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LAW SOCIETY BOSSES

Those who question whether law societies should be monopolies will find plenty of ammunition merely by studying the conduct of the presidents and chief executives of law societies.

A remarkable example was given at the New Zealand Law Society Conference in Rotorua during the session on the regulation of the legal profession. The session was remarkable enough in itself. It had initially been proposed by a group of lawyers, the Law and Economics Association, who offered to provide the speakers. They were quickly told that there would have to be a balancing speaker, something the gender equity stream evidently did not require, and eventually the session was hi-jacked by the Law Society.

Present at the session, but reduced to speaking from the floor, was the Chief Executive of the Legal Practice Board of Victoria. His absence from the panel of speakers was itself sufficient evidence that the Law Society did not want the matter discussed in an informed way.

Also present was the Chief Executive of the Law Institute of Victoria, formerly the equivalent of the Law Society for solicitors only and now one of the Registered Professional Associations allowed under the model administered by the Legal Practice Board. This gentleman announced from the floor that New Zealand should not follow the Victorian route and allow competing professional associations. This was because if the press came to him and asked for a comment on some matter, they would then go off to other groups who would say something different.

In fact your editor made the point that contestability of opinions was a good thing in a paper on the regulation of the legal profession given at the Commonwealth Law Conference and subsequently subjected to sustained attack by Mr Haynes.

The example given was that of Hong Kong where the Law Society, representing solicitors, had rapidly caved in on the composition of the Court of Final Appeal, whereas the Bar (not members of the Law Society) had continued to protest. Had there been a monopoly Law Society, there would have been no protest.

The point would appear to have been lost on at least one person present, Mr Robert Sayer, President of the Law Society of England and Wales.

At Kuala Lumpur, Mr Sayer gave a speech in which he said that all was well so far as ethics and standards were concerned in the English profession. He supported this by giving examples of the fatuous, trivial, mad and irrelevant complaints regularly received by the Office for the Supervision of Solicitors.

But this itself was fatuous. One could do the same with the police. Many complaints against police are fatuous, trivial, mad or irrelevant and a fair few malicious into the bargain. One cannot reason from this to the conclusion that all is well in the police.

Mr Sayer has now excelled himself. He returned to England with your editor's words ringing in his ears and publicly argued that the Law Society should regulate and represent anyone and everyone he could think of. This included not only barristers, as here, (and who reacted with what passes in England for fury) but also legal executives, licensed conveyancers, arbitrators and anyone else who might compete with lawyers.

It does not take much intelligence to realise that if a monopoly regulator regulates several groups, one of which is much larger than the others, regulation will quickly come to favour the large group at the expense of the others. The English Bar saw through this and promptly pointed out that this was what the Law Society was up to.

But the mere fact that the leader of such an organisation can make such a claim and apparently expect to be taken seriously is itself a good reason for not allowing monopolies of this sort to develop.

Here the Law Society is the monopoly regulator of barristers and solicitors and has considerable sway over legal executives. The Auckland District Law Society has done its bit to control conveyancers by embroiling them in constant litigation before the Courts and the Trans-Tasman Tribunal set up under the MRA Act. The costs are born by the individual conveyancers, of course, but not by the ADLS hierarchy which spreads the cost over all Auckland lawyers, many of whom actually object to the course the ADLS has taken.

Nor is our Law Society exempt from making imperialist claims. Recently, there was talk of regulating ADR practitioners, but no one has managed to work out how to define a "mediator", so that issue has gone quiet.

The Law Society is making concessions in terms of voluntary membership and relaxation of other conditions, but is determined to maintain its position as monopoly regulator. One of its reasons is its role in defending the Rule of Law. This claim might be more credible if the Law Society and the supposedly independent Law Foundation had not imported as keynote speakers at the last two Law Society Conferences, (and then brought one back for another bite at the cherry at Victoria University) people dedicated to attacking the equal application of the law. It seems that there is more than one definition of the Rule of Law around, in which case it might be a good idea to have more than one Law Society to defend it. ❑

SHARED OWNERSHIP OF LAND

D F Dugdale, The Law Commission

introduces the Commission report

"Tenancy in common" Lindley LJ once observed "is a tenure of an inconvenient nature, and it is unfit for persons who cannot agree amongst themselves". (*Leigh v Dickenson* (1884) 15 QBD 60, 69 (CA), in which the Court held that a tenant-in-common had no claim to contribution from co-tenants to the cost of repairs. One of the recommendations in the Law Commission's report published in November, *Shared Ownership of Land* (NZLC R59), would reverse that rule in relation to access strips. But this is not the only context in which tenancy in common is inconvenient. Another is cross-leasing.

Blessed as we are with the Torrens system we are perhaps less on our guard against problems of land title than we ought be. The cross-lease system began as an ingenious solution to the impasse between on the one hand the town planning doctrine that we all for our own good need to live in homes surrounded by open space, the theory presumably being that mowing lawns and growing cabbages would keep us out of public houses, and on the other the rather different demands of the market.

But it is a flawed solution which should have been abandoned when the Unit Titles Act 1972 made a better answer available. There are now some 39,000 individual flats owned within about 15,000 cross-lease arrangements in Auckland City alone. Problems with additions to the original buildings are well known. Still awaiting us are the difficulties likely to arise when buildings reach the end of their economic lives. Most cross-leases though ostensibly for 999 years are in terms the effect of which is that when the building goes the lease ends. What are my rights as flat owner then, particularly if I own less than a moiety and so cannot compel a sale of the entire parcel? These matters can of course be sorted out by agreement, but what of "persons who cannot agree amongst themselves"? There is a choice between waiting till those problems are upon us or attempting a stitch in time.

The Law Commission's view expressed in its preliminary paper in January 1999 (NZLC PP 35) and now repeated in its final report is that no more cross-leases should be permitted. This view was almost universally supported. The report proposes a machinery for conversion of cross-leases (to sub-division or unit title) and recommends a mandatory conversion after a date to be fixed by order-in-council such date to be not sooner than ten years after enactment.

The difficulty with mandatory conversion is of course the cost. It can be argued that ownership of a dwelling carries with it the cost of upkeep, and that in this respect there is no essential difference between repairing a title and repairing a roof. But the reality is that many cross-lease owners are the reverse of well-to-do.

The Commission sets out various devices it proposes to keep down the expense but there remains an inescapable minimum of survey and legal costs. The point of the ten years' delay is that all who buy within that period should know of the expenditure lying ahead and that those who remain owners over the ten year period will have had ample time to make their financial arrangements.

The Commission proposes that conversion to sub-division not be constrained by Resource Management Act requirements. Whatever the town planning objective of the initial prohibition of sub-division it was effectively defeated by the cross-leasing. The territorial local authority having allowed this should not now be permitted to impose requirements or extract payments as a condition of conversion. The authority need only receive the equivalent of a notice of sale in order to keep its records current.

The report recommends various amendments to tidy up the Unit Titles Act. It would make it clear that there can be a unit comprised solely of air space. There is a proposal for greater flexibility in relation to unit entitlements. At present entitlements, fixed by valuation at the outset, are the basis for apportioning levies which is not always appropriate. The cost of running a lift for example may confer no benefit on a ground floor owner. There is in the Act no recognition that values of units may change during the life of a building. A view may be built out, or a ground floor unit may increase in value as a result of changes in permitted use. An amendment is proposed to enable unit entitlements to be varied by unanimous agreement and contributions to be levied on a basis that takes into account the benefit of the expenditure.

These two changes enable the staged development provisions of the 1979 amendment to be replaced by a neater scheme utilising the redevelopment provisions of s 44. There is a provision enabling dispensing with the body corporate where there are six units or less all on the same storey. Freeholding would be permitted in the same circumstances. There are proposals intended to make it easier to recover moneys due from owners in default.

The recommendation is made that jurisdiction under ss 42 and 43 (relating to rules) be transferred to the District Courts so that we no longer require a High Court Judge to decide such questions as whether a Rhodesian Ridgeback dog 22 inches high is a small domestic animal.

The report has had substantial input from surveyors and from lawyers practising and academic. I hope it will be seen as a solid piece of work that will help tidy the corner of the law with which it deals. ❑

ELECTRONIC COMMERCE 2

Paul Heath QC and Megan Leaf, The Law Commission

introduce the proposed basic legal framework

Electronic Commerce Part One: A Guide for the Business and Legal Community was largely a theoretical discussion of the law's application to the electronic environment to ascertain whether reform of New Zealand's domestic law was needed. The report aimed to stimulate discussion and called for submissions relating to an extensive range of legal topics. The second report enters the hinterland of improving the lot of users of electronic commerce.

Electronic Commerce Part Two: A Basic Legal Framework (ECom 2) recommends that an Electronic Transactions Act (the proposed Act) be enacted that applies to electronic transactions conducted "in trade"; the term "in trade" being used in the same way as in the Fair Trading Act 1986. The proposed Act will affect the interpretation of existing statutes – much like the Interpretation Act 1999 – and by doing so will remove legislative barriers which specify the form of a transaction. The Commission identified six barriers to electronic commerce as: (a) statutory requirements that certain documents be "in writing"; (b) statutory requirements that the "writing" be "signed"; (c) the need to retain for various purposes "original" documents; (d) statutory requirements in relation to notices and the service of documents (whether by post or in person); (e) statutory requirements for physical presence or attendance of persons when things are done; and (f) the negotiability of electronically generated documents. The proposed legislation removes many of these barriers to electronic commerce and is facilitative in nature. Wherever possible contractual solutions are preferred to legislative solutions.

Electronic commerce transcends territorial borders. An international response to the regulation of electronic commerce is essential. Conflicting approaches between, for instance, New Zealand and Australia would increase the likelihood of Trans-Tasman litigation (ie conflict of laws issues) and thereby stymie the use of electronic commerce. The proposed Act adopts much of the Model Law on Electronic Commerce developed by the United Nations Commission on International Trade Law. Consistency with international regimes will diminish the problems caused by choice of law or choice of forum issues.

By reference to the Model Law, the proposed Act:

- allows parties to opt out of the provisions of the Model Law or vary their application (art 4);
- confirms that information shall not be denied legal effect solely because it is electronically generated (art 5);
- confirms that other terms can be incorporated into a contract by reference (art 5 bis);
- allows an electronically generated message that is "accessible so as to be usable for subsequent reference" to meet the legal requirement of writing (art 6);
- allows electronic signatures to meet the legal requirement of signature if the electronic signature is reliable and performs the function of identification (art 7);
- allows the production and retention of electronically generated messages in lieu of their physical counterpart provided the information is accessible so as to be usable for subsequent reference (arts 8, 9 and 10); and
- institutes default rules as to the time and place of dispatch of electronically generated documents (art 15).

