast seminar

October 19
Mediation Training Centre workshop
Advanced skill development workshop
Auckland

November 9
AMINZ breakfast seminar

November 13
AMINZ seminar
Advanced arbitration

2000

Easter
Peace conference
"Just Peace – peace building and peace making in the new millennium"
Massey University – Albany campus
Auckland

July 28-30
LEADR 7th International conference
Regent Hotel
Sydney

FAMILY TRUSTEES' DISCRETION

Richard Peterson, Morrison Kent, Wellington

finds that "absolute and unfettered discretion" may be neither

The decision of Wild J in *Blair v Vallely* HC Wellington, 23 April 1999 CP 8/98, will cause consternation to trustees of discretionary family trusts where the trust deed purports to confer an absolute and unfettered discretion upon trustees.

The case involved a challenge to an interim distribution to beneficiaries by the trustees of a family trust. The plaintiff and the second to sixth defendants were the residuary beneficiaries of the trust who on winding up would succeed to the trust fund in equal shares. The first defendants were the trustees.

The trustees proposed an interim distribution which effectively debited the plaintiff with a sum for benefits the trustees considered he had already received by virtue of his close association with the trust. Those benefits were his lease of the family farm, the opportunity to graze a nearby farm, also owned by the trust, and the opportunity to purchase that nearby farm, complete its development and sell it at a substantial profit.

The proposed distribution debiting the plaintiff with a "farming opportunities adjustment" was challenged on several grounds but the fundamental issue as seen by the Judge was whether in making the interim distribution on the basis they proposed the trustees would be acting reasonably and fairly.

It was common ground that the Court could interfere if it considered trustees had exercised their discretion ultra vires, in bad faith, not impartially between beneficiaries or classes of beneficiaries or in conflict with their duty to act only in the interests of the beneficiaries as opposed to their own interests.

Except in these circumstances, there is clear authority that it is not the function of a Court to superimpose a Judge's views on those of trustees appointed by the settlor or persons to whom that power of appointment has been delegated in pursuance of provisions to which the settlor agreed.

This case demonstrates a judicial disregard of the established rules relating to the right to interfere. There seems to be an ever increasing willingness for Judges who (being unaware of family considerations) inevitably start with a predisposition towards equality to substitute conclusions based on refined equitable views rather than take account of considerations which a settlor would consider quite valid and quite appropriate to be taken into account by trustees in whom confidence was reposed.

In his decision Justice Wild embraced obiter comments of Tipping J which support the widening of the ultra vires principle in *Craddock v Crowhen* (1995) 1 NZSC 40,331, a case concerning a superannuation scheme:

> If trustees exercise their discretionary powers in a manner which, although formally intra vires, is unreasonable, the Court should be able to intervene. The basis is that unreasonableness is, in reality a species of ultra vires. The donor of the power be it testator, settlor or for that matter the members of a superannuation scheme, give the trustees their powers on the implicit basis that they will exercise them reasonably. ... But it must be emphasised, a decision in the present field, as in the public law area, will not be regarded as unreasonable unless it is such that no reasonable trustee could rationally have made in all the circumstances. The Court will not intervene simply because it would or might have made a different decision. To be impugned the decision must be one which can fairly be said to be beyond the bounds of reason.

Having cited that passage and other authorities he considered relevant Wild J in *Blair* concluded: "It can be said that a trustee's duty of good faith in exercising a discretion is a broad one encompassing obligations to give relevant matters honest and genuine consideration, to act rationally and not perversely and to exclude the irrelevant".

His Honour then applied this interpretation to the facts and answered the question "have the trustees acted reasonably" – "decisively no". This was in relation to trustees who had an absolute discretion and who sought to bring to account advantages which they perceived had been enjoyed by a beneficiary. The trustees in fact had endeavoured to effect what they understood to be the intentions of the settlor namely that the trust should be used as a springboard to enable each member of his family to be given an advantage in life and (contrary to the conclusion some may draw from the parable of the talents) to make additional provision for those who had not had that opportunity. In *Blair* the Judge appears to have expected the trustees to have made detailed mathematical calculations to support an unequal distribution designed to achieve the settlor's objectives. He stated that if there are no reasons or if they do not stand scrutiny, then the trustees can only be said to have acted unreasonably, ie without proper reasons. While such an approach might be acceptable in the case of a superannuation scheme where contributions have been made by or on behalf of specific beneficiaries it is submitted it is quite inappropriate in a family trust situation where no consideration moves from beneficiaries.

With respect Wild J's view goes well beyond Tipping J's statement that a decision would not be regarded unreasonable "unless it is such that no reasonable trustee could rationally have made it in all the circumstances". In a family

trust in the writer's submission it is quite normal to take account of the financial circumstances of various beneficiaries and the advantages they may have had even if these were derived as a result of their own efforts. Such advantages may be subjective and not capable of mathematical calculation.

It is unfortunate that counsel, after consultation with the trustees, abandoned the argument that the Court ought not to examine the trustees' reasons because the trustees were not obliged to disclose them and had only done so in the course of and because of the proceedings. *Karger v Paul* [1984] VR161, 166 would have supported such an argument. It is clear law that where trustees disclose their reasons they can be examined by the Court to see whether they satisfy the standard of being valid reasons. This does not however apply where the trustees have disclosed them only for the purpose of showing their good faith.

In Karger *the Judge saw "no good reason for importing rules of natural justice into the exercise of discretion by the Trustees of the Will"*

The established principle is that unless trustees choose to give reasons for the exercise of a discretion their exercise of that discretion cannot be examined by the Court so long as the trustees act in good faith and without an ulterior purpose. Harman L J in *Re Londonderry's Settlement* [1965] Ch 918, explained the principle as follows:

> Trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision. This is a long-standing principle and rests largely I think, on the view that nobody could be called upon to accept the trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he was not liable to have his motives or his reasons called in question either by the beneficiaries or the Court.

In *Karger v Paul* insufficiency of inquiries by trustees was not a ground on which the exercise of discretion by the trustees could be reviewed. The Court held the trustees' exercise of discretion can be reviewed only to determine whether there has been "real and genuine consideration".

The Judge in *Blair* also canvassed the trustees' duty of impartiality and the duty not to allow personal interests to conflict with their duties to the trust and its beneficiaries. This author considers those were irrelevant considerations. The Judge cited with approval an extract from Thomas J's decision in *Jones v AMP Perpetual Trustee Company* [1994] 1 NZLR 690, 711:

> This fundamental principle, as I apprehend it, is to ensure that the trustees' loyalty to serve the interests of the trust, or the beneficiary of the trust is not distracted by a personal interest which conflicts with those interests. As stated in Garrow & Kelly's *Law of Trusts and Trustees* "the rule is really an illustration of the more general principle that no one who has a duty to perform shall place himself in such a position that his interest will conflict with that duty and that, if interest and duty do conflict interest must give way".

As that quotation indicates, a trustee has an obligation not to place himself in a position of conflict. Where, however, he is placed in that position by the settlor or by the persons to whom the power to appoint trustees has been given issues of conflict do not arise. This was also overlooked in the decision of Panckhurst J in *Re Mulligan* [1998] 1 NZLR 481 where the Court does not appear to have been referred to the decision of the English Court of Appeal in *Sargeant v National Westminster Bank plc* (1990) 61 P&C R 515 where Nourse LJ stated:

> The rule that a trustee must not profit from his trust holds that prevention is better than cure. While it invariably requires that a profit shall be yielded up it prefers to intervene beforehand by dissolving the connection out of which the profit may be made. At that stage the rule is expressed by saying that a trustee must not put himself in a position where his interest and duty conflict but to express it in that way is to acknowledge that if he is put there, not by himself, but by the testator or settlor under whose dispositions his trust arises the rule does not apply. Persons acting as trustees exercising discretions must consider all possible beneficiaries and the extent to which a discretion should or should not be exercised in their favour. The principle that the trustees must be unanimous unless the underlying instrument provides for a majority decision means that resort must be had to the combined wisdom of all trustees before a discretion is exercised which in practical terms means that it is less likely to be exercised the greater the number of trustees. If trustees are required to be unanimous a capricious decision is unlikely to be made.

This decade has seen an increasing tendency for judicial interference with decisions made by others. This may be appropriate where there is an obligation imposed on the decision makers to act judicially. In *Karger* the Judge saw "no good reason for importing rules of natural justice into the exercise of discretion by the Trustees of the Will". In *Blair* jurisdiction was given to the Judge, as a result of concessions by counsel, to examine benefits which he then held to be "unreasonable, irrational, mistaken and incorrect".

It is submitted the decision should be given limited effect and read in the context that the Judge was invited and thus given jurisdiction to consider the reasonableness of what was proposed. It should not treated as disagreeing with *Karger*.

It is to be hoped that in the future counsel will be wary of extending to the judiciary jurisdiction to overrule the decision of trustees who have genuinely endeavoured to give effect to considerations which would be beyond reproach if a testator had taken them into account when making a testamentary disposition having the same effect.

It is submitted that the Judge failed to recognise what are valid considerations in family situations in expecting some mathematical formula to determine what could be classified as indirect benefits.

The lesson is that trustees proposing to exercise discretionary powers to effect an unequal disposition of trust assets should ensure that they solicit from beneficiaries all information which potential beneficiaries consider should be taken into account as well as objective evidence available, record, so far as practicable the reasons for their decision but steadfastly refuse to make these available unless required to do so by the Court, or under protest in circumstances where they do not waive the protection which the rule in *Karger v Paul* has hitherto conferred upon them. ❑

"BEST ENDEAVOURS" AND "REASONABLE ENDEAVOURS"

Quentin Lowcay, Allen and Overy, London

identifies the differences

In any commercial agreement, the parties will usually spend considerable time arguing over whether certain obligations should be based on using "reasonable endeavours" or "best endeavours". Frequently, the slight variation of "all reasonable endeavours" is settled on.

Over the negotiation table, the commercial people look at each other, nod and agree to wording that they think they understand. Meanwhile, lawyers advise their clients based on what they understand to be the position.

After all, everyone knows that "best endeavours" means almost a positive obligation and "reasonable endeavours" means to do everything reasonably in your power. As for "all reasonable endeavours" this adds very little. Correct?

In New Zealand there is no definitive case addressing the meaning of both phrases. However, there have been several recent English Court of Appeal cases which have looked at both phrases, and come to some interesting conclusions.

This article looks at the cases in New Zealand and England and suggests some ways of ensuring the contract accurately reflects both parties' intentions.

NEW ZEALAND CASES

The definition "best endeavours" was considered in *Hospital Products Ltd v United States Surgical Corp Ltd* (1984) 156 CLR 41 as cited and approved by Williams J in *Artifacts Design Group v NP Rigg Ltd* [1993] 1 NZLR 196, at 228 the Court held:

> an obligation to use "best endeavours" does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more.

Williams J found that to use best endeavours is "... to use all its efforts and skills ... to the extent that it was reasonable to do so in the circumstances ...".

In terms of "reasonable endeavours" there appears to be no case directly on point. *Anchor Butter Co Ltd v Tui Foods Ltd* [1993] 3 NZLR 124, summarising and affirming *Silhouette International Gesellschaft mbH v OHL Corp Ltd* (HC Auckland CP 1090/90, 27 June 1991) had to decide what was "reasonable notice".

The Court held that what was "reasonable" must be determined in the light of the circumstances at the time, and not from the circumstances at the time the contract was made and in the light of the interests of both contracting parties.

The New Zealand approach in respect of "best endeavours" and "reasonable" is consistent with the English. Therefore, as New Zealand does not have an established line of cases contracting the meanings of "best endeavours", "reasonable endeavours" and "all reasonable endeavours", the English cases in this area are of particular relevance.

It is however important to remember, that all phrases used must be interpreted in accordance with the wording surrounding them. Their use could therefore be coloured by the contractual clauses around them.

REASONABLE ENDEAVOURS

Any phrase involving the word "reasonable" conjures up images of the "reasonable man" on the Clapham omnibus, busy listening into other peoples' commercial negotiations. In *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* (*The Times*, 13 November 1986, CA), Standard Life was a large commercial landlord. UBH supplied central-heating, and agreed to supply Standard Life's development properties with heating. Part of the agreement was an incentive payment of £1000 per annum, for Standard Life to "use its reasonable endeavours" to procure its tenants to use only the heating provided by UBH.

In fact the tenants were dissatisfied with the cost and quality of the UBH services, and one tenant insisted on only leasing the property if UBH heating was not included. They were in the wooden pallet business, and would burn broken pallets for heating. UBH claimed that by granting the lease on those terms, Standard Life had not used "reasonable endeavours". The English Court of Appeal held Standard Life was not in breach.

Two other tenants refused to maintain the heating covenant in their leases – both refusing to use UBH after repeated problems and high costs. Standard Life did not enforce the heating covenants, and UBH also claimed this was a breach of its obligations to "use its reasonable endeavours". Again, the Court held there was no breach.

Crucial to the Court's findings were that Standard Life did not act in bad faith. Standard Life did try to both procure the two rebel tenants to use UBH services, and to have the lease with the third tenant contain the heating covenant.

It was this effort that persuaded the trial Judge that Standard Life had discharged its obligation to use "reasonable endeavours". While it could have done more – for example sue the two rebel tenants, improve the heating system itself, insist on the heating covenant or not lease the property – that did not mean it had not acted reasonably. The Court found it would probably not have made much difference in any event.

The trial Judge held "reasonable endeavours" to be "appreciably less than best endeavours". The Court of Appeal upheld the decision. Croom-Johnson LJ stated:

> Whether the action which was not taken would have made any difference must always be a factor to be

> considered in deciding if the defendant's endeavour was reasonable or not. But if the evidence clearly shows it would have made no difference at all, the Court only with great persuasion would be induced to say that if they were not to take it, it would be unreasonable. There might even be a case where there was a prospect that a course of action could produce a certain result but for other reasons it would still be reasonable not to take it. It must be a question of fact in every case.

Standard Life was therefore entitled to balance their own commercial considerations against their "reasonable endeavours" obligations. They were entitled to consider the direct costs they could face, their reputation as a landlord, uncertainty in getting enforcement of covenants etc and decide whether or not to pursue a course of action.

From *UBH v Standard Life* "reasonable endeavours" simply means "an honest try". Any financial or practical impediment could justify taking no positive action. Certainly only minimal effort is required.

This approach is also consistent with other cases:

- In *Flower v Allan* (2 H&C 688), in the context of an obligation to use "reasonable efforts" to serve a writ, "reasonable" was held to mean reasonable according to the actual facts of the case. It did not mean reasonable according to the facts of the case in the mind of the person obliged to make the efforts. In other words "reasonable" is an objective standard.
- In *P & O Property Holdings Ltd v Norwich Union Life Insurance Society* [1993] EGCS 69, the House of Lords held that an undertaking to use "reasonable endeavours" to obtain a letting is not the same as promising to agree the terms of the letting. In particular the undertaking should not be construed so as to produce an unworkable or uncommercial situation.

Therefore, the circumstances at the time must be looked at to determine whether the obligator has at least considered using certain efforts and then honestly balanced those efforts against their own commercial considerations.

Possible problems

Viewed in that light, the English case *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] CLC 329 does conform. However, *Phillips* does add a new note of warning in relation to "reasonable endeavours" clauses as they may be unenforceable if the meaning is uncertain when read in context. The facts of that case centred around an agreement to jointly develop a North Sea gas field. Enron was to sell the gas produced at the site to Phillips over the course of 18 years.

The agreement was a true cooperative venture. Enron and Phillips were obliged to:

- use "reasonable endeavours" to coordinate construction of their respective facilities;
- use "reasonable endeavours" to agree (not less than 30 days in advance) when deliveries should commence. A long-stop date was also prescribed;
- use "all reasonable endeavours" to ensure each of their respective facilities were completed by the agreed date for delivery commencement.

Phillips was obliged to use "reasonable endeavours" to nominate the quality of gas required, and Enron would use "reasonable endeavours" to supply. Both parties were obliged to act in "good faith" to each other.

The parties constructed the facilities but in the interim the price of gas had fallen. Phillips refused to agree to an early commencement date for deliveries – leaving the long-stop date when they had to commence purchasing. Enron sought a declaration that this failure to agree to an earlier date on the grounds of commercial considerations breached the obligation of using "reasonable endeavours".

At first instance, Coleman J held that while it was settled law that a mere agreement to agree is not enforceable (which includes using reasonable endeavours or best endeavours to agree), applying the principle in *Didymi Corp v Atlantic Lines and Navigation Co Ltd* [1968] 2 LI Rep 108 and *Sudbrook Trading Estates Ltd v Eggleton* [1983] 1AC 444 where the contract contains sufficient indication of objective criteria to enable that which has to be agreed or calculated to be arrived at by the parties or, if they are unable to agree, by a Court or arbitrator, the provision may be treated as enforceable. Whilst recognising that the relevant provision in the contract was itself entirely silent on what criteria (if any) were applicable, he nonetheless held that such criteria were inherent in the mutual obligations provided for in the agreement as a whole.

Therefore, the entire cooperative approach coloured the ability of Phillips to allow their own commercial interests to override the obligation to use "all reasonable endeavours" to agree an earlier delivery date.

> It is to that objective [ie avoiding delay and coordinating efforts] that the various qualified obligations to use reasonable endeavours are directed. If the scope of the contractual choice under the agreement provision included an unfettered entitlement to withhold agreement for commercial considerations, that would be entirely inconsistent with the purpose to which those qualified obligations were directed. The unfettered power to delay the commencement of the normal regime under the [agreement] would appear to be highly improbable alongside the other terms of the contract.

The Court of Appeal rejected this approach. While agreeing that all phrases must be viewed in light of the subject matter, contractual setting and other circumstances, there was nothing that denied Phillips from taking into account its own commercial interests. As Kennedy LJ held:

> I find it impossible to say that they [the contract clauses] impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed everything else other than technical or operational practicality, when deciding how to discharge his obligation to use reasonable endeavours to agree to a commissioning date prior to 25 September 1996. If the obligation were to be strait-jacketed in that way, that is something which to my mind would have been expressly stated, and ... this is not a situation in which it would be appropriate for the Court to imply a term, not least because it is unnecessary to do so for purposes of business efficiency. The fall-back provisions expressly state what is to happen if no early commissioning date is agreed.

This decision certainly is in line with the previous cases, especially the result in *UBH* (which was previously decided, yet was not referred to in *Phillips*).

One additional and crucial line of reasoning in the case comes from Potter LJ. While agreeing with the reasoning of Kennedy LJ, he went on to state that even if the consideration of the financial interests were excluded from "reasonable endeavours" a Court would not be able to enforce the requirements of "reasonableness" as it is too uncertain in the absence of strict criteria to measure it against.

> Finally, the unwillingness of the Courts to give binding force to an obligation to use "reasonable endeavours" to agree seems to me to be sensibly based on the difficulty of policing such an obligation, in the sense of drawing the line between what is to be regarded as reasonable or unreasonable in an area where the parties may legitimately have differing views or interests, but have not provided for any criteria on the basis of which a third party can assess or adjudicate the matter in the event of dispute. In the face of such difficulty, the Court does not give a remedy to a party who may with justification assert, "well, whatever the criteria are, there must have been a breach in this case". It denies the remedy altogether on the basis of the unenforceability in principle of an obligation which may fail to be applied across a wide spectrum of arguable circumstances. This case seems to me to afford a good example of the wisdom of that approach.