Similar proposals are contained in a Bill currently before the Australian Federal Parliament: the Electronic Transactions Bill to which ECom 2 refers in detail.

Two discrete topics warranting legislative reform separate from the proposed Act are computer misuse and defamation. The chapter in ECom 2 on criminal law discusses what we proposed in our *Computer Misuse* report and explains why a further offence (to those proposed by *Computer Misuse*) of "intentionally and without authority gaining access to data in a computer" is necessary. As for defamation, it is proposed that the definition of "distributor" provided for by the Defamation Act 1996 be amended to make it clear that an ISP is able to invoke the defence of innocent dissemination in appropriate circumstances.

Topics not included in the proposed Act include: enhanced electronic signatures (not provided for by the Model Law or the Australian Bill); allocation of risk (art 13); conflict of laws (Hague Convention on Jurisdiction of Foreign Judgments); and transportation documentation articles 16 and 17. It was decided preferable to defer consideration of those topics as they are still the subject of discussion at international fora. Instead, the Law Commission will continue to participate in such discussion and, if appropriate, recommend augmentation of the proposed Act in its third report on electronic commerce, due to be published late in 2000. The third report will also be informed by submissions received in response to ECom 2.

Remaining parts of ECom 2 focus debate on options for further reform. The report calls for submissions on issues such as: the privacy implications of caching information on a computer; who should be liable for unauthorised electronic banking transactions and whether legislation is, in any event, desirable; whether legislation is required to allow the use of electronic transportation documents; and whether legislation is necessary to provide greater protection against the misuse of information.

The closing date for submissions is 30 June 2000. Copies of ECom 2 are available from the Commission (phone 04 473-3453, fax 04 471 0959 or e-mail: mleaf@lawcom.govt.nz), and can be downloaded from the Commission's web site at http://www.lawcom.govt.nz. ❑

WORLD TRADE BULLETIN

Gavin Mcfarlane, Titmuss Sainer Dechert, London

reviews the NZ v Canada *milk quota case and sleeplessness in Seattle*

NZ EDGES VERDICT OVER CANADA

New Zealand and the United States had both complained to the dispute resolution body of the WTO about alleged export subsidies which they contended that Canada or its provinces had granted through its Special Milk Classes Scheme to support the export of dairy products. Panels were set up under the WTO procedure, and concluded that Canada had in fact acted inconsistently with the WTO/GATT Agreement on Agriculture by providing export subsidies in excess of the quantity commitment set out in the schedule relating to Canada. It was also decided that Canada had, by restricting access to the tariff rate quota for fluid milk to consumer packaged milk for personal use, and limiting it to entries valued at less than $Can 20, acted inconsistently with its obligations under art II:1(b) of GATT 1994. Against these decisions Canada brought an appeal to the WTO appellate body. The decision on the appeal was released in October, and is something of a mixed bag. The appellate body upheld the panel findings that Canada had through the Special Milk Classes Scheme acted inconsistently with its obligations under the WTO/GATT agreement on agriculture by providing export subsidies in excess of the quantity commitment levels specified in Canada's schedule to that agreement. However, it reversed the findings of the panel that Canada had, by restricting access to the tariff rate quota for fluid milk in its schedule to packaged milk imported by Canadian importers for personal use, acted inconsistently with its obligations under art II:1(b) of GATT. Nevertheless, it still maintained the panel's finding that Canada had, by restricting access to the tariff rate quota for fluid milk in its schedule to entries valued at less than $Can 20, acted inconsistently with its obligations under the same article of GATT. On balance New Zealand has come out better than Canada. While the Canadian import regime is largely upheld, Canada has lost on the broader question of its export subsidies.

THE SEATTLE AGENDA

The run up to the Seattle ministerial conference of the WTO has not been auspicious. International trade is an increasingly delicate subject; both the political classes throughout the world, and the increasingly better educated populations which they serve or govern have identified many of the issues at the heart of the next round of GATT negotiations as being crucial to their own prosperity in the new century. Some pressure groups would go further, and say bluntly that depending on the decisions which are taken, the future existence of the human race as we now live our lives is in the balance. Those who practise in the field are well aware that trade ministers of all geographical locations and persuasions are particularly prone to overstating a case. This means that any form of negotiation involving trade is liable to be conducted in a frenetic atmosphere of near hysteria. This is illustrated by the series of bitter disputes between the United States and the European Union in the WTO dispute forum over recent months. Bananas and beef hormones are only the tip of the iceberg. When the genetically modified fat hits the pan, the mother of all WTO disputes is going to break out.

The EU agrees its stand

So far as the member states of the EU are concerned, the first difficulty was to agree among themselves a common agenda for Seattle. In WTO matters, the EU speaks with one voice, but there were quite a number of sticking points to be resolved before this single voice began to be heard. In the run up to the internal negotiations, Germany had been particularly anxious to press for broad recognition of basic employment conditions, while other member states considered that the developing states in the WTO – and they are in the majority – would never accept this. France has traditionally been anxious to preserve the right of a state to maintain its own cultural identity. Paris therefore is especially keen to ensure that the next round of the GATT does not prevent national governments from taking steps to control the amount of foreign audio visual material which is admitted to their media outlets such as cinemas and television. Even if such controls are permitted in the future, the rapid development of the Internet will certainly undermine any such barriers. So the EU has called for a joint standard working forum on trade globalisation and employment; on cultural diversity the member states wish to allow WTO member states to "preserve and develop their capacity to define and implement their cultural and audio visual policies for the purpose of preserving their cultural diversity".

Tough talking ahead

So far, so good. But three main groupings have emerged within the WTO which seem hell bent on getting their own way; both the US, the EU and the majority grouping of developing states have warned that unless they get what they want from the next round of negotiations, the Seattle ministerial meeting is inevitably going to fail. Meanwhile outside, an alliance of charitable and non-governmental organisations is coming together to oppose the whole concept of further trade liberalisation. The EU's attempt to move forward on conditions of employment has run into a brick wall of opposition from the developing block, as had been expected. The pessimists are saying that the EU project has almost no chance of getting on to the formal agenda; some states in this category are contending that labour issues are outside the remit of the World Trade Organisation altogether. Other developing states have put on record their opinion that environmental matters also are outside the mandate of the WTO. Many developing countries say that they are not prepared to accept lectures from the developed world, which they claim achieved its current position partly through the exploitation in earlier decades of its own environment and resources. Amid this turmoil, Mike Moore, as D-G of the WTO, is struggling to bring some order out of

chaos. He is working with a core group of WTO member states to produce some flexibility, and agreement on identifying basic subjects on which all member states would be prepared to begin negotiations – a kind of lowest common denominator.

Outstanding points of difference

These seem to have increased steadily in the run up to Seattle. The EU has indicated that it is not prepared to move far if at all on the alleged protectionism of the Common Agricultural Policy. But the Cairns Group have joined the US in insisting that agricultural topics are right at the heart of the next trade round. This will throw up immense difficulties, as a gulf is opening up between the Cairns/US view that barriers to GM products and crops should be removed, and the hostility multiplying within the electorates of EU member states to anyone and anything connected with the food industry – producers, politicians and food ministries in particular. The clash between the developed and the developing worlds also looms large. Representatives of the latter continue to maintain that there is little interest in their ranks about further extension of free trade principles; they do not consider that the undertakings to remove barriers and reduce trade protection to which they have already signed up have produced any real benefits in their economies. "The wealthy WTO states do not sufficiently take account of the needs of the poorer members" it is said.

Meanwhile, outside the wrangling at ministerial level, a backlash of organisations hostile to the whole concept of globalisation and further freeing up of trade is threatening to disrupt the Seattle meeting with demonstrations against the aims of any Millennium Round. This alliance of charitable organisations and groupings with environmental and humanitarian objectives on their banners has come together to present implacable opposition to further dismantling of the right of nation states to erect protective barriers around their economies. One factor is the fear of job losses; it is notable that following the recent trade agreement between the US and China, voices have been heard claiming that within particular sectors of both economies, there will be substantial losses of employment which could cause embarrassment in both Beijing and Washington.

BANANA TAILPIECE

This epic still rumbles on. In some ways it is becoming a test of the WTO's legitimacy. In a further effort to solve the impasse, the EU Commission has now come up with a proposal which involves it abolishing all banana quotas by the year 2006, and from that date Brussels says that it would operate a tariff only system. In the interim period there would be a regime based on tariff rate quotas. There would be a quota available to the Latin American states, several of which joined the United States in its original complaint to the WTO. This would be allotted on a principle of successful first applications, contrary to the basis which Washington had sought of allocation of licences according to historical commercial activity. But ACP bananas would still have a preferential tariff of up to a ceiling of £275 per tonne, which would in reality mean that a large proportion of these would enter the EU at a nil rate of duty. Whatever the regime which is eventually introduced in substitution for the ones which have fallen foul of the WTO dispute system rulings, there will always be strident critics. The Commission of the EU has twisted and turned to try to protect the old colonies in the Caribbean, but these small independent island economies will undoubtedly cavil at these new proposals, which will leave them fully exposed after the quota system has disappeared after 1 January 2006. This will touch directly on what now looks to become a major issue in the Seattle negotiations. The great banana conflict has mercilessly exposed the weakness of a total free trade system in a number of respects. There remain a number of small underdeveloped economies who have typically only one major export product. That is usually in the agricultural sector, and due to soil conditions and geography, it may be quite impossible to produce at prices which will be fully competitive. Almost always, these local interests will conflict with those of multinational corporations which are seeking the largest possible export markets for their products. These issues will be right at the forefront of the WTO meetings. ❑

LETTER

In May 1998 you published my comments on the Women's Access to Justice Project. They were a summary of points raised in a longer publication available on the Internet at:
http://econ.massey.ac.nz/cppe/ papers/waj1.htm

My main concerns were that the methodology was flawed, the project's reports published to that time contained misleading and inaccurate information, and that the project itself was one-sided advocacy research.

D F Dugdale, Law Commissioner, responded in the June 1998 issue. The response lacked substance, stating only that criticisms should not be made until after the report is published. The report has now been published and is available at:
http://www.lawcom.govt.nz/WALs/NZLCSP1.pdf.

I note that, in his preface to the report, the President of the Law Commission states, "The study has already had considerable effect in bringing the issue to attention and influencing change".

At the top of the Law Commission's web page it describes itself as follows: "The Law Commission is New Zealand's foremost law reform agency, established by statute in 1985 to undertake the systematic review, reform and development of New Zealand law. We are independent and publicly funded, and seek to help make law that is just, principled, and accessible, and that reflects the aspirations of the peoples of New Zealand."