As it was held by the Court of Appeal that the contract in *Phillips* did not reveal any express or implied criteria, His Lordship found that:

> The standard of fairness and reasonableness is an objective criterion to which the Court is frequently willing to resort when determining a price or other sum not specifically agreed but readily assessable by reference to market rates and prices in the relevant sphere. No such straightforward or well-established exercise arises in a "one-off" case of this kind, in which no criteria have been specified and there are a variety of considerations which may legitimately operate in the minds of the parties in relation to their ability or willingness to agree upon a specific date.

This approach seems to suggest that for a "reasonable endeavours" clause to ever be enforceable, then there must be some clear criteria to measure against. Otherwise the "objective test" will fail since there are so many considerations which could apply to any given situation.

This entails setting out in a contract exactly what each party must do to satisfy the obligation of "reasonable endeavours" to avoid the possibility of unenforceability.

All reasonable endeavours

A useful analysis of whether there is any difference "reasonable endeavours" and "all reasonable endeavours" can be found in the judgment at first instance in *UBH*.

In *UBH v Standard Life* counsel for the plaintiff was forced to concede that "the phrase 'all reasonable endeavours' is probably a middle position ... implying something more than reasonable endeavours but less than best endeavours". Rougier J went on to state "I think that 'reasonable endeavours', the phrase more commonly considered" and went on to talk of a balancing act whereby the defendants were:

> obliged to put in one scale the weight of their contractual obligation ... and in the other they were entitled to place all relevant commercial considerations, including ... the cost and uncertainties of any proposed litigation, and the expense to them occasioned by [the fulfilment of *all* reasonable endeavours].

Therefore, each case will require all those endeavours which the obligations in it merit, balanced against all the commercial reasons not to pursue those endeavours. Those obligations requiring "all reasonable endeavours" will rank midway between those requiring "best endeavours", and those requiring "reasonable endeavours".

Significantly, after the Court of Appeal decision in *Phillips*, another Court of Appeal case held that an obligation of using "all reasonable endeavours" was enforceable.

In *Lambert v HTV Cymru (Wales) Ltd* (*The Times*, 17 March 1998, CA), a series of agreements granted HTV the exclusive copyright in the cartoon characters "The Furlings". One of the assignment provisions contained the undertaking that HTV would "use all reasonable endeavours" to obtain for Lambert first rights of negotiating any book deals from any new assignee. HTV sold the rights without including any such obligation.

The Court of Appeal held the phrase "all reasonable endeavours" was not unenforceable for lack of certainty. As Marmitt LJ said:

> there was all the difference in the world between the contract itself [and whether that was enforceable as an "agreement to agree"] and a contractual obligation to use all reasonable endeavours. The latter made it quite clear what a contracting party was obliged to do.

This was in spite of a "wide range of goals at which the endeavours were to be directed".

It would appear if Potter LJ's reasoning in *Phillips* is to be followed, then "all reasonable endeavours" will not fall into the same category as "reasonable endeavours". It should therefore be enforceable even though no specific criteria are set down in the contract.

BEST ENDEAVOURS

If the situation for "reasonable endeavours" is now uncertain in light of *Phillips*, at least the phrase "best endeavours" is still available.

One of the earliest English cases on the meaning of "best endeavours" was *Sheffield District Railway Co v Great Central Railway Co* (1911) 27 TLR 451. GCR agreed to use its "best endeavours" to develop rail traffic for the District Railway. In considering whether GCR had properly used its best endeavours, the Judge held:

> We think "best endeavours" means what the words say; they do not mean second best endeavours ... they cannot be construed as meaning that the Great Central must give half or any specific proportion of its trade to the Sheffield District. They do not mean that the Great Central must so conduct its business as to offend its traders and drive them to competing routes. They do not mean that the bounds of reason must be overscored with regards to the cost of the service; but short of these qualifications the words mean that the Great Central must, broadly speaking, leave no stone unturned to develop traffic on the Sheffield District line.

The Court held that "best endeavours" creates a "quasi-judiciary position ... similar to that of a bailiff or agent".

This exceptionally high test has however been read down in subsequent cases.

In *Monkland v Jack Barclay Ltd* [1951] 21 KB 252, the defendant had agreed to use "best endeavours" to obtain a car for the plaintiff by a certain date. The Court found that the defendant had used best endeavours, largely because it had been continuously in touch with the manufacturer supplying the car and had "persisted to the end": "best endeavours" did not require the defendant to breach its own retail agreement with the manufacturer or to act in an uncommercial or fraudulent manner.

Pips (Leisure Productions) Ltd v Walton (1980) 43 P&CR 415 also considered "best endeavours" when looking at a vendor's actions in relation to completing a sale by a certain day. The Court held:

> "Best endeavours" are something less than efforts which go beyond the bounds of reason, but are considerably more than casual and intermittent activities. They must at least be the doing of all that reasonable persons reasonably could do in the circumstances.

In that case the Court held that the vendors' substantial delay was a breach of their "best endeavours" obligation. If they did have a problem with that date, then the "best endeavours" obligation includes a duty to seek agreement to have the date extended at an early stage.

In *Rackham v Peek Foods Ltd* [1990] BCLC 895 a covenant in an acquisition agreement obliged the directors of a merchant bank and another company who were purchasing shares in a property company from Rackham (and others) to use their "best endeavours" to get their relevant shareholders to approve the purchase. Initially, the directors did advise their shareholders to support the acquisition, but the government announced tax changes affecting property companies. The directors subsequently advised their shareholders to reject the transaction.

The Chancery Division held the directors had not breached their "best endeavours" obligation – even though they had expressly told their shareholders to not approve the deal. As Templeman J held:

> it does not seem to me that the "best endeavours" covenant ... was broken by any recommendation made by the directors to their own shareholders. Of course, directors normally recommend a conditional agreement because otherwise they would never have allowed the company to enter into the agreement itself. But, if, after the date of the conditional agreement, the directors consider that the bargain has become unacceptable from the point of view of the shareholders, it is the duty of the directors so to advise the shareholders and that advice by the directors does not constitute a breach of the "best endeavours" covenant by the company ... they were nevertheless entitled and bound to give honest advice ... and could not be in breach of their covenant if they gave honest advice, albeit that the advice resulted in the agreement failing to become unconditional.

The "fiduciary duty" from *Sheffield District Railway* must therefore be read subject to other existing duties or obligation.

In *IBM UK Ltd v Rockware Glass Ltd* [1980] FSR 335, IBM was obliged to use its "best endeavours" to obtain planning permission for a new property development from the local authority. After considering IBM's application, it was refused. IBM did not appeal, and Rockware Glass (who had a contract with IBM relating to the development) sued for breach of their "best endeavours" obligation.

The Court of Appeal held that the words should be given "their clear, primary and natural meaning". IBM to fulfil its "best endeavours" obligation must take all steps:

> in their power which are capable of achieving the desired results. ... steps which a prudent, determined and reasonable owner, acting in his own interests and driving to achieve that result, would take.

IBM had breached its obligation. IBM did have to appeal the planning decision from the local authority. The main reason was the balancing of the expense of taking an appeal (fairly significant costs) and the overall cost of the development planned (very significant investment). *IBM* suggests that all steps within reason and available to it at the time need to be taken to ensure "best endeavours" are performed.

This approach was supported in the case of *Midland Land Reclamation Ltd v Warren Energy Ltd* (20 January 1997 QB), Official Referee). Midland managed a landfill and agreed to use its "best endeavours" to maintain, develop and operate the site to extract methane gas for Warren Energy. While the argument centred around the science of methane production (an emerging industry speciality), the Court rejected the suggestion that Midland had failed to meet the test.

Importantly, the Court held the test must be applied at the time of the alleged default to see if such efforts were being used. No evidence was before it that the efforts were not up to "best endeavours" standard. As Judge Bowsher QC held:

> It is clear that a "best endeavours" provision is sufficiently certain to be enforceable: *Walford v Miles* [1992] 1 All ER 453 at 138C of the former report. "Best endeavours" imposes a duty to do what can reasonably be done in the circumstances and the standard of reasonableness is that of a reasonable and prudent board of directors acting properly in the interests of their company; *Terrell v Mabie Todd & Co 69 RPC 234, [1952] WN 434* at 435; *Pips (Leisure Productions) Ltd v Walton* at 420/1. "Best endeavours means what it says – it does not mean second best endeavours": *Sheffield District Railway v Great Central Railway.*
>
> I reject the submission made on behalf of the defendants that "best endeavours" obligation is the next best thing to an absolute obligation or a guarantee. I would not go so far as to agree with counsel for the plaintiffs that "best endeavours" must be construed in the light of the art at the time of the contract, but it must at least be construed in the light of the art as it developed from time to time during the life of the contract. It would be quite wrong to say that in the light of all the expert evidence produced at the trial one should use hindsight to judge the "best endeavours" during the course of the contract. The use of methane gas in the way envisaged by this contract is a very recent development. But [the relevant clause] does, amongst other things, require the plaintiffs to use their best endeavours to "develop" the system.
>
> To be satisfied of a breach of a "best endeavours" clause by one party or the other, I would wish to hear evidence that in the light of the knowledge available at the time of the alleged default the party alleged to be in default was culpable.

Therefore, at the time of the alleged breach it must be measured to see if the obligated party is indeed "leaving no stone unturned". It will then depend on what could reasonably have been done at that stage, considering all countervailing duties and obligations.

Overall, this is certainly consistent with the approach taken in New Zealand in *Hospital Products.*

CONCLUSION

It is important to remember all phrases must be interpreted in context, and the above analysis must always be viewed in the circumstances and drafting of a particular contract.

However, it would appear that essentially the definition of the phrase "best endeavours" means what many had thought "reasonable endeavours" meant.

Summary Chart

"ENDEAVOUR" CLAUSES – UK CASE SUMMARY

	Enforceable	Obligation level	Meaning
Reasonable endeavours	• Now uncertain (*Phillips*); • Need to set out in contract criteria to be measured against, otherwise may not be enforceable (*Phillips*).	• Very low (*UBH*); • "Appreciably less than best endeavours" (*UBH*).	• An honest try. Can not act in bad faith; • Objective test, can apply any commercial or other consideration in whether or not to exercise any endeavour at the time; • Can include not acting at all, or deliberately acting against the other party's interests if justified or"reasonable" at the time.
All reasonable endeavours	• Yes (*Lambert*).	• Low (*UBH* – first instance, *Lambert*); • Between "reasonable endeavours" and "best endeavours" (*UBH* – first instance).	• Again, must act in good faith; • Objective test, can apply any commercial or other consideration in whether or not the exercise any endeavour at the time; • Probably a greater range of possible actions may need to be considered than mere "reasonable endeavours". Same balancing act between contractual obligations and commercial considerations at the time is available.
Best endeavours	• Yes (*Walford*).	• Moderate; • Well short of absolute obligation (*Midland*).	• "Leave no stone unturned" but again balanced against any countervailing duty, obligation or commercial interest; • Take all steps a prudent, determined and reasonable person would take in the same situation; • More than a casual or intermittent activity. Must notify as soon as possible if a definite problem arises; • Duty to do what can reasonably be done in the circumstances at the time.

Note that all clauses need to be interpreted in context. ***This chart can only be used as a guide.***

"Best endeavours" means some honest and positive effort, but must be balanced against any other duty or commercial interest. Action, if required, should be taken, unless prohibited by other considerations. The test is quite simply what a reasonable person should do in that situation, at that time after considering all the circumstances.

If the approach from the English Court of Appeal is followed in New Zealand, "reasonable endeavours" will have some difficulties. Commercial considerations can easily remove the obligation to adopt a course of action, providing the party is not acting in bad faith. Only very minimal effort may be required, if it at all. There is also the added complication that Courts may not wish to determine whether the test has been passed if clear criteria are not specified in the contract itself. This only adds to the uncertainty.

"Reasonable endeavours" seems from the English cases not to mean an obligation to act particularly "reasonably" (as used in normal everyday speech) to the other party.

When this is contrasted with "all reasonable endeavours", then the possible argument of non-enforceability seems to be solved. However, the similar minimal effort as "reasonable endeavours" would be required, but it is likely a greater number of possible courses of action should be considered under an "all reasonable endeavours" clause.

The solution to all of the judicially created uncertainty is to draft into any agreement the actual intention of the parties – what they mean by "reasonable endeavours", what are the "reasonable" criteria to be met, and the considerations a "best endeavours" approach should weigh up.

Very few contracts do address these issues at present. Yet with the extensive use of these phrases, (often as a "fall-back" position or for ease in drafting) the potential for misunderstanding or argument is widespread. ❑

MENTAL INJURY AND ACTIONS FOR DAMAGES

Professor Stephen Todd, University of Canterbury

looks at latest twists in the development of ACC

Actions claiming damages for psychiatric injury pose one of the more problematic issues of duty in the law of negligence. Decisions in England show the Courts attempting, arguably with very limited success, to formulate principles which will allow recovery in deserving cases yet which will not extend liability too far. In New Zealand, by contrast, the common law is relatively undeveloped. The difficulties have been considered in some first instance decisions, but not yet by the Court of Appeal. However, new developments in this field seem very likely. Since 1992 there has been only limited coverage for mental injury under the accident compensation scheme and, consequently, the possibility in some circumstances of bringing actions for damages at common law. Now, in *Queenstown Lakes District Council v Palmer* (CA 83/98, 2 November 1998) and *Brownlie v Good Health Wanganui Ltd* (CA 64/97, 10 December 1998), the Court of Appeal has sought to explain how far mental injury is covered by the accident compensation scheme and how far actions for damages for such injury can be maintained. It is clear from *Queenstown Lakes*, the reasoning in which is entirely convincing, that the statutory bar is less extensive than some had thought. Unfortunately the reasoning in *Brownlie*, decided one month later, is much harder to support and, indeed, is hardly consistent with the earlier decision.

These cases were decided in relation to the Accident Compensation Acts of 1972 and 1982 and the Accident Rehabilitation and Compensation Insurance Act of 1992. On 1 July 1999 the provisions of the Accident Insurance Act 1998 which are the equivalent of those which have been under consideration by the Court of Appeal come into force. The wording of the new Act differs from its predecessor to some extent, but this probably does not make a difference to its coverage.

BACKGROUND

Claims for mental injury originally were included within the ambit of the accident compensation scheme. The Accident Compensation Acts of 1972 and 1982 provided for cover where a person suffered personal injury by accident, which was defined to include the physical or mental consequences of the injury or the accident. In *ACC v E* [1992] 2 NZLR 426 the Court of Appeal held that these words covered a person who suffered a mental breakdown as a result of being sent by her employer to attend a highly stressful management course. Gault J affirmed that the mental consequences of an accident (the cause of which did not have to be unexpected or undesigned) were included, whether or not there was also physical injury. It would be a strange situation, he thought, if cover for a person suffering serious mental consequences caused by an accident depended on whether or not some physical injury, however slight, also was sustained. His Honour was not persuaded by the argument that if there was cover then no distinguishing line could be drawn to exclude a whole range of dramatic experiences where the emotional distress had significant mental consequences, for example trauma through sitting examinations or receiving bad news. Cover was appropriate and this conclusion would not necessarily open the floodgates. Each case would require consideration in the light of established principles.

The consequence of this interpretation was that the bar on bringing actions for damages for personal injury which was imposed by s 5(1) of the 1972 Act and s 27 of the 1982 Act extended to include claims for mental injury standing alone. The scope of the coverage for mental injury was such that there was no room for any claims for compensatory damages falling outside the legislation where the common law might give a remedy.

ACC v E was one of the decisions of the Courts which the government of the day regarded as having taken too wide an interpretation of the 1982 Act and as having contributed to the escalating costs of the scheme. Claims for compensation for mental injury accordingly were targeted when the coverage of the scheme was cut back in the Accident Rehabilitation and Compensation Insurance Act 1992. As we shall see, the Act draws precisely the distinction which Gault J had been concerned to reject.

THE ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT 1992

Mental injury (defined in s 3 as meaning a clinically significant behavioural, psychological or cognitive dysfunction) is compensatable under the 1992 Act where it constitutes "personal injury" which is covered by the Act. Section 4(1) provides a definition of personal injury:

> For the purposes of this Act, "personal injury" means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by s 8(3) of this Act.

There is cover for personal injury where s 8(2) applies (namely, where the injury is caused by an accident to the person concerned, or is caused by an occupational disease, or is medical misadventure, or is a consequence of treatment for personal injury covered by the Act), and also under s 8(3) (which extends cover to personal injury which is mental or nervous shock suffered by the victims of the sexual offences

which are listed in the First Schedule to the Act). So there is cover for mental injury in two categories of case, where the mental injury is an outcome of physical injury covered by s 8(2) (for example where a road accident victim suffers mental as well as physical injury), and where s 8(3) applies (for example where a rape victim suffers mental injury even without any physical harm). In these cases compensation for the injury can be sought under the Act. At the same time, any proposed actions for damages are caught by the bar in s 14(1). This provides:

> No proceedings for damages arising directly or indirectly out of personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is suffered by any person shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

Section 14(2) makes it clear that the bar cannot be avoided by a failure to make a claim, or a purported denial or surrender of rights under the Act, or a lack of entitlement to any particular benefit under the Act.

THE ACCIDENT INSURANCE ACT 1998

A person (or an "insured" in the new vernacular) who suffers mental injury is covered by the Accident Insurance Act 1998 on similar bases to those under the 1992 Act. By s 29(1) "personal injury" means:

> (a) The death of an insured; or
> (b) Physical injuries suffered by an insured, including, for example, a strain or sprain; or
> (c) Mental injury suffered by an insured because of physical injuries suffered by the insured; or
> (d) Mental injury suffered by an insured in the circumstances described in s 40
>
> Section 29(2)-(4) proceeds to explain what is and is not personal injury in certain other defined categories of case –
>
> (2) "Personal injury" does not include personal injury caused wholly or substantially by gradual process, disease, or infection unless it is personal injury of a kind described in s 39(2)(d), (e), (f) or (g);
> (3) "Personal injury" does not include a cardio-vascular or cerebro-vascular episode unless it is personal injury of a kind described in s 39(2)(h) or (i);
> (4) "Personal injury" does not include –
>
> (a) Personal injury caused wholly or substantially by the ageing process; or
> (b) Personal injury to teeth caused by the natural use of those teeth.

By s 39(2) an insured has cover for a personal injury which is caused (a) by an accident, or (b) by medical misadventure, or (c) by treatment for personal injury, or (d) by a work-related gradual process, disease or infection, or by gradual process, disease or infection that (e) is caused by medical misadventure, or (f) is consequential on personal injury for which the insured has cover, or (g) that is consequential on treatment for personal injury for which the insured has cover, or by a cardio-vascular or cerebro-vascular episode (h) caused by medical misadventure or (i) which is work-related. By s 40 there is cover for mental injury caused by an act performed on, with or in relation to the insured which constitutes one of the criminal offences listed in Schedule 3 to the Act. These are the same offences as in the 1992 Act, with the addition of assault on a child or by a male on a female, and of certain offences relating to female genital mutilation.