Perhaps we should all be concerned that an agency with such objectives should choose to undertake a project which lays itself open to strong criticism for failing to meet its own objectives. It is of even greater concern that the Commission, rather than answering criticisms, attempts to deflect these criticisms by delaying tactics. On its own admission, the project was already having "considerable effect".

On 27 September 1999 I invited the President of the Law Commission to respond to my criticisms or otherwise explain the Law Commission's position for a forthcoming publication on the quality of policy advice. I have had no response to my letter. I therefore publicly invite a response from the Law Commission and/or from Joanne Morris, ex-Law Commissioner with responsibility for the project, to put its/her case in the forthcoming publication.

Stuart Birks, Director
Centre for Public Policy Evaluation
Massey University

GRADUATE EMPLOYMENT SURVEY 1999

John Caldwell, The University of Canterbury

with information vital to students

Nine years ago, a nation-wide survey of 62 medium to large law firms was published, analysing the importance placed by practitioners on various factors when making the decision to employ a law graduate (see [1990] NZLJ 163). In August this year, essentially the same survey was conducted amongst much the same firms, to discover whether there had been any significant changes in attitudes. The "Staff Partner" of each surveyed firm was asked to assess the relative importance placed on academic grades, degree content, and personal attributes. Questions as to the ranking of Law Schools and starting salaries were included. New questions, reflecting increased student interest in these matters, dealt with the importance attached by practitioners to honours and masters degrees.

As in 1990, students in the Administrative Law class at Canterbury University were surveyed as to their perceptions.

Not scientifically designed, the surveys on both occasions have aimed to expose trends; and while this survey does reveal some attitudinal shifts over the nine years, it also shows a certain constancy in law firm thinking.

SURVEY GROUP AND RESPONSE

Of the 62 firms surveyed this year, 50 replied – a response rate of 80 per cent (cfd 85 per cent in 1990). Of the 62 firms, 15 were from Auckland; 15 from Wellington (including eight national firms with branches in more than one city); ten from Christchurch, seven from Dunedin, five from Hamilton, and two each from Whangarei, Hastings, Palmerston North, Nelson, and Invercargill.

From the written responses, it is clear that in some cases the survey was discussed, either formally or informally, amongst a group of partners; for others, the views expressed were the individual sentiments of the "Staff Partner".

THE QUESTIONS

The Staff Partners and the law students were asked to reply to the questionnaire sent by ticking a box on a scale from "1" (very important) to "5" ("no importance") their responses:

(a) How important in your employment decision are the academic grades of the applicant?

(b) How important in your employment decision are the personal attributes of the applicant?

(c) How important in your employment decision is the content of the degree (eg whether commercial options have been preferred over welfare law options, or vice versa)?

Additionally, the Staff Partners were asked:

(i) Is a student more likely to be employed if he or she has an honours degree?

(ii) Is a student more likely to be employed if he or she has a masters degree?

(iii) Do you have a preference for graduates from a certain Law School?

(iv) If asked, how would you rank the five law schools from "1" (best) to "5"?

(v) What is your normal starting salary for a Law graduate?

THE IMPORTANCE OF GRADES

There has been no shift of significance in the importance attached to grades. Twenty per cent of the respondents ranked grades "1" in importance (cfd 17 per cent in 1990); 66 per cent ranked them "2" (64 per cent); 12 per cent ranked them "3" (17 per cent); and, as in 1990, only one firm ranked them below that level.

A number of recurring comments appeared in this section. It is apparent that grades are used by many firms as the first factor in screening applicants before an interview, with a minimum "B" grade degree being specified by one Wellington firm. However, in the ultimate selection process, grades assume a much reduced significance.

Unexpectedly, outstanding grades were perceived negatively by some firms. One comment was that some of the graduates with the best grades had made "lousy lawyers ... the ability to have a business or practical brain is more important". An Auckland firm expressed a wariness over straight "A" students on the basis of the firm's experience that there was a risk that they did not think sufficiently laterally, and ended up as research rather than transactional lawyers; and a Christchurch firm similarly stated that it would tend to avoid the straight "A" student.

Overwhelmingly, firms expressed the view that personal skills were the critical determinant of a successful lawyer, and that grades generally gave no indication of those personal skills. One Wellington respondent argued, however, that high grades did provide evidence of the diligence that is needed in a busy practice.

HONOURS AND MASTERS DEGREES

The reservations about the significance of grades were reflected in the responses to question as to the importance of either an honours or postgraduate degree. Forty-two per cent of respondents said they would not be more likely to employ a student with an honours degree. A telling 76 per cent said the same of a masters degree.

A clear majority of firms, 58 per cent, do regard an honours degree as an advantage, but that majority is not nearly as compelling as many law students would have

imagined. For firms that did express the preference for an honours student, the intellectual fire-power was not necessarily the dominant consideration. Rather, as one partner put it, honours students tend to be highly motivated and conscientious; and as another said, the honours students should have developed good research skills.

PERSONAL ATTRIBUTES

Consistently with the above, personal attributes are accorded paramount importance. Ninety-two per cent of respondents ranked them "1" in importance, and eight per cent ranked them two. On this matter there has been an apparent strengthening in the importance compared to nine years ago, when 77 per cent of the respondents rated them "1". One Wellington firm said it took matters such as a student's learning ability and knowledge as given attributes, and it focused almost exclusively on personal attributes during the recruitment process.

Communication skills, both oral and written, were the most frequently identified desirable attributes. One Auckland firm complained that too many graduates could not compose a letter, the grammar being "quite appalling". Wide and varied interests, cultural, sporting, or community, were also regarded highly, being seen as indicative of a student's ability to communicate well and relate easily to people. Proffering advice that should appeal to students, one Wellington firm recommended law students to partake of debates, sport, politics, café life, and parties. A number of firms singled out an ability to be a "team player", and placed considerable significance on the student having participated in team sports – one said that in a decade there had not been one occasion where that mind-set had proved to be incorrect.

Many respondents wrote at length on the attributes being sought, and the following is a small but representative sampling: "personal and organisational 'fit' are extremely important"; "secure enough not to have a problem admitting a mistake; ability to work with minimum direction and to seek guidance when necessary"; "being able to keep a number of balls in the air at one time"; "good organisational skills, excellent people skills, and good finishers"; "know when to work late rather than leave when the pressure is on"; "enthusiasm"; "no whining"; "most important of all, high ethical standards".

DEGREE CONTENT

There appeared to be some shift in thinking since the last survey concerning the importance of degree content. This year, 66 per cent of respondents ranked degree content as either "1" or "2" in importance, (43 per cent in 1990), with 18 per cent ranking degree content at "1". Correspondingly, only 34 per cent ranked this at "3" or below, compared with 57 per cent in the earlier survey.

The written comments once again generally expressed a preference for "black letter" or commercial law topics, reflecting the areas in which the firm practised. One Christchurch partner wrote that law practice is more than ever a business, and that the firm would steer clear of a student who was heavily biased towards non-commercial subjects. A Wellington firm observed that degree content is not a problem for most students, because most selected subjects fairly wisely. Some firms expressed a desire for a well-rounded graduate; and a Wellington respondent made the observation that a law degree trains a student to think in a certain way, with much of the content of the more esoteric options not being retained in any event.

LAW SCHOOL PREFERENCE

Nine respondent firms indicated a preference for graduates from a certain law school, four of the five respondent firms in Dunedin so replying, and two of the ten in Christchurch. Only one firm in each of Wellington and Auckland so replied. In 1990, four firms from Christchurch had so replied, three from Dunedin and two from each of Auckland and Wellington. In all cases, needless to say, the preference was for graduates from the local law school. Overall, 82 per cent of the respondent firms expressed no such preference.

In response to the question asking respondents to rank the five law schools, 15 respondents (30 per cent) declined to do so. From the replies that did rank the Law Schools, four law schools fell within a fairly narrow band. One Law School was placed last by 85 per cent of the respondents to this question, but that must be read in the context of a very large majority of firms having no preference for graduates from any particular university.

SALARY

Commencing salaries ranged from $20,000 in one Dunedin firm to a high of $35,000 in one Auckland firm. As in 1990, there are clear regional variations in salary. In Dunedin, the average appears to be $23,000; in Christchurch, $25,500; and in Wellington and Auckland $28,000 (with the larger national firms in Wellington offering, on average, $29,000).

STUDENT PERCEPTIONS

The Canterbury law student responses revealed that the extreme importance placed on personal attributes was not fully appreciated by all students. Only 53 per cent of the student respondents ranked attributes as "1" in importance (cfd 92 per cent of practitioners); and 17 per cent of the students ranked attributes as "3", with no practitioner placing attributes at that middling level.

Similarly some students may not have realised the change in practitioner thinking on degree content. Seventy-two per cent of students rated content at "3" or lower, compared to only 34 per cent of practitioners. A similar percentage of students and practitioners did rate grades as being either "1" or "2" in significance, but students were more likely than practitioners to rank grades as being of first importance – 36 per cent of students compared to 20 per cent of practitioners ranked grades at "1".

CONCLUSION

As was apparent from the previous survey, personal attributes will decisively trump grades in terms of the final selection decision, but good grades do remain important as a screening device for employing firms. The weighting placed on personal qualities and skills, though, has increased in the last nine years, as has the importance placed on the content of the degree. Students, at least at Canterbury, may not be fully cognisant of this. Except for a number of Dunedin firms, the place of graduation is of no significance to employment prospects, but there are definite regional bands of commencing salary, which may balance out when differences in regional living costs are taken into account.

For many students, the question of future legal employment is an issue of real anxiety, and a number of practitioners expressed sympathy for students facing such a constricted employment market. This survey shows that active involvement in sporting, cultural, or community activities is probably the best strategy that a student can adopt to reduce stress and to maximise employment prospects. ❑

LEGAL WRITING

Bill Sewell, Wellington

urges authors to focus on the reader

Few lawyers will be unfamiliar with the terms "plain English" or "plain legal language". And most lawyers now accept, however grudgingly, that plain legal language is a good thing for the better administration of the law, and indeed for business.

Of course, the plain legal language advocates have occasionally given themselves a bad press by oversimplifying the matter. Particularly in the early days they thought that it was enough to straighten out the syntax and make a few deletions and word substitutions. Sometimes all they achieved was a distortion of the law. Now the approach is more scientific, with consultation and testing an important part of many a plain legal language exercise, whether it is drafting legislation or preparing client newsletters.