Possibly we do not need to worry unduly about *Brownlie*. If the mental injury was covered for accident compensation in any event, the question whether it was barred had it not been covered might be thought to be academic. Yet in different circumstances a victim might suffer mental injury which is not an outcome of concurrent physical injuries, or, under the Accident Insurance Act 1998, is not suffered "because of" the physical injuries. Whether a claim for such injury can be maintained at common law does matter. Perhaps, then, the Court of Appeal should look afresh at the *Brownlie* reasoning.

The bar on actions for damages for personal injury is continued and is found in s 394(1). This has been simplified a little and provides:

> No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any Court in New Zealand, for damages arising directly or indirectly out of –
>
> (a) Personal injury covered by this Act; or
> (b) Personal injury covered by the former Acts.

There are anti-avoidance provisions in s 394(6), which correspond to those in s 14(2) of the 1992 Act.

Queenstown Lakes DC v Palmer

There has been controversy as to how widely the bar on actions can operate. Of course, mental injury may be suffered in circumstances which are not covered by the 1992 or 1998 Acts. Examples are where a person is shocked after narrowly avoiding personal injury or after seeing another person suffer death or injury. One might think that in cases such as these the way is opened automatically to the possibility of a common law action, but the Courts have not always accepted this. The argument was that where a person suffered psychiatric injury caused by seeing the death or injury of another, which injury was not itself covered under the Act, the claim nonetheless was for damages arising "indirectly" out of personal injury suffered by "any person" to which s 14(1) of the 1992 Act still applied. (See, for example, *Kingi v Partridge* HC Rotorua, CP 16/93, 2 August 1993, Thorp J; *McDonnell v Wellington Area Health Board*, HC Wellington, CP 250/93, 16 December 1993, Master Thomson; (but cp *McDonnell v Wellington Area Health Board*, HC Wellington, CP 250/93, 16 December 1994, Gallen J); *McMeekin v Boyce* HC Palmerston North, CP 5/97, 11 December 1997, Master Thomson.) The consequence of this view was that the plaintiff could recover neither accident compensation nor common law damages, a result which one would think could not be right. Fortunately the Court of Appeal has confirmed in *Queenstown Lakes* that it was not right, and that in cases of this kind s 14 did not apply.

Mr Palmer was visiting Queenstown with his wife. They chose to take a rafting trip down the Shotover River. The venture was operated by Danes Shotover Rafts and approved by the Queenstown Lakes District Council. At a critical point the raft capsized and Mrs Palmer was thrown into the water and drowned. Mr Palmer was not physically injured but he suffered serious mental injury; post-traumatic stress disorder, major depressive disorder and an associated speech impediment. He brought an action in negligence

against the operator and the council and the question arose whether his claim was barred by the ARCIA 1992.

The Court of Appeal held that the action was not barred. Thomas J, delivering the judgment of the Court, said that s 14(1) had to be interpreted as a whole having regard to the context of the subsection, the scheme and purpose of the Act and the consequences of the interpretation under consideration. When that was done Parliament's intention became clear. Section 14(1) had to be read in conjunction with s 8(1) and (2), which defined the cover for personal injury. The scope of the Act, in other words, was coterminous with cover provided under the Act. Section 8 had an obvious import for s 14(1), when referring to proceedings for damages arising out of personal injury "covered by this Act". Further, the reference to an action being brought by "any other person" was added out of an abundance of caution to cover a claim by the victim's personal representatives.

In the instant case the proceedings did not arise indirectly out of Mrs Palmer's death, so as to bring s 14(1) into operation, because Mr Palmer was not seeking damages for his wife's death. The relevant injuries for which he was seeking damages were the mental injuries which he himself suffered as a result of the alleged breach of a duty of care owed to him by the defendants. Mrs Palmer's death was simply part of the sequence of events which provided the factual basis for his claim. If Mrs Palmer had survived, and had not herself suffered personal injury, but Mr Palmer had still suffered shock at the sight of his wife being thrown into the water, his cause of action would have remained intact. In the view of the Court, therefore, the relevant personal injury for the purposes of s 14(1) must be the personal injury for which damages are sought.

Turning to the policy of the Act, Thomas J noted that persons covered under the Act were denied access to the Courts at common law in return for the perceived advantages of the statutory scheme. The exchange was frequently spoken of as a social contract or social compact. In the case of mental injury, His Honour said that the express provision in s 4(1) providing cover for mental injury only where that mental injury was the outcome of physical injuries to the person had to be taken as showing an intention that the corresponding right at common law would be revived where the mental injury was not an outcome of physical injuries suffered by the plaintiff. His Honour said also that the purpose of the provision barring common law claims was to prevent persons who suffered personal injury being compensated twice over, not to prevent them recovering any compensation at all. He continued:

It follows from what has been said that the application of the Act and the corresponding scope for common law proceedings automatically adjust as and when the scope of the cover provided by the Act is extended or contracted. To the extent that the statutory cover is extended, the right to sue at common law is removed; to the extent that the cover is withdrawn or contracted, the right to sue at common law is revived.

Any other view would lead to fundamental injustice, whereby a person was deprived both of compensation and of damages. It would also lead to the anomaly that the availability of a claim for damages would depend on whether the claimant suffered trauma from his or her own peril or from peril to another person and, if the latter, whether that person was actually injured or merely endangered. Only if the other was killed or injured would the claim be barred. However s 14 did not cover this case either, and Mr Palmer's claim for damages thus could proceed.

One result of Mr Palmer's case may be that a secondary victim not covered by the accident compensation scheme might recover substantially more by way of common law damages than the primary victim could obtain by way of compensation under the Act. This might be perceived to be an injustice or anomaly, but Thomas J remarked that damages and compensation were never intended to correspond. Uncertainty of recovery at common law was exchanged for a no-fault scheme which included provision for rehabilitation as well as ongoing earnings-related compensation. Disparity between the two would always exist. So too would difficulties necessarily arise out of the line between injuries arising from accidents and other injuries and conditions which were not attributable to accidents.

persons covered under the Act were denied access to the Courts at common law in return for the perceived advantages of the statutory scheme. The exchange was frequently spoken of as a social contract or social compact

Brownlie v Good Health Wanganui Ltd

Following *Palmer*, the relationship between the accident compensation legislation and the common law seemed to be straightforward. If the injury was covered by the scheme then a claim for damages was barred, and if it was not then the claim could still be maintained. *Brownlie* decided shortly afterwards, complicates matters.

The eight plaintiffs were patients at a hospital operated by the first and second defendants. They all underwent surgery at the hospital and had tissue samples taken for pathological examination to determine whether cancerous or pre-cancerous conditions were present. The examinations were carried out by the third defendant, who was a doctor employed either by the first or the second defendant. In each case the doctor's report was that no malignancy or pre-cancerous condition was detected. The hospital authorities subsequently discovered that a large number of patients may have been misdiagnosed as a result of the third defendant's reports, and the plaintiffs became aware that they might be included in those who were potentially at risk. After further testing they were advised that they were in fact suffering from various forms of cancer. The plaintiffs instituted proceedings in negligence, seeking compensatory damages for mental injury occurring on ascertaining the possibility of the incorrectness of the diagnosis and continuing after ascertainment of the fact of misdiagnosis. Exemplary damages also were sought.

Henry J, delivering the judgment of the Court, considered first the position of the two plaintiffs who underwent their respective surgical procedures after the coming into force of the 1992 Act. The first inquiry was whether they suffered personal injury which was covered by that Act. Under s 8(2)(c) cover extends to personal injury which is medical misadventure as defined in s 5. Medical misadventure means personal injury resulting from, inter alia, medical error, which in turn means the failure of a registered health professional to observe a reasonable standard of care and skill. It does not include a failure to diagnose correctly or a

failure to treat unless the failure is negligent. Cover accordingly existed if the plaintiffs had suffered personal injury as a result of a negligent medical error. The definition of personal injury in s 4 (as to which see above) covered the physical injuries to a person, and while "physical injuries" were not further defined it was common ground that the plaintiffs did suffer physical injury in the form of progression of the cancerous condition. His Honour noted that s 4 also includes as personal injury mental injury which is the outcome of physical injury, but that counsel for the plaintiffs presented his case on the basis that the mental injury alleged was not within that description. He recognised that the formulation of the claim was expressed in wide terms, and included mental consequence of a kind which appeared to be outside that description.

Proceeding, therefore, on the basis that the plaintiffs suffered physical injury and had cover under the Act for that reason, the further question was whether the present claims were for damages arising directly or indirectly out of the physical injury. The plaintiffs alleged, inter alia, that they had suffered shock, canceritus and post-traumatic stress disorder arising from their reliance on the incorrect advice that they did not suffer from cancer, and from their knowledge that they did not receive necessary treatment or monitoring, that they faced uncertainty as to their future health and wellbeing and that their reliance on the defendants was misplaced. In Henry J's view the answer was clear. Once the initial period of being in a state of uncertainty was over, it seemed unarguable that the mental consequences which flowed thereafter arose at least indirectly from the physical injury, even if it could be said that they were not the outcome of physical injury. The damages claimed therefore arose from medical misadventure which was covered under the Act. There was undoubted causal connection. Section 14(1) accordingly operated as a bar to common law claims for those damages. The fact that cover did not extend to the particular kind of injury for which compensation was sought did not assist. So for these mental consequences (assuming, but without deciding, that they were not the outcome of physical injury) the plaintiffs were entitled neither to relief under the Act nor to damages at common law.

Different considerations appeared to apply to the mental injury suffered as an immediate result of a plaintiff ascertaining that she may have been one of a number of patients who had been misdiagnosed. There was a relatively short period of time when the plaintiffs, and other patients, were in a state of uncertainty as to whether or not, contrary to the earlier advice, they were in fact suffering from cancer. Henry J said that he did not see how their mental stress could be said to have arisen from any physical injury. Until confirmation one way or the other the same kind of mental injury would be suffered whether or not there had in fact been physical injury. The actual existence of physical injury would be irrelevant. There was, therefore, a very limited kind of damages claim which might be available to the plaintiffs which was not barred by s 14 and which could be incorporated in their pleading by way of amendment.

Henry J proceeded to consider the position of the plaintiffs to whom the 1972 or the 1982 Acts applied. Under the 1972 Act, s 5 barred proceedings for damages where there was cover under the Act. Cover extended to personal injury by accident, which included both physical and mental consequences and medical misadventure. The mental shock caused to one plaintiff whose misdiagnosis occurred while the Act was in force was included, even though the shock was not suffered until a much later date. The events giving rise to cover for medical misadventure had occurred, and the fact she was unaware of those did not affect her entitlement under the Act. The relevant provisions of the 1982 Act, which were referable to the other five plaintiffs, for present purposes were indistinguishable from the 1972 Act. The same consequences followed. They were entitled to cover and their claims for damages were barred.

> **Brownlie** ***accepts that there may be cover under the statute, so an action for damages is barred, but no relief under the statute. In such a case the victim fails under both heads***

Finally Henry J looked at the transitional provisions in s 135(5) of the 1992 Act. The effect of this was that there was cover under the 1992 Act only if the personal injury by accident suffered by the pre-1992 plaintiffs was also personal injury that was covered by the 1992 Act. There was such cover and, save for the "window" of uncertainty, the claims were, therefore, barred.

Evaluation

Brownlie accepts that there may be cover under the statute, so an action for damages is barred, but no relief under the statute. In such a case the victim fails under both heads. This seems an unhappy conclusion, especially in the light of *Queenstown Lakes* where it was contemplated that cover and claims for damages do not overlap and that the latter take up where the former ends. Certainly, as a matter of good policy it would be appropriate to interpret the statute so far as possible to avoid the result in *Brownlie*. And arguably another, much more satisfactory, interpretation was open to the Court.

Section 4 provides, inter alia, that "personal injury" means the physical injuries to a person, and clearly these include the continuation of a disease. This is implicit in the provision in s 5(7) that medical misadventure covers a negligent failure to diagnose or to treat. So the plaintiffs had cover for those physical injuries. But, accepting for the moment the Court's assumption that the mental injury was not the outcome of the continuation of the cancer, the plaintiffs did not, as the Court recognised, have cover for this mental injury. This was not personal injury within s 4(1) of the Act and thus the cover for personal injury in s 8(2) could not apply. A victim can suffer both physical and mental injury and have cover for one but not the other.

This brings us to consider the interpretation to be given to the words of s 14(1), which is where we part company with the Court of Appeal. The question is whether the claim for mental injury constituted "proceedings for damages arising directly or indirectly out of personal injury covered by" the three Acts. As we have seen, Henry J said that it seemed unarguable that the mental consequences arose at least indirectly from the physical injury. This contention, however, is by no means unarguably right. Perhaps the proceedings might be said to have arisen indirectly out of personal injury covered by the Act, but the question should be whether the damages arose out of that personal injury. In *Queenstown Lakes* the proceedings in a sense arose indi-

rectly out of Mrs Palmer's death, but, as the Court of Appeal emphasised, the personal injury for the purposes of the s 14 bar must be the personal injury for which damages are sought. So the question in *Brownlie* was whether the plaintiffs' claims were proceedings for damages arising directly or indirectly out of personal injury for which the plaintiffs were seeking damages and which were covered by the Act. Seemingly they were not. On the contrary, and still making the same assumption as the Court, the personal injuries for which the plaintiffs were seeking damages were mental injuries which were not covered by the Act. And while the damages can arise "directly or indirectly" out of the relevant personal injury, this makes no difference to the argument. In *Queenstown Lakes* Thomas J noted that in *Donselaar v Donselaar* [1982] 1 NZLR 87 at 115 Somers J had held that these words had been included ex abundanti cautela so as to include, for example, the recovery of funeral expenses. So they remove any doubt about the recovery of compensation for different forms of compensatable loss. Seemingly they were not meant to cover a claim for damages which is not covered and is not compensatable.

Surely, then, the mental injury was at least partly "the outcome" of the untreated cancer, in which case it also was covered for compensation

We have seen that in *Queenstown Lakes* the purpose of s 14(1) was said to be to prevent double recovery, not to prevent any recovery at all. But this is precisely what has happened in *Brownlie* as regards the plaintiffs' mental injuries. The injustices and anomalies which the Court of Appeal in *Queenstown Lakes* was concerned to avoid have reappeared. Yet it is hard to see any relevant distinction between the two cases. In one the physical injury was suffered by a third person and in the other it was suffered by the plaintiffs, yet in neither case did the damages for the mental injuries arise out of personal injury covered by the Act.

Thus far we have accepted the assumption in *Brownlie* (which the Court did not decide) that the mental injury was not the outcome of the physical injury. However, it is very doubtful whether this can be right. Seemingly counsel for the plaintiffs argued as he did out of a wish to obtain damages rather than accident compensation. But it appears manifest that the cause of the plaintiffs' mental injury was the misdiagnosis and their knowledge of the fact that they had cancer which had not been treated. The pleadings are founded on this crucial fact. Indeed we have seen that the Court drew a distinction between the period of uncertainty, when there was no cover, and the period after cancer was confirmed, when there was. Surely, then, the mental injury was at least partly "the outcome" of the untreated cancer, in which case it also was covered for compensation. Presumably even now the victims can assert this and seek to gain compensation for any mental injury which qualifies within the meaning of the Act.

On either argument, that a claim for damages for mental injury which is not an outcome of physical injuries is not covered by the legislation and is not barred, and that on the facts the mental injury was an outcome of the physical injuries and thus was compensatable, there is no gap where neither remedy is available. This must be a desirable conclusion.

Accordingly, mental injury is covered where it is suffered because of physical injuries suffered by the insured or where it is caused by one of the specified criminal offences. Coverage under the former category raises the question as to the meaning of "physical injuries". Under the 1992 Act the Courts accepted (for example in *Brownlie*), that the concept must include disease, and probably the position is the same under the 1998 Act. On the face of it this might seem hard to accept, for "physical injuries" (which is not separately defined) seems to mean only injuries coming about by an accident, including, in the example in s 29(1)(b), a strain or sprain. Disease, infection, heart attacks and strokes are then dealt with separately in s 29(2) and (3), and are treated as personal injury where they are covered by s 39(2). However, s 39(1) provides that an insured has cover for a personal injury if (a) he or she suffers the personal injury in New Zealand on or after 1 July 1999, and (b) the personal injury is any of the kinds of injuries described in s 29(1)(a), (b), or (c), and (c) the personal injury is described in any of the paragraphs in subs (2). Seemingly, "physical injuries" in s 29(1)(b) must, therefore, include the instances of personal injury by gradual process, disease or infection and personal injury by heart attacks or strokes which are covered in s 39(2)(d)-(i). If these are not physical injuries they are never covered for compensation. It follows that mental injury also is covered where it is suffered "because of" personal injury which is covered by any of the categories in s 39(2).

LOOKING AHEAD

We know at least that the accident compensation scheme does not bar claims for mental injury where the victim fears for his or her own safety but is not in fact injured, or where the victim fears for the safety of another. In cases such as these the principles of the common law in this country still need to be determined. In England the House of Lords has limited recovery by drawing a distinction between "primary" victims (persons at risk of injury) and "secondary" victims (who suffer mental injury through fear for others) (as to which distinction see *Page v Smith* [1996] 1 AC 155), and laying down special conditions applying to claims by the latter. In particular, there needs to be a relationship of love and affection between the plaintiff and the primary victim, the plaintiff should be proximate in time and space to the happening of the accident, and the mental injury should come about through a sudden assault on the nervous system. (See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.) Recently Their Lordships have declined to treat rescuers as falling into a special category and so, applying the preceding principles, they must either have been in danger or be able to satisfy the *Alcock* requirements before a claim for mental injury can succeed. (See *Frost v Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509.)

Whether too much importance has been attached to the primary/secondary distinction, how the line between the two categories ought to be drawn, and, crucially, whether the rules which apply to secondary victims can sensibly be justified have all attracted continuing controversy. (See especially the Report of the English Law Commission Liability for Psychiatric Illness Report No 249 (1998).) It seems likely that the New Zealand Courts are going to need to find answers to these difficult questions. ❑

WHITHER ACC?

Dr Bill Maughan, Bournemouth University

reviews the Roundtable report

Accident Compensation: Options for Reform (report prepared by Credit Suisse First Boston for the New Zealand Business Roundtable Nov 1998) (The report) examines the policy issues surrounding the Accident Rehabilitation and Compensation Insurance Scheme (ACS).