I have always approached plain legal language with a healthy scepticism. Working for some years as a legal researcher at the Law Commission, I very quickly became aware of the limitations of plain language when confronted, for example, with the exigencies of legislative drafting. And also, having an extensive background in non-legal areas of writing, I recognise that plain language promotes a bland, universal style that does not always sit well with the writer's individuality.

So I am no plain language zealot. But I do firmly believe that plain language has a number of basic principles and techniques to offer writers of all kinds: these can easily be put into practice and will improve both understanding on the part of the reader and, on the part of the writer, the style. In this article I want to outline these principles and some of the techniques.

Starting from the user

The most important principle derives from a useful working definition of plain language drafting. Janice Redish suggests that it is "a process that results in a document that works for users" ((1997) 38 *Clarity* 30). To understand the implications of this, let us look at a very brief document that probably does not work for most users. This is a small notice by the driver's door of the buses in a major New Zealand city: "It would be appreciated if the correct fare could be tendered".

The reason why this is unlikely to work for users is its language, which is circumlocutory, intimidating and obscure, when the real message is simply "Please have the correct fare ready". While the use of the passive "[i]t would be appreciated" instead of "please", though stilted, is at least understandable to everyday bus-users, the word "tendered" in this context is certainly not.

This notice then is a document that does not take into account the needs and expectations of the users. It has been drafted by an official who wanted to sound authoritative by dressing up the text in an overly formal way; in other words, he or she was taking into account solely the needs and expectations of the "issuing body". However, all documents – with the possible exception of some literary ones – should start from the user, which means that before even beginning to plan a document writers must always ask themselves who the audience will be.

Most documents, and particularly legal ones, do not exist for their own sake, but as a means to an end, a tool "intended to provide information to assist people in solving problems, and to inform in appropriate decision-making", as Phil Knight maintains ((1997) 38 *Clarity* 12). They must enable the reader to do three things: first, to find the information they are seeking; secondly, to comprehend it; and, finally, to act on their understanding of it.

Legal documents therefore provide a service, and to a range of users. Naturally, these users include lawyers, and their needs must be met; but the users also include clients, and the general public. All will have different levels of understanding of the substance in question, but whatever their level of understanding, all will appreciate drafting that is clear, concise and considerate. Such drafting may even influence potential clients when it comes to choosing legal representatives.

The fundamentals of plain language

Before looking at the fundamentals of plain language writing, it is important to remove some common misapprehensions and emphasise what plain legal language does not do. It does not require general principle drafting or "fuzzy law" (which is another issue altogether). Nor does it necessarily reduce the amount of paper a document consumes: on occasion, indeed, it may involve amplifying text that is too compressed. Nor does it sacrifice accuracy for superficial clarity and rapidity of comprehension. As David Kelly has pointed out, sometimes legal terminology has critical nuances that cannot be rendered in any other way (an example he gives is the difference between "terminate" and "expire", which cannot always be reduced to "end")((1999) 43 *Clarity* 5).

There are four major components to plain language writing: direct expression; clear organisation; effective layout; and testing. I would like to focus on the first, because it is a useful starting-point; but I will outline the others to provide a complete picture.

Direct expression requires a document to have sentences constructed so that the reader can quickly grasp their sense, a principle to which we shall return. It also means preferring words that are commonly used and understood, rather than jargon or vocabulary that has an unnecessarily bureaucratic or legalistic flavour. An example would be to use "under s 35" rather than "pursuant to s 35".

Clear organisation is planned organisation, resulting in a logical and coherent structure that users can easily follow. It requires the substance of a document to be carefully developed and thought out, and also ordered in a predictable way. Organisation is of course determined to a large extent by the substance; but it also involves applying certain simple rules such as that general material should come before the particular, and that headings should if possible be drafted and arranged to summarise the argument.

The layout of a document needs to be designed so that users can easily locate and select the information they are looking for. This requires, for example, generous spacing, clearly set out and clearly differentiated headings, a sensible numbering system, and a suitable choice of typeface and typesize.

Testing is something of a latecomer to the plain language environment, even though it should be an integral part, particularly with documents that are to have a wide distribution. It can range from asking colleagues to critique a document from a user's point of view to setting up focus groups, who might be asked to respond by means of interview, questionnaire, or comprehension test.

The sentence

The key to direct expression is an ability to control the sentence. If a writer understands how sentences work, it should help them to draft more clearly. A skilled writer knows how to arrange the words in a sentence so that its structure is readily exposed, giving the reader faster access to the substance.

The structure of any sentence will set up certain expectations in a reader, which it must then resolve. The following example resolves the reader's expectations very quickly: "This Act binds the Crown". In this sentence, the crucial word is the main verb – the only verb – "binds". It provides the pivot around which the sentence turns. Readers have to be able to find this pivot in a sentence before they can apprehend the meaning.

Now here is an example of a more complex sentence in which the reader is left unnecessarily in suspense before they find the main verb:

> Unless the Court is satisfied that, because the penalty that may be imposed is fixed by law or for any other special reason, it would not be of assistance to receive the evidence provided for by this section, the Court "shall hear" any person called by the offender to speak to any of the matters specified in the evidence. [Main verb shown in quotes]

If a sentence is overloaded with modifiers and qualification, it becomes more difficult to find the main verb; the reader is forced to juggle a number of competing ideas; and reading and understanding the sentence become a test of memory. So, as a general rule, place the main verb as close to the beginning as possible and do not allow the sentence to extend beyond five lines of text.

It is not always possible to avoid long sentences with a complex structure – the substance often demands it – but there are certain ways of making them less daunting.

Here are six techniques that can be immediately applied:

- Eliminate unnecessary words. This might be a truism, but it is surprising how much jettisonable material a thorough edit will reveal. It ranges from redundancies and "fillers" such as "s 7 of this Act" (if it is obvious from the context which Act is meant) or "It is important to note that ...", to repetition such as "has full force and effect", to grammatical constructions that are profligate with words;
- Use verbs whenever possible, and avoid nominalisations. Nominalisations are verbs that are turned into nouns; for example, "a person may make application" instead of "a person may apply". This is a habit endemic amongst lawyers and those who write in an official capacity, often to preserve some kind of "professional mystique". It is ugly, forbidding and rarely adds anything to the substance;
- Use the active instead of the passive voice; for example, "The occupier must give notice" instead of "Notice shall be given by the occupier". Like nominalisation, the passive voice is popular in legal and administrative circles, perhaps because it introduces a note of circumspection. But, again, it is ugly and forbidding, and writers should use it only when there is good reason for doing so;
- Prefer the present tense and the indicative mood; for example, "This agreement is governed by the laws of New Zealand" instead of "This agreement shall be governed by the laws of New Zealand". In fact, the auxiliary verb "shall" should no longer have a place in legal writing. Depending on context, it can be replaced by the present tense, the future "will", or, where it indicates compulsion, "must";
- Avoid embedded clauses or phrases, which are an occupational hazard for lawyers, who are in the habit of qualifying and modifying as they write. For example:

  > Additionally, s 37ZQA(1) itself, by "listing various requirements to be met", can, "in the Commission's opinion", be accepted as a strong indicator of matters to be taken into account in determining what may be good government. [embedded clauses and phrases quoted];

- Draft such a sentence instead as two separate sentences:

  > Section 37ZQA(1) itself also lists various requirements. The Commission considers that it is a strong indicator of matters to take into account in determining what may be good government;

- Finally, use affirmative statements, since untangling double negatives requires unnecessary mental effort on the part of the reader. For example, write "a form is valid only if the taxpayer has signed it" rather than "a form is not valid if the taxpayer has not signed it".

CONCLUSION

These six techniques will not always get a writer out of difficulty; they will not always be possible to apply; and they will not guarantee an elegant or individual style. However, using them represents perhaps the most important faculty that plain language principles can instil in writers: awareness, both of the reader and of the writer's own approach to writing. If plain language principles can create this awareness, they will have gone a long way towards promoting more accessible documents for every kind of user. ❑

LET-DOWN IN *LANGE*?

Bill Atkin, Victoria University of Wellington

reads between the lines of the Privy Council judgment

Those who expected the appeal to the Privy Council in *Lange v Atkinson* (Privy Council Appeal No 71 of 1998, 28 October 1999) to generate a definitive formulation of our defamation law may well feel let down. At first sight, the Privy Council appears to have produced a Clayton's judgment, which leaves the direction of the law in limbo. For instead of ruling on the law and in particular whether New Zealand law can accommodate a wholesale privilege for "political discussion" (subject only to s 19 of the Defamation Act 1992), Their Lordships, including Lord Cooke of Thorndon, have sent the case back to the Court of Appeal for reconsideration. This reconsideration must take account of the monumental decision of the House of Lords in *Reynolds v Times Newspapers* (28 October 1999), heard by the same Judges and delivered on the same day as *Lange*. That aside, the New Zealand Court of Appeal is left free to develop the New Zealand law differently from the rest of the common law world.

So, it looks as though the Privy Council has kicked for touch, and indeed expressly recognises "the limitations of its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy". As in the famous *Invercargill City Council v Hamlin* [1996] AC 624 case dealing with the liability of local authorities for such things as building inspections, it is accepted that there may be typically New Zealand circumstances which justify an approach different in this country from England. In *Hamlin* however the Privy Council actually ruled that way and agreed that such circumstances existed. On the other hand, in *Lange* there is no such agreement and, reading between the lines, it is clear enough that the Judges do not believe that New Zealand conditions merit a radical departure from *Reynolds*.

Towards the end of the judgment, the Privy Council states that it does not seek to influence the New Zealand Court towards a particular solution. If the New Zealand Court of Appeal decides to stick with its wide privilege for political discussion fashioned in the judgment under appeal ([1998] 3 NZLR 424; for the High Court, see [1997] 2 NZLR 22), it "is entitled to maintain that position". But then in the next breath it is said that the United Kingdom, Australia and New Zealand "are all parliamentary democracies with a common origin. Whether the differences in details of their constitutional structure and relevant statute law have any truly significant bearing on the scope of qualified privilege for political discussion is among the aspects calling for consideration". Can there be any real doubt that by implication this means that the differences do not have "any truly significant bearing" on the defence?

Our Court of Appeal may eventually disagree, but is the Privy Council not really saying that *Reynolds* ought to be the law in New Zealand? Lord Cooke in his judgment in *Reynolds* in effect says as much: "... the possibility of a difference between English and New Zealand common law on the issue has to be accepted, albeit not advocated". The last three words are telling.

IS NEW ZEALAND DIFFERENT?