The report concludes that the ACS is fundamentally flawed and needs to be radically reformed. The main recommendations are that optimal insurance arrangements require termination of the statutory monopoly of the Accident Rehabilitation and Compensation Insurance Corporation (the Corporation), privatisation of the Corporation and its liabilities, and an end to most mandatory insurance coverage. In addition, there should be minimal prudential regulation of insurers, and the Crown should have freedom to specify the conditions under which people may use the road network or take employment with the Crown. There will be a need for the same safety net for all hardship cases whether due to accident or sickness, and for targeted assistance to low income earners to pay insurance premiums. Optimal liability rules will require a deliberative work programme to ascertain which arrangements might best protect sanctity of contract, and provide protection of the community from unduly capricious tort actions, in the event of a return to a right to sue. The report also recommends that there should be no blanket restoration of the right to sue for losses from personal injury by accident without widespread agreement that contracting parties should be allowed to contract out of detailed regulation affecting medical, workplace and product safety.

To economists the analysis and the recommendations on insurance coverage will seem mostly unexceptionable. They are consistent with the criteria of economic efficiency. The recommendations on liability rules may be more contentious: they involve changes to social rules, the desirability of which cannot be judged solely on efficiency criteria.

However, to many non-economists, particularly to those who view accident compensation and torts as opportunities for the redistribution of wealth, both the analysis and the recommendations may appear threatening. In particular the report will appear to be advocating an end to statutory compensation for accidents without an unequivocal return of the right to sue – a concept that is anathema to many. Thomas J writes that "The principal injustice which would result if the interpretation contended for by the appellants were to be accepted would be that ... [the respondent] would have lost the right to sue for damages without obtaining the corresponding right to recover compensation under the statutory scheme". (*Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549, 556.)

The widespread belief in this trade-off, a residual but strong commitment to contracting with the state, and the dislike of many for the use of efficiency criteria in relation to accident (and sickness) victims, may mean that the proposals are not given the consideration they deserve. This article presents and evaluates the substance of the report. The viewpoint in the article is that of an economist interested in property rights and committed to economic efficiency, but conscious of the limitations to efficiency.

BASIC CONCEPTS OF LIABILITY

Entitlement

Calabresi and Melamed, authors who oddly are mentioned only in passing in the report (p 97) state in their famous article "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harvard LR 1089 that "The first issue which must be faced by any legal system is one we call the problem of 'entitlement'". They go on to say (p 1090) that, "When a loss is left where it falls in an auto accident, it is not because God so ordained it. Rather it is because the state has granted the injurer an entitlement to be free of liability and will intervene to prevent the victim's friends, if they are stronger, from taking compensation from the injurer. The loss is shifted in other cases because the state has granted an entitlement to compensation and will intervene to prevent the stronger injurer from rebuffing the victim's requests for compensation" (p 1091).

In short, the essence of an accident (or of sickness) is that costs are to be borne. The incidence of those costs, and the liability for those costs, depends partly on how they fall in some "state of nature" and partly on the way in which that liability is assigned, and the incidence shifted, by the state.

Fault and no-fault systems

The report is principally concerned with rules of obligation under tort and contract: some small references to criminal law are made. The rules are categorised in various ways, not all mutually exclusive. The first major division used in the report is between fault and no-fault systems of liability.

Fault systems use concepts of negligence and/or of breach of duty to apportion liability, and hence to decide who shall bear the costs of an accident. Fault systems tend to be used for large classes of accidents involving parties who might be held responsible (employers, producers, motor vehicle drivers). Under such systems, liability is assigned according to tort rules. The report distinguishes in its analysis between three main sets of tort rules: *no-liability* rules (employers, producers and their insurers are not liable for the costs of accidents); strict liability rules (defendants cannot plead non-negligence, but can deny causation and claim contributory negligence by the plaintiff); and negligence

with due care rules (injurers only liable under a negligence rule if their level of care is less than the due care).

In contrast, under a no-fault system, no proof of fault is required. Liability for the costs of an accident is assigned to a particular party or to their insurer in a manner which amounts to a rule of absolute liability. No fault systems may therefore be used to cover almost every type of accident. The system that has evolved in New Zealand post 1972 (the ACS) is a no-fault scheme which was intended to cover all accidents and in which absolute liability rested with the state.

Costs under either a fault or a no fault system may be borne directly by the individuals concerned, or indirectly by larger groups through insurance, or through levies and taxation. Insurance may be provided by the state or by the private sector, and the responsibility to insure (and the extent of insurance) may be mandatory or voluntary. Payments from any scheme may be made in lump sums or as income. In New Zealand the ACS is a state owned and operated scheme funded from assessments imposed on potential victims and defendants. Lump sums are not now paid.

Consensual situations and accidents to strangers

The second major set of categories used in the report involves concepts of consensual situations and accidents to strangers: and of unilateral and bilateral accidents. Consensual situations refer to those situations in which it may be possible for two or more parties to contract with each other. The definition in the report includes those situations in which one person or "firm" may contract with many people to use a facility such as the road network or a sporting facility. Thus consensual situations, as defined in the report, can be as diverse as employer-employee relationships, product liability, non-urgent medical cases, and accidents on government owned roads. Such situations in theory allow the possibility of contracting out of some tort liabilities, although much "contracting out" is currently prohibited. Accidents to non-consenting strangers do not allow this possibility. They can however arise as a result of a consensual agreement where a party not privy to the agreement is injured as a result of the actions of those who are privy.

In both consensual and non-consensual situations there is the possibility that there may be asymmetric information between potential injurer and potential victim about the level of risk involved in any activity: and in all situations there is the possibility that neither injurer nor injured may accurately assess the risk.

Within these categories, unilateral accidents are defined as those in which only the potential injurer's level of care can affect the probability of the accident: bilateral accidents are those situations in which the level of care of both injurer and victim affect the probability of the accident.

ECONOMIC EFFICIENCY: NORMATIVE AND POSITIVE USES

The report proper begins at s 2 with a discussion of economic efficiency. Understanding the normative and positive uses of efficiency is central to understanding the report.

Economic efficiency is an abstract concept that derives from a theoretical model of resource allocation. The model is one of resource allocation by voluntary exchange in competitive markets with undistorted prices acting as signals to the various economic agents. In this simplified model a number of basic assumptions are made. All exchanges are costless: ie there are no transaction costs and information is freely available. Economic agents are assumed to be rational, to be motivated by a desire to maximise utility, and to be subject to constraints imposed by income, technology, and social controls. Property rights are assumed to be established, prior to exchanges taking place. If all profitable exchanges are made in competitive resource and goods markets, then economic efficiency, a normatively desirable state of affairs, is said to result.

The theoretical model, despite its abstraction, has considerable prescriptive and predictive value. It needs, however, to be used with caution, particularly when used normatively, since distributional issues, and justice criteria, as well as efficiency criteria, influence a society's choice of entitlement. Moreover efficiency is essentially a utilitarian concept that cannot provide guidance on non-utilitarian matters. (See Maughan and Copp "The Law Commission and Economic Methodology: Values, Efficiency and Directors 'Duties'" (1999) 20 *Company Lawyer* 124, 128 for discussion of the limitations to efficiency.)

The report emphasises the limitations to the use of efficiency, and although noting that many fairness issues can be addressed successfully by using efficiency criteria, states (p 7) that it is not advocating efficiency as the sole criterion for guiding policy in relation to the ACS: tax and welfare measures (distributional policies) may need be used in conjunction with any proposed reforms. Nevertheless the report assigns a high weighting to efficiency.

In relation to the positive (predictive) use of the model, further difficulties arise. The discrepancies between real life and the theoretical constructs of the model are considerable. For instance, in the real world, resource allocation takes place in response to commands (within government and firms) as well as in response to voluntary exchange, property rights are not necessarily well defined, nor is information costless. The model cannot be used without qualification.

Economists react to these discrepancies in two ways. The first is to assume that the traditional model is somehow incorrect or incomplete. This view rejects the classical economic model with its assumptions about voluntary exchange and perfect competition, and sees the world in terms of imperfect and unstable markets that need to be regulated, particularly in the light of alternative values such as equity and justice. This view tends to be intolerant of many real life business practices, and to be pro-regulatory and interventionist. The second is to assume, on the basis that the model derives from inductive observation, that efficiency is normatively desired as a dominant goal and that economic agents are continually striving in real life to attain efficiency. Observable practices are therefore attempts to attain efficiency. In this view, practices that differ from the model are interpreted as "least inefficient" attempts to deal with real life problems absent in the model, such as information and transaction costs. This view is tolerant of many real life business practices, and is opposed to excessive regulation and intervention. The report adopts the second view.

INSURANCE ARRANGEMENTS

The ACS

In s 3, the report looks at the history of the ACS, its structure and methods of funding. The scheme was designed in 1972 to provide a comprehensive programme to protect New Zealanders from losses incurred due to personal accident and injury. It was claimed that its monopoly structure would lead to cost savings, encouragement of rehabilitation, and

development of a centralised data bank on accidents. This no-fault scheme replaced statutory legislation on workers' compensation, compulsory third party motor vehicle insurance, and a criminal injuries compensation scheme. Rights to sue for personal injury caused by accident, except for exemplary damages, were abolished. Lump sum payments, with a maximum of $17,000 could be made under certain circumstances. The scheme was initially intended to be fully funded through a mixture of payroll taxes, car registration fees, and general tax revenue. However the levies were set at below the level necessary for full funding and above the level necessary for pay-as-you-go funding. Significant reserves built up and in 1984 the ACS was changed to pay as you go. Unfunded liabilities now amount to $7.5 billion.

From its inception the scheme has been criticised on several grounds, not only for efficiency reasons, but also for distributional reasons: it provides differential treatment for instance, for accident victims compared with the sick. The main criticisms on efficiency grounds have been directed towards the monopoly structure, and the compensation-based rather than insurance-based approach of the ACS. The report outlines some of these criticisms, and states that there are fundamental problems with the present structure which create inefficiencies and higher than necessary expenditures. The costs of inefficiencies are borne ultimately, not by businesses and by some abstract "state", but by consumers, employees, and taxpayers. The problems stem from the fact that the ACS, despite the 1992 reforms, is still only partly insurance-based. Moreover, the level of cover is mandated, there is no competition for accident insurance, and the institutional framework is flawed.