So, what might possibly justify New Zealand going its own way? The particular features which our Court of Appeal invoked are summarised by the Privy Council:

> the constitution of New Zealand as a democracy based on universal suffrage; the change in access to government documents brought about by the Official Information Act 1982; the New Zealand Bill of Rights Act 1990; and the abolition, in 1992, of the long-standing offences of criminal libel and publishing untrue matters calculated to influence votes during an election campaign or a local election or poll.

It is hard to see how any of these make New Zealand distinctive. England has universal suffrage; it has freedom of information rules, shortly about to be properly legislated on; it has passed its Human Rights Act, which, together with European human rights jurisprudence, was regarded by the parties in *Reynolds* as being relevant to the outcome of that case even though it is not yet in force; it also has electoral systems for Scotland, Wales and Europe based on party lists not unlike New Zealand's MMP electoral system. The last points of supposed distinction are hardly compelling – there was no suggestion with the abolition of criminal libel that there would be a corresponding widening of qualified privilege in the political arena, criminal libel in any event not being limited to political defamation, and the other offence related only to elections not to politics in general.

As summarised by Lord Cooke in *Reynolds*:

> As I see it, however, the United Kingdom is no less a representative democracy with responsible government than Australia. The same can be said of other comparable jurisdictions, including New Zealand. For the purposes of defamation law, the background or context does not seem materially different. The constitutional structures vary, but the prevailing ideals are the same. Freedom of speech on the one hand and personal reputation on the other have the same importance in all democracies.

If there are no significant constitutional arguments to support a peculiar New Zealand approach, are there any if we adopt a narrower focus? The European Convention on Human Rights freedom of expression provision expressly refers to restrictions which may be necessary for the reputa-

tion and rights of others and the United Kingdom Human Rights Act also has some built in instructions not found in the New Zealand Act, viz a Court dealing with journalistic, literary or artistic material has to have regard to the extent to which it is or would be in the public interest for the material to be published. Should these provisions render New Zealand law radically different from English law?

On the first, we should remember that the New Zealand Bill of Rights Act does not purport to incorporate all rights. Some rights are implied and the right to reputation is surely one of them. Further, restrictions based on reputation can fall within the justified limitations allowed for in s 5. As to the second, the New Zealand Court of Appeal's rule on political discussion is not confined to "journalistic material" nor is the UK language confined to political matters. The extra wording found in the UK Act therefore seems to have little to do with what our Court of Appeal was aiming to achieve.

Rt Hon David Lange as Prime Minister in 1989

A further possible argument permitting New Zealand to do its own thing is that the seamless thread of the common law has already been disrupted by the Australian High Court. The latter allows a privilege for government and political matters, so long as the publisher prove its conduct to be reasonable. But the Privy Council has not offered the Australian approach as an option (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520), and the New Zealand Court of Appeal in *Lange* rejected the Australian approach. The mere fact that another common law country had come up with another but unattractive model hardly permits our Courts to do what they like.

WHAT DOES *REYNOLDS* DO?

So, if there is little to distinguish New Zealand and England, *Reynolds* ought to apply in New Zealand. What emerges from this case?

Reynolds involved the publication in *The Sunday Times* in Britain of allegations that the former Irish Prime Minister had deliberately and dishonestly misled the Irish Parliament. There were question marks over the source of this allegation and over the fact that the paper had failed to mention Mr Reynolds' own explanation to the Irish Parliament. Interestingly, the Irish edition of the paper did not contain the same objectionable statements. All five Judges in the House of Lords agreed on the law but they split 3-2 on the facts, the majority holding that this was not an occasion of privilege.

To summarise the law from *Reynolds*, the House of Lords rejected any generic privilege based on political discussion; it rejected the so-called "circumstantial test" formulated by the English Court of Appeal in *Reynolds* and instead reiterated the classic duty/interest analysis for determining whether an occasion was privileged, such analysis taking account of the circumstances of the case; and rejected a "reasonableness" test similar to the one developed in Australia. The House made it clear that privilege could apply to political discussion, not as a generalised rule, but on a case by case basis. That said, there are strong indications that most political discussions in the media will attract privilege. Lord Nicholls who gave the leading judgment put it this way:

> The press discharges vital functions as a bloodhound as well as a watchdog. The Court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.

The generic privilege

The House of Lords acknowledged that a rule, referred to as a generic qualified privilege, stating that all political discussion is privileged has the advantage of certainty. Uncertainty may have a "chilling" effect on the media. But as Lord Hobhouse put it "[a]ny generic category will tend to be both too wide and too narrow".

It will be too wide because privilege will attach to media reports based on casual gossip, or driven by the desire to be the first with a "scoop". According to Lord Cooke: "the commercial motivation of the press and other sections of the media can create a temptation, not always resisted, to exaggerate, distort or otherwise unfairly represent alleged facts in order to excite the interest of readers, viewers or listeners". The Court does not demand perfection from the media. In a persuasive answer to the "chilling effect" point, Lord Nicholls made this important statement:

> With the enunciation of some guidelines by the Court, any practical problems should be manageable. The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse.

A generic category of privilege may be too narrow because it is hard to see how it could be confined to political discussion. There are many matters of public interest which are not "political". The American "public official" law first formulated in the famous *New York Times v Sullivan* 376 US 254 (1964) decision soon expanded to a "public figure" rule. In recent days in New Zealand, there has been much controversy over the management of WINZ (Work and Income New Zealand), the role of advertisers Saatchi and Saatchi, the payment to top people on government tourism boards, and so forth. Why should privilege not attach as easily to these subject areas as to the retrospective assessment of the contribution of a former Prime Minister?

Already, the Court of Appeal's decision in *Lange* has led to a bizarre ruling of privilege in a case involving trainers and owners of race horses (*New Zealand Trainers Association Inc v Cranson* Wellington High Court AP 14/98, 22 March 1999; leave to appeal has been granted: CA 187/99, 23 August 1999). While that judgment was in part based on the Court of Appeal's ruling that there need be no reciprocity between the maker and receiver of defamatory statements, the subtext was that the Court of Appeal had opened the way to virtually any situation being privileged in the absence of the statutory version of malice set out in s 19 of the Defamation Act 1992.

A generic privilege based on political discussion will be impossible to hold in check. It will have ripple effects throughout the law of defamation.

The House of Lords had other reasons for finding against a generic privilege, Lord Cooke indeed listing nine such reasons. One reason is a rule of practice in England which does not apply in the United States that the media are not required to reveal their sources. Unless there is access to sources, the only escape route for plaintiffs – malice, or in New Zealand s 19 – will be virtually impossible to prove. A further point made by Lord Cooke is that a generic privilege would "at one stroke" render other defences, including justification (in New Zealand "truth"), fair comment ("honest opinion") and statutory privilege "virtually obsolete". Violence would therefore be done "to the present pattern of the law without any compelling evidence of necessity".

The circumstances

The Court of Appeal in *Reynolds* held that there were three components to be satisfied before common law qualified privilege would be found: a duty to publish, an interest to receive, and no circumstances to deny the privilege. (This was not to exclude other categories where the publisher has an interest to advance and the recipient a duty to protect that interest, or where they have a common interest in the communication.) The threefold test was novel and has been rejected by the House of Lords. The point is not however one of deep substance but rather of structure or "taxonomy". For, the Judges sensibly accept that the duty/interest analysis must be undertaken, taking all the circumstances into account. These circumstances may change from age to age, and their impact will vary from case to case.

Lord Nicholls listed ten "circumstances" which may be relevant in the duty/interest analysis – the seriousness of the allegation, the nature of the information, its source, steps taken to verify the information, the status of the information (eg it has already been the subject of investigation), the urgency of the matter, whether comment was sought from the defendant, whether the article contained the gist of the plaintiff's side of the story, the tone of the article and the timing of the publication. None of these is a requirement. So, for example, verifying sources, which is part of the Australian requirement of reasonableness, will not necessarily be significant. It all depends on the particular facts. Overall the exercise is to determine whether the public was entitled to know the particular information. As Lord Steyn stated: "And what is in the public interest is a well known and serviceable concept".

In upholding the reciprocal duty/interest analysis, the House of Lords was merely reiterating the classic understanding of common law qualified privilege. Nowhere in either the House of Lords or the Privy Council judgments is mention made of the New Zealand Court of Appeal's abandonment of the notion of reciprocity ([1999] 3 NZLR 424, 441). By implication however, we must surely conclude that House of Lords considered that the Court of Appeal was wrong.

No "reasonableness" test

As already mentioned, the High Court of Australia built into its generic privilege a requirement that the publisher prove that its conduct was reasonable, which would generally include the need to verify sources. The House of Lords in *Reynolds* did not adopt such a test. Indeed, the parties did not argue in favour of the Australian approach. The defendant did however have a fall-back position not dissimilar, except that the onus would be on the plaintiff to prove that the publisher had acted unreasonably. This was rejected on the basis that "it would turn the law of qualified privilege upside down".

Human rights

One of the noticeable features of the House of Lords' decision is the prime place given to human rights notions and jurisprudence. Lord Steyn stated: "The starting point is now the right of freedom of expression, a right based on a constitutional or higher legal order", and Lord Nicholls: "To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved". The countervailing consideration is, of course, the protection of reputation, a matter which affects not only the individual but also the public interest as "[i]t is in the public interest that the reputation of public figures should not be debased falsely" (Lord Nicholls). "The crux of this appeal", Lord Nicholls continued, "lies in identifying the restrictions which are fairly placed and reasonably necessary for the protection of reputation".

One of the impressive features illustrated by the above quotes is the central place given in *Reynolds* to the human rights analysis, much more prominent than in the New Zealand Court of Appeal's decision in *Lange*, where such an analysis appears rather as an afterthought. Although the UK Human Rights Act is not yet in force, obviously the House of Lords was gearing itself up for that day and was already influenced, in a way which is not so apparent in New Zealand, by European human rights law. In this regard, the House of Lords took particular note of the jurisprudence of the European Court of Human Rights which requires a balancing of competing rights and interests in the light of the facts of each case.

CONCLUSION

The House of Lords has refused to endorse the New Zealand Court of Appeal's ruling that there is an automatic privilege for defamatory statements which fall within the category of political discussion. Privilege for such statements will depend on the circumstances of each case and on an assessment of what information the public is entitled to know. The House of Lords' reasoning is formidable. That is not to say, however, that in these days of quicker communication and vigorous debate of public issues Their Lordships did not signal a relaxation in the way in which the privilege might operate. They have placed the right to freedom of expression centre stage. Inroads into that freedom must be carefully scrutinised.

As a result of the Privy Council decision in *Lange*, the law in New Zealand is left up in the air until the Court of Appeal reconsiders its previous judgment. This is set down for 10 February 2000 before the same Bench as before – a hint from the Privy Council that the Court may be differently constituted looks unlikely to be taken up. Presumably, any reconsideration can be subject to a further appeal to the Privy Council. Presumably also, the parties in *Lange* may yet settle and no reconsideration will take place. The costs incurred by the parties must already be significant and no award of costs was ordered by the Privy Council. The possibility of the law remaining in limbo for a considerable length of time is the price of the Privy Council's decision not to come out with a firm ruling.

It has been suggested above that the arguments in favour of New Zealand's maintaining an independent stance are not powerful. The Court of Appeal ought, but is not bound, to follow *Reynolds*. ❑

MISLEADING OR DECEPTIVE CONDUCT

Chris Walshaw, Palmerston North and Lindsay Trotman, Massey University

ask whether misrepresentation is required

Although there is nothing in s 9 of the Fair Trading Act 1986 or any other provision in the Act that says so, there has been a tendency by the Courts to limit conduct in contravention of s 9 to conduct which contains or conveys a misrepresentation. It is respectfully suggested that this is an unwarranted gloss on s 9. It has the potential to be a source of confusion.

AUSTRALIA LEADS...

The seeds of a misrepresentation requirement were sown in the influential joint judgment of Deane and Fitzgerald JJ in *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) ATPR 40-303. In an oft cited passage they said (43,751):

> ... conduct ... cannot, for the purposes of s 52, be categorised as misleading or deceptive unless it contains or conveys, in all the circumstances of the case, a misrepresentation.

There has been a tendency in both texts and judgments to recite this passage without comment as some sort of touchstone.

The proposition that contravening conduct must contain or convey a misrepresentation raises the important issue of what a representation and a misrepresentation are, generally, and in the context of s 9. In addressing these issues there is a tendency to revert to common law learning and to import into a straightforward statutory provision the difficulties and contradictions of the common law.

This judicial limitation on the application of s 9, made notwithstanding judicial pronouncements against judicial gloss, has the potential to exclude claims of deceptive or misleading conduct, when the conduct cannot be characterised as a misrepresentation. For example, in *Tenth Cantanae Pty Ltd v Shoshana Pty Ltd* (1988) ATPR 40-833, the appellants used the name "Sue Smith" in advertisements for the sale of video recorders. The advertisement depicted two women, one on a television screen being watched by the other woman, who bore some resemblance to a well known television personality named Sue Smith. Her consent had not been obtained, but it was found as a fact that she was not known to the appellants. The respondents alleged that there had been an unauthorised exploitation of the name and identity of Sue Smith – an appropriation claim reflected in the American tort of that name. In particular it was said that viewers of the advertisement would be misled into believing that Sue Smith endorsed the product. On appeal the claim was dismissed. The majority was of the opinion that viewers would not be likely to identify the advertisement and the common names of Sue and Smith with the respondent. Pincus J, with whom Wilcox J substantially agreed, said:

> Since the doctrine of *Taco* ... that it is necessary to show a misrepresentation ... has been accepted, it may be that the task of an applicant for a relief under s 52 of the Trade Practices Act has become harder than it would have otherwise have been. If one asks if any misrepresentation relevant to the second respondent is made by these advertisements, the most which can be said in favour of the respondents is that some readers might suspect that, although the model described as "Sue Smith" is plainly not the second respondent, she permitted her name to be used in the advertisements. That is not enough, in my opinion, to uphold the view that the advertisements are made unlawful by sec 52.

Other conduct which may not be able to be characterised as a misrepresentation includes erroneous advice and opinion, non-disclosure and silence, and the breach of a contractual promise.

Australian retreat from *Taco*

Lockhart J, an influential Judge of the Federal Court in this field, had as early as 1984 expressed views contrary to *Taco*, but it was not until 1988 in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) ATPR 40-850, that there was a clear opportunity to state and apply a contrary view, with the support of Burchett and Foster JJ This case is important in a number of contexts. Collins Marrickville purchased from Henjo a licensed restaurant called the New York Deli. The vendor's manager and broker told the purchaser that the restaurant could seat 128, and the restaurant was set up to that capacity. Following completion of the sale the plaintiff discovered that the restaurant was licensed to seat only 84. In the present context Lockhart J said (49,151):

> Misleading or deceptive conduct generally consists of representations, whether express or by silence; but it is erroneous to approach s 52 on the assumption that its application is confined exclusively to circumstances which constitute some form of representation. The section is expressed briefly, indeed tersely, in plain and simple words .... There is no need or warrant to search for other words to replace those used in the section itself. Dictionaries, one's own knowledge of the developing

> English language and ordinary experience are useful touchstones, but ultimately in each case it is necessary to examine the conduct, whether representational in character or not, and ask the question whether the impugned conduct of its nature constitutes misleading or deceptive conduct. This will often, but not always, be the same question, as whether the conduct is likely to mislead or deceive.

The same theme appears in the judgments of French J (also a leading commentator in this field), including *State Government Insurance Corporation v Government Insurance Office of NSW* (1991) ATPR 41 – 110, at 52,711-2.

There has been influential support from Gummow J (now a Judge of the High Court of Australia) in *Demagogue Pty Ltd v Nicholas Karnensky* (1993) ATPR 41-203 at 40,851.

Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd (1993) ATPR 41-269, was a successful claim by CCH that the breach of a warranty contained in a written contract for the sale of a computer program was misleading or deceptive conduct. The program was found to be a reproduction or at least an adaptation of another's program. It had been warranted that the vendor had copyright in the program. It was found that the vendor did believe it had copyright and that there were no oral representations about copyright. On appeal it was argued that the mere giving of a warranty was not capable of constituting a misrepresentation in breach of s 52. This was rejected by the majority. Lockhart and Gummow JJ in their majority joint judgment set out the issue relating to s 52 as follows (41,639):

> The primary Judge held that the breadth of the provision in sub-s. 4(2) of the Trade Practices Act as to the meaning of the phrase "engaging in conduct" was such that the term "conduct" would embrace the giving of warranties in an agreement without any anterior representation or semble other conduct if those warranties were inaccurate at the time when given, the giving of them could be capable of constituting misleading or deceptive conduct.

They agreed (41,645-8) that the precise boundaries of the territory within which s 52 operates remain undetermined and that the provision, because of the purpose and policy underlying it, should be construed so as to give the fullest relief which the fair meaning of its language will allow. That this may result in the imposition of liabilities and the administration of remedies different from those supplied by the general law did not matter in their view. They warned that the Court should resist the temptation to reason that s 52 is concerned with representations rather than the larger concept of "conduct":

> Whilst s 52 speaks of "conduct", many of the decided cases have dealt with that species of conduct which involves what at general law would be classified as "representations" as to a present state of affairs. But it is necessary to keep steadily in mind when dealing with the statute that "representation" is not co-extensive with "conduct".

In 1996 French J writing extra-judicially in an essay titled "The action for misleading conduct: future directions" in Misleading or Deceptive Conduct: issues and trends, C Lockhart (ed), Federation Press, 1996 at 290-1, said:

> It would impede the flexibility and developmental possibilities of the action to elevate the identification of a representational element in the impugned conduct to a necessary condition of characterisation. While it may be a useful tool of analysis it should not decide that question. ...
>
> This absolutist approach [requiring a representation] is at risk of imposing a restriction that is not justified by the language of the Act. It encourages inquiry, which in some cases may involve a degree of artificiality, into the existence or non-existence of imputed representations. It has been accepted, for example, that the overall impression created by a collection of statements which are literally true may be misleading. To subject such an impressionistic collocation to representational analysis may be a waste of time where what is necessary is an assessment of its impact upon the range of ordinary, perhaps gullible or uneducated reader or viewer. So too cases in which a non-disclosure may be characterised as misleading or deceptive may not all demand the identification of some representation. The Act is concerned in terms with "conduct" bearing the necessary causal connection to error.

Sometimes it has been accepted that a misrepresentation is not required but it is then said that there is not much difference between a misrepresentation and misleading and deceptive conduct which offends the section. A recent example of this approach is found in the judgment of Priestly JA in *Arbest Pty Ltd v State Bank of New South Wales Ltd* (1996) ATPR 41-481.

> The matter I refer to is the representation/conduct distinction. I do not disagree with what has been said about this in cases such as *Henjo* .... The point I would make simply is that since that conduct which the statutes speak of is conduct which has an effect of a particular kind on a complaining party, there is not really very much difference between a representation in the wide sense in which that word was explained in *Hawkins v The Queen* (1994) 181 CLR 440 and conduct which has an effect on a party making a claim of breach by a person of the relevant statutes.

Recent authority in Australia indicates that any requirement of a misrepresentation has been so watered down as to be tautological and meaningless. In *S & I Publishing Pty Ltd v Australian Surf Life Saver Pty Ltd* (1999) ATPR 41-667, Hill RD, Nicholson and Emmett JJ in their joint judgment on an appeal to the Full Federal Court in an association case said (42,507):

> Section 52 operates in a variety of situations. It may not be limited to cases where the conduct complained of is a misrepresentation although that is the normal case which presents itself: *Henjo*.

It is suggested that present trends in Australia indicate that, if there remains a requirement of a misrepresentation, this is now confined to the association cases, although even in that context its utility is questionable.

NEW ZEALAND FOLLOWS...

A survey of the New Zealand cases reveals that the Court of Appeal has maintained the requirement that contravening conduct must convey or contain a misrepresentation, notwithstanding the Australian trend to the contrary.

Interestingly, the Court of Appeal initially rejected the requirement but in later cases followed the *Taco* requirement for a misrepresentation. The initial rejection came in

Prudential Building & Investment Society of Canterbury v Prudential Assurance Co of NZ Ltd [1988] 1 NZLR 653. This was an appeal against an interim injunction that the appellant cease trading under the name "Prudential". Both parties had been registered and in business since the 1920s. In 1987 a statutory amendment to the Building Societies Act enabled the appellant to expand its business including its lending policy. It did so vigorously, giving emphasis to the name "Prudential" in a style of type face broadly similar to that of the respondent. The respondent was particularly concerned with the geographical market expansion. McGechan J in the High Court found that although it was arguable that in Christchurch the appellant's name was known and understood, a considerable section of the public elsewhere would be misled into thinking that the appellant's business was a branch or aspect of the respondent's business. Prior to the hearing of the appeal, the appellant took steps to publicly disclaim any association with the respondent. It was then submitted that because of this, its activities could no longer be regarded as involving a misrepresentation. This was not accepted by the Court of Appeal. Bisson J for the Court said (658):

> Mr Young submits that the appellant can only be guilty of passing off or a breach of the Fair Trading Act if its activities as they presently stand can be regarded as involving essentially a misrepresentation that it is associated with the respondents. We do not accept that statement. While the tort of passing off involves proof of a misrepresentation (in this case the allegation is that the appellant has "deceived and misled the commercial community and general public to believe that the defendant's business and/or financial services were those of the plaintiffs, or enjoyed some association with the plaintiffs' business") the provisions of s 9 of the Fair Trading Act require no more than conduct in trade, which is "misleading or deceptive or is likely to mislead or deceive". The distinction is a clear one. In the tort of passing off misrepresentation, such as that alleged, which is calculated to injure the goodwill or business of the respondents and does do so, or in a quia timet proceeding, will probably do so, is an essential element. This is not the case where an injunction is sought under s 41 of the Fair Trading Act.