The conclusion that the ACS is fundamentally flawed is unexceptionable to economists since it merely states that the ACS is by definition inefficient. Its structure and mode of operations are inconsistent with both the requirements of first-best efficiency, and also with the requirements of second-to-best "least inefficient" criteria. Specifically, the Corporation is a monopoly which does not appear to be justified in terms of a trade off between productive efficiency (lower costs due to economies of scale) and allocative efficiency (producing what consumers want): the ACS distorts prices by cross-subsidisation: the Corporation mandates rather than allows voluntary contracting: the Corporation has mixed objectives and is not liable to the normal market checks imposed on firms.

Options for reform

Section 4 argues that there are three possible options for reform, all of which could be undertaken regardless of any changes to liability rules:

- Option one: privatising the corporation, removing mandatory first party insurance and opening the market;
- Option two: privatisation and competition, but retention of mandatory first party insurance; and
- Option three: competitive tendering.

The report recommends Option one.

From an efficiency perspective, option one is the first best. As long as the Corporation is subject to political interference, and as long as it is protected from the normal disciplines of product and share markets, it cannot deliver through time and at least cost the products required by consumers. However, this first-best solution may not be achievable, as the report itself recognises, mainly because a reliance on voluntary insurance runs into three real-life difficulties. First, some people will choose not to insure themselves (ie they will assess risk incorrectly). Second, some people will be unable to afford insurance. And third some risks may be unforeseen or uninsurable. None of these difficulties are easy to resolve, and the report is somewhat misleading in claiming (p 60) that "[m]andating the level of accident insurance would be likely to reduce the level of welfare to below the level that would be attained in a voluntary market". This is an unprovable assertion. If it were this simple, then the problems of funding pensions and long-term care could easily be resolved. While it is true, as the report argues, that these difficulties can be ameliorated through devices such as targeted income measures (or vouchers), improvements in information markets, disincentives to free ride and so on, the knowledge that the state would always, for moral reasons, provide some basic safety net for the uninsured, would create opportunities for free-riding. Gains from voluntary contracting could therefore be eroded by the costs of free riding and/or of monitoring. Nevertheless, there are sound efficiency arguments for keeping the level of mandatory insurance and of regulation to a minimum, and for allowing individuals to decide voluntarily the level of insurance they wished to purchase, since different individuals with different risk incidences and different risk preferences are likely to wish to choose different mixes of market insurance, self-insurance, and self-protection (risk reduction). Efficiency gains would arise from allowing individuals to choose the mixes appropriate to themselves. Even under a mandatory insurance scheme there would be gains from allowing individuals to top up and to alter the product mix above some minimum level.

Implementation issues

The report continues in s 5 with a discussion of the implementation of the various options. Belief in Option one is reaffirmed, and an analysis made of how the Corporation may best exit the market. Transitional options such as retention of the ACS as an SOE are rejected on the basis of experience with other SOEs. The report concludes that, if efficiency is to be the outcome of the exit, then the essential aim of any exit scheme should be that all insurers, including the privatised Corporation, operate on a competitively neutral basis. This, again, is simply a logical extension of the efficiency argument, even though it implies, as the report explains, that the unfunded liability should be corporatised and privatised separately from the ACS, in order to maintain competitive neutrality.

However, pursuit of an efficient outcome does not automatically justify the corporatisation and privatisation of either the ACS or of the unfunded liability. Privatisation involves a change to property rights, and property rights are assumed to be fixed in the efficiency model. Changes to these rights are therefore exogenous to the model and cannot be justified solely on efficiency grounds: distributional and justice issues will intrude. This intrusion will likely surface as criticism of the proposal by those who view the unfunded liability in terms of injured people rather than of a financial liability. Such critics may also resist the notions that governments can fail, or that privatised treatment and rehabilitation can lead to better as well as cheaper patient care than public treatment and rehabilitation.

While the report is aware of this potential criticism, and refers to the need for any potential buyer of the unfunded liability to be "reputable" and with a "high credit rating" (p 82), the report's proposals would be more convincing and probably more acceptable if they were backed by

empirical evidence on the relative costs and benefits of private versus public treatment and rehabilitation of accident victims.

LIABILITY RULES

The final section of the report addresses the issues of optimal liability rules, and of a possible return of the right to sue in the event of privatisation. It is in this section that extensive reference to the article by Calabresi and Melamed would have clarified the vexed issues of the "right to sue", and of changing liability rules. Calabresi and Melamed make it clear that there is no basis for the concept of a right to sue, or indeed of any liability rule, that can be independent of the state, unless one affirms a rule that "might is right". Hence, there is no inalienable right to sue: the concept of a trade-off is a myth. The fact that the New Zealand state moved from a fault system, with a right to sue under statute and common law, to a no fault system with no right to sue, does not mean that the state need move back to the previous system if the no fault system is abandoned. The state can choose any system that it likes on the basis of any criteria. The questions that need to be addressed, therefore, in relation to any reform of liability rules, are what criteria should be used in assessing liability options, what weights should be given to the chosen criteria and what options most closely conform to the chosen criteria and the balance of the criteria.

Had the report taken this approach, s 6 could have distinguished more clearly, as it does not, between its normative advocacy of efficiency as the dominant criterion for deciding what we want to do about accidents, and its positive use of efficiency as a model for evaluating various rules. The closest the report comes to admitting this difference and to justifying its use of efficiency in both normative and positive ways, is the reference at p 97 to earlier work of Calabresi by Professor Richard Epstein of the University of Chicago (a major contributor to the report). The report quotes Epstein as saying "Around 1970 Guido Calabresi came out with a famous minimisation formula [in relation to the costs of accidents] in which the objective was to minimise the sum of the costs of accidents, the costs of administration, and the costs of prevention, subject to a constraint of justice. We have now waited over twenty five years to see how that last constraint influences the first three elements of the analysis, and no one has yet provided a strong and clear example of where four variables give us a better analysis than three". In other words Epstein's view, which is adopted by the report in s 6, is that in choosing liability rules, the dominant, perhaps the only criterion the state should (normatively) use is that of economic efficiency. If this criterion, and its high weighting are accepted, then the analysis of liability rules in s 6 follows automatically.

The practical and jurisprudential implications of this approach are considerable, as the report recognises in its analysis and recommendations. All private law concerned with obligations in relation to accidents, whether under common law or statute, contract or tort, together with some criminal law, would need to be reconsidered in the light of efficiency objectives. Doctrines of privity and remoteness would need to be rethought. The sanctity of contract would need to be reaffirmed, as would the conditions under which one could contract out of tort obligations. Moreover these changes would just be first order changes.

Second order changes would involve the development of least inefficient adjectival law to complement the substantive rule changes. Professor Epstein's belief ("Do Judges need to know any economics?" [1996] NZLJ 235) that such adjectival law would develop efficiently and logically from simple liability rules used by a sceptical and cautious judiciary, ignores the potential for judicial and/or political intervention that is always present. (See *W v W* [1999] 2 NZLR 1 where the attention of Their Lordships is drawn to the Accident Insurance Act 1998, which "... provides that no rule of law shall prevent a person bringing proceedings for exemplary damages even though the defendant has been convicted or acquitted of an offence involving the conduct concerned in the claim".) Caution about change would therefore seem appropriate.

The report is so cautious. Section 6 analyses the efficiency of three tort rules (no-liability, negligence with optimal due care, and strict liability) in a series of situations involving accidents to strangers and consensual situations, and in which the risk depends on either the level of care alone, or on the level of care and the level of activity. Further distinctions are drawn between the activities of individuals and firms, and between situations in which information is more or less imperfect. Section 6 also discusses the efficiency implication of a proposal by Epstein to extend motorists' liability for the damage they cause.

The conclusions reached by the report are in some ways less important than the analyses. Predictably, since an efficiency objective would seek to minimise the costs of prevention, (either ex ante or ex post), as well as the costs of accidents and the costs of administration, the report concludes that tort rules are not necessarily efficacious in all instances, and that a no-liability rule is almost never more efficient than a negligence or strict liability rule. The implications for the ACS are obvious. The report also concludes that a strict liability rule based on a government created road code (the Epstein proposal) could be optimal for road accidents: such a proposal needs further investigation.

Other proposals, on such matters as product safety, safety in employment, and medical safety, will be more contentious. Here, the report is concerned with the high costs of vexatious litigation, with the arbitrary and extensive tort awards that are made in other countries (but not traditionally in New Zealand, as Sir Geoffrey Palmer notes at p 10), with judicial activism, and with the intrusion of the state and of remote third parties into contractual arrangements. The report recommends investigation of measures to extend consensual contracting to optimise assignment of risk. It suggests that no return to the right to sue without measures to affirm the sanctity of contract and of principles of privity, and to prevent capricious and unpredictable tort actions. It recommends investigation of these ideas. It also recommends an initial focus on the Epstein proposal as part of this investigation. There are other proposals.

The investigation is needed. High on the list of priorities should be detailed analyses of the true costs of the present ACS, and a review of the relative costs and benefits of public and privately funded and/or administered schemes of rehabilitation. Further work also needs to be done on the Epstein proposal; on privity and remoteness; and on investigating the extent to which consensual agreement can or should be protected by the sanctity of contract. Much of this work could be done concurrently with privatisation of the ACS and its unfunded liability, although analyses of the costs of the ACS and of various rehabilitation systems would need to precede privatisation. The weighting to be given to efficiency in deciding whether to privatise, and whether to change the liability rules needs more debate. The report is a most interesting document: it should be read. ❑