Taco was not referred to in that case, but was mentioned by McGechan J in the High Court in *Taylor Bros Ltd v Taylors Group Ltd* [1988] 2 NZLR 1, 28, as part of a citation of principles in the context of association cases. A year after the decision in *Prudential* the Court of Appeal first expressed agreement with the *Taco* requirement. This was in *Trust Bank Auckland Ltd v ASB Bank Ltd* [1989] 3 NZLR 385, a case similar to *Prudential*. It concerned use of the name HIT to describe a high interest account. An injunction was confirmed on appeal. Cooke P for the Court cited the joint judgment of Deane and Fitzgerald JJ in *Taco*, but in the context of an attempt to read down s 9 and in a manner indicating that the Court of Appeal's approval was qualified (at 338-9):

> Notwithstanding what was said in *Taylors*, another attempt has been made in argument in the present case to use *Parkdale* as a source of principles of law refining the tests under the section. ... Another suggestion in argument was that *Parkdale* shows that initial customer confusion does not matter if rectified at point of sale. We view this suggestion in the same way. There seems to us to be no reason why s 9 should not protect the public from being led into business premises by being misled as to the ownership of the business. Once a prospective customer has entered, he or she will often be more likely to buy. On both this question and the question of erroneous assumption we agree generally with what was said by Deane and Fitzgerald JJ in their joint judgment in [*Taco*].

the provisions of s 9 of the Fair Trading Act require no more than conduct in trade, which is "misleading or deceptive or is likely to mislead or deceive"

Taco received detailed analysis and endorsement by Tipping J in the High Court in *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502. This was an appeal against conviction on a charge of making a misleading representation concerning the place of origin of imported leather jackets in breach of s 13(j) of the Act. His Honour pointed out that "representation" is not defined in the Act. He referred to *Taco* and said (506):

> The essence of a representation for present purposes is that the representor must be saying something to the representee either by words (whether spoken or written) or other means. The representee may of course be a specific person or group of persons or indeed persons generally such as shoppers who may come into a particular shop. The representor must be communicating a statement of fact to the representee either directly or by clear and necessary implication. It will usually be convenient to consider whether a representation has been made alongside the question of the subject-matter of the representation.

In the context of a prosecution under s 13, there can be no criticism of this approach.

The Court of Appeal adopted *Taco* in *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187. This case concerned the import of coffee in vacuum sealed foil packets similar to the product of the respondent and worded so as to give the impression that the packets contained roast and ground coffee of the type sold by the respondent, rather than being the ground and soluble coffee of the appellant. The Court of Appeal upheld an injunction (varying the terms). Gault J delivered the judgment of the Court and after commenting that counsel took little issue with the applicable principles said (192):

> What must be shown are misrepresentations by words or conduct or a combination of words and conduct: *Taco* .... In trade description cases the focus is upon what is said and done rather than what is not said or done. The legal obligation is to avoid falsehood, it is not an obligation to provide compendious explanations. Of course silence in particular circumstances can amount to a misrepresentation as can literal truth but in each case only when as a result there is affirmatively conveyed another meaning that is false.

Bonz Group (Pty) Ltd v Cooke [1994] 3 NZLR 216 (HC) and (1996) 7 TCLR 206 (CA) concerned an unsuccessful claim that a former salesperson of Bonz was manufacturing and selling hand knitted woollen garments with features which were likely to mislead or deceive potential customers into thinking that her garments were Bonz garments. In the

High Court Tipping J rejected a claim of breach of copyright and noted that the claim for passing off was abandoned (228). He then considered the claim under s 9 and said (229):

> The essence of a cause of action based on s 9 is some misrepresentation by the defendant. Conduct cannot be described as misleading or deceptive or likely to be so unless it involves a misrepresentation. ... My own judgment in *Marcol* ... considered ... the concept of representation. I suggested that the essence of a representation for present purposes is that the representor must be saying something to the representee either by words (whether spoken or written) or by other means.

On appeal it was argued that by requiring proof of a misrepresentation Tipping J wrongly introduced intention as a necessary element of s 9. Gault J for a full Bench of the Court of Appeal noted the reference by Tipping J to *Taco* and said (210):

> That proposition was stated in the joint judgment of Deane and Fitzgerald JJ in the *Taco Co* case ... so as to emphasise exclusion from the scope of the corresponding Australian section of confusion arising from a statement the sole meaning of which conveys the truth. There is no indication in the context that an element of intention was contemplated.

This may prove to be an important explanation (and qualification) of *Taco*. His Honour then stated that the requirement of misrepresentation was adopted by the Court of Appeal in *Unilever NZ Ltd v Cerebos Gregg's Ltd*. He followed with reference to some of the Australian cases and literature referred to above which question the requirement. The Court had been referred to its own decision in *Prudential*. After quoting the passage from *Prudential* set out above Gault J said (211):

> This passage is not easily understood in its immediate context because the submission of counsel which it addresses is so briefly stated. But when it is read with what follows it appears that the submission was that because of the public disclaimer of association the plaintiff could not succeed in the substantive proceeding because it could not show any damage to its goodwill (subsequently referred to as economic loss). In that context the distinction is drawn between passing off which requires proof of injury to goodwill and s 9 of the Fair Trading Act which does not. ... It is not a distinction between passing off which requires proof of misrepresentation and s 9 which does not.

It is suggested that the submission of counsel in *Prudential* was that in view of the public disclaimer of association there was no misrepresentation and therefore a defence to the claims of both passing off and breach of s 9. With respect, the matter of damage to goodwill, only relevant to a claim for passing off, was not the focus of this particular submission. This view is reinforced by the Court in *Prudential* proceeding to make a clear distinction between passing off and s 9, the first requiring proof of misrepresentation and the second of conduct in breach of the terms of s 9. Goodwill is mentioned as descriptive of the effect of a misrepresentation for the purpose of the tort of passing off. It seems that by this unfortunate route the Court of Appeal has adopted the requirement that conduct involves a misrepresentation.

> ***"An action under s 9 may be brought by a rival trader, but it remains an action of a public character directed at the protection of consumers"***

It may be submitted that this part of the judgment is obiter. As the Court points out (211):

> In this case counsel did not identify any conduct of Mrs Cooke which could be said to be misleading or deceptive but did not amount to misrepresentation. On the contrary, the case for Bonz is that by placing before prospective customers garments the design and appearance of which so nearly resembled those of Bonz Mrs Cooke was conveying that her garments were those of Bonz, or were associated with Bonz.

Bonz was referred to with approval in *Neumegen v Neumegen and Co* [1998] 3 NZLR 310, 317 CA.

CONCLUSIONS

Taco and many of the New Zealand cases referred to above are association or passing off cases, and in that context the emphasis on misrepresentation is at least understandable. Thomas J in his dissenting judgment in *Neumegen* pointed out, with important words of caution (325):

> It must be fully recognised that the cause of action in passing off and the cause of action based on s 9 are quite different beasts. Passing off is a tort of a private nature directed at the protection of the trader's intangible property right in his or her reputation and goodwill. An action under s 9 may be brought by a rival trader, but it remains an action of a public character directed at the protection of consumers. The danger is that the public interest elements which should dominate a proceeding under s 9 become subverted by the language and concepts of a private proprietary action. Formulae appropriate to the latter divert the Courts from the consumer-oriented analysis of the case which is required in order to give effect to the object of the statute.
>
> It will do no injury to the doctrine of precedent if the Courts strive to keep the two causes of action analytically separate and distinct so that the approach adopted in the one does not infect the approach adopted in the other. The public concerns which underlie the consumer legislation are not to be submerged by the case law which has developed around the proprietary tort, or more particularly the attitudes or mode of thinking it engenders. The Courts must deliberately accommodate this difference as they move from a private cause of action to a cause of action having a public character and the public interest as its touchstone.

It is respectfully suggested that the views expressed by the New Zealand Court of Appeal are properly confined to association cases. The implications of applying the requirement of a misrepresentation outside those cases do not appear to have been either argued before or fully considered by the Court of Appeal. Section 9 does not contain words which characterise the conduct, other than that it be misleading or deceptive or likely to mislead or deceive. It contains a general prohibition on misleading and deceptive conduct in trade in contrast to ss 10-14 which contain specific prohibitions on particular types of misleading conduct and the making of false representations. The strength of s 9 should be its potential to provide a remedy in circumstances which are not constrained by the requirement to prove an actionable representation. ❑

TRANSACTIONS

MISLEADING CONDUCT

with
Brian Keene

Fletcher Construction NZ v Cable Street Properties Ltd CA 271/98, 9 September 1999

This case concerned statements and representations made on behalf of the appellant, Fletcher Construction to the respondents ("Cable"). It is illustrative of the extent to which the Courts are prepared to take a broad view of misleading conduct and its consequences.

Fletchers were separately selling two proximate buildings in Jervois Quay and in Cable Street, Wellington. Cable became the nominated purchaser. Fletchers had negotiated up the purchase price upon representations (inter alia) that the net annual rental for one of the properties, the Wakefield Markets Building, was $168,000 per annum. The tenant of that property was Number One Plates Ltd ("Plates").

After signing the contract, but before it became unconditional, Cable opened negotiation with Plates for a new lease pursuant to an option for a new lease for two years on the lessor's terms.

The initial negotiations with Plates were difficult. Cable believed the company to be of substance but Plates argued difficult trading conditions in the market and had started its rental bargaining at a gross rental of $120,000 – a far cry from the expected $168,000 per annum net rental expected. The fraught negotiations with Plates continued so that by July Plates had received a "take it or leave it" offer from Cable and had decided to "leave it", based upon Plates' view that the market was no longer viable. Cable was left without a tenant.

Cable in August 1994 leased the building to one Thwaites at an annual net rental of $168,000 plus 30 per cent of the net profits made by the tenants from the Wakefield Market. Thus, ostensibly, Cable had achieved its expected net return and more. Unfortunately within six months Thwaites failed and surrendered his lease.

In the High Court Cable sued Fletchers for misleading conduct which included disclosing the terms of the existing lease showing a net rental of $168,000 without disclosing private arrangements as to rent relief which had not only been granted in the past but were actively being pressed by Plates as to the future. Nor was the fact that Plates were currently in arrears disclosed. At a meeting on 27 May 1994 Fletchers' representative claimed that from his knowledge of Plates' financial statements they could afford the same net rental for the new term and that the pleas of poverty were merely a negotiating tactic.

The Judge found that this misleading conduct was a substantial cause of Cable losing Plates as a tenant. Losses were fixed at the difference over the two year period of the lease between what had been recovered compared to what the Judge considered to be a secure net annual rent of $138,000 which Cable would have accepted from Plates (and would have recovered) but for the misleading conduct. A net figure of damages of $223,360 was assessed.

Misleading conduct

It is true that a statement of a net rental return of $168,000 per annum omitted the proper qualification of earlier rent relief. However, there were two mitigating influences on the alleged misleading conduct. The first is that as at the time of the negotiations between Fletchers and Cable, Fletchers were in fact entitled to, although not in fact receiving a rental equivalent to the represented amount. The second was that, irrelevant of anything done or said by Fletchers, Cable knew that it was in for a hard negotiation indeed with Plates on rental amounts, so continuation of a rental rate of $168,000 was in doubt.

Both Fletchers and Cable were represented by experienced property executives. They were worldly wise and recognised "hardball" tactics applied by Plates. Although Fletchers were better informed about the past history and withheld information, Cable were under no illusions. Statements made by Fletchers of Plates' ability to afford the higher net rental were merely statements of opinion. However, lacking full disclosure, Fletchers' opinion as to Plates' ability to pay coupled with the suppressed information was found to be misleading. As this finding was factual the Court of Appeal declined to interfere with it.

Causation

Here the simple argument was whether the effect of the misleading statements was to cause Cable to lose Plates as a tenant. Fletchers argued that the negotiating tactics adopted on each side was the primary cause of any loss, not the misleading conduct. Again, but not without misgiving, the Court of Appeal declined to interfere with what was a essentially a factual finding made by the trial Judge.

Lease to Thwaites

The third argument was that the chain of causation had been broken between the misleading statements and the loss given the intervening lease to Thwaites. Thus it was Thwaites' failure to honour his lease commitments which occasioned Cable's loss, not the misleading statements.

The Court rejected this contention sayting quite simply that the Thwaites lease was an attempt to mitigate actual losses which failed. It did not break the chain of causation.

Damages and contribution

Authorities both in Australia and New Zealand make it clear that the inducement issue arising out of the Fair Trading Act breach is mitigated by the causative influence of a plaintiff's own actions. Although at first instance the Judge awarded full damages, the Court of Appeal was persuaded that those should be reduced by 50 per cent given the responsibility of Cable in its negotiations with Plates.

Thomas J

Whilst not dissenting Thomas J confessed he could have readily been persuaded that the claim should not have succeeded. He instanced the nature of the misleading conduct alleged and the degree to which it had been affected by information known to Cable or disclosed to it during negotiations with Plates. He concluded with a warning to the commercial community:

> I do not consider that, in such circumstances, s 9 could ordinarily be invoked to assist experienced developers obtain damages under the Fair Trading Act. Ordinarily, for the Courts to grant relief in such circumstances would be perceived as patronising. The reach of s 9 falls short of permitting the Court to act as a nursemaid to those engaged in commerce.

He held on balance that Fletchers' conduct attracted a liability "but only just".

Observations

It is worth noting that the cause of action was upheld even though the statement made by Fletchers was one of opinion. It is also a case of non-disclosure where the Courts may be disturbed at the failure of experienced business persons to ask obvious and prudent questions. These marginal qualities tend to place it well up towards the high water mark of liability.

CONTRACTUAL REMEDIES: CANCELLATION AND AFFIRMATION

McGuigan v Cullinane CA 172/99, 9 September 1999

This case serves as an object lesson on the need in cases of contractual breach to carefully and precisely consider available remedies and unequivocally espouse them and so to perform or cancel a contract.

McGuigan purchased at auction from Mr and Mrs Cullinane a Christchurch property. Although an experienced property developer, he made no inquiries of the local body relating to the property. After the auction he declined to settle because of outstanding requisitions allegedly undisclosed at the time of the auction. He sued for the return of his deposit and was met with a counterclaim by the vendors for loss arising in a subsequent resale.

At the auction the existence of a letter from the local body containing requisitions was alluded to by the auctioneer but the details were not read out and the purchaser McGuigan believed that they amounted to no more than appeared from another letter from the vendor's building consultants which casts the issues a rather different light.

At first instance the District Court Judge had little difficulty in finding a breach of the relevant contractual term warranting no material requisitions from the council. He was then required to consider two further questions, namely whether, with knowledge of the breach, the purchaser had affirmed the contract and secondly whether, on the facts, cancellation was available and had been invoked. The District Court Judge found affirmation hence cancellation had not taken place. On appeal to the High Court the Judge held that no affirmation had occurred and cancellation was proven. The purchaser appealed.

Affirmation

The principal affirming event was a letter written by McGuigan's solicitor after full disclosure of the council's letter of requisition. After outlining his complaints he concluded:

> Our clients will not be prepared to settle unless all the requisitions noted in the council's letter have been satisfied. We also require confirmation that all required inspections at foundation and framing stages have taken place to the satisfaction of the council.

The District Court had found that this was either an offer to affirm the contract on condition that the contract as asserted was strictly performed, or an offer to waive the breach if the vendor would promise to rectify the defects. He found affirmation to have occurred after full knowledge of the facts.

In both the High Court and the Court of Appeal the learned Judges reminded themselves that the authorities had emphasised the need for affirmation to be unequivocal. Given a number of possible interpretations, the paragraph above could not be said to be unequivocal. On this legal ground alone affirmation was denied.

Cancellation

Here there were two questions. The first was whether the effect of the breach was to substantially reduce the benefit of the contract. It was argued that the cost of remedying estimated at $14,000 was insubstantial in comparison to the purchase price of $370,000 agreed. However, the Court rejected an approach which decided the issue solely by reference to monetary comparison. The property was large and impressive and the deficient workmanship serious. The breach was sufficiently serious to justify cancellation.

On the second argument, whether the requisition clause satisfied the test of essentiality, the Court of Appeal declined to revisit the Judge's finding.

Commentary

It is not uncommon in practice to have to deal with a situation where a breach of contract gives rise to a decision whether to cancel or affirm and/or sue in damages.

This case demonstrates the need for a clear thinking approach to a basket of remedies. Faced with breach innocent parties remain indecisive at their peril.

Professional advisers must guard against keeping all options open for too long so as to choose the most expedient solution. Upon learning of the breach a reasonable time (and that depends upon the circumstances) only can lapse before the innocent party must react.

Failure to do so heightens the risk of affirming conduct with its potentially unfortunate effects for a client who may reasonably believe he or she has kept all options open.

SECOND CAVEATS: *A-G v LANGDON* UPDATED

At [1999] NZLJ 368 the decision of the full Court of the High Court in *A-G v Langdon* was reviewed. It held that the DLR could not lawfully receive a second caveat for registration. The DLR was found liable in damages for having done so. The Court opined that under R 24 of the Land Transfer Regulations 1966 the DLR had power to solicit further information concerning the nature of the caveat in order to discharge his obligations under the Act.

Following this decision the DLR is requiring a written undertaking from any caveators that there is no linking connection between the caveat lodged and any lapsed caveat. There appears to be no statutory basis for the DLR's refusal to register a caveat lacking the requested undertaking. Indeed s 138 obliges registration, whilst s 148 categorically forbids it for a second caveat.

It is not immediately apparent how the DLR can, as suggested by the full Court in the *Langdon* decision, require sufficient information under the powers of s 138 and R 24 of the Act and regulations to establish whether the caveat is indeed a second attempt. Lacking such statutory power the DLR must either register immediately and risk having to pay compensation or refuse registration arguably without statutory authorisation. In that event he may be responsible for any dealing registered which may otherwise have been successfully prevented had he registered the caveat at the time of its receipt. In short, he is damned if he does register and damned if he does not.

If the foregoing analysis is correct the only solution is a law change which either stipulates that the DLR can immediately register a caveat upon receipt without liability or permits him to decline to register unless and until some appropriate certificate is given by the caveator as to the relationship between the caveat lodged and any former caveat on the same title. A corollary to the second alternative must be that, with the benefit of the caveator's certificate, the DLR is absolved from further liability.

An additional present problem is that the mandatory provisions of ss 138 and 148 probably mean that that result could not be achieved by regulation, as the Act seems on its face clear and unequivocal on both the duty to register and the Registrar's legal liability if he registers a second or subsequent caveat.

TENANCY – QUIET ENJOYMENT

London Borough of Southwark v Mills [1999] 3 WLR 939 (HL)

Mrs Tanner and Ms Baxter lived in council flats in London. Both flats, erected between the Wars, shared a common problem starkly articulated by Lord Hoffmann in his leading judgment:

> both complain of being able to hear all sounds made by their neighbours. It is not that the neighbours are unreasonably noisy. For the most part, they are behaving quite normally. But the flats have no sound insulation. The tenants can hear not only the neighbour's televisions and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their lovemaking.

They went to law to force their landlord to provide sound insulation between their flat and their neighbours. They were far from lone voices. The London Borough of Southwark estimated it would cost £1.271 billion to bring its existing housing stocks up to acceptable modern standards. Its 1998-9 budget for major housing schemes was under £55 million. The stakes were therefore immense for the council and its ratepayers.

The tenants' causes of action were breach of the covenant of quiet enjoyment and nuisance. On each ground, they argued, the council was compelled to install sound insulation.

The leading judgments were delivered by Lords Hoffmann and Millett. For each the starting point was that, absent any warranty from the landlord that the flat had sound insulation, the law will not imply such an obligation.

Quiet enjoyment

Lord Hoffmann stated the apparent paradox thus:

> Ms Baxter's agreement says:
>
> "The Council shall not interfere with the tenants' rights to quiet enjoyment of the premises during the continuance of the tenancy."
>
> Read literally, these words would seem very apt. The flat is not quiet and the tenant is not enjoying it. But the words cannot be read literally.

The word "quiet" in the covenant did not mean undisturbed by noise. It means without interference – without interruption of the possession.

Nor indeed did "enjoyment" intend to refer to any state of contentment by the tenant. Rather it:

> refers to the exercise and use of the right and having the full benefit of it, rather than to derive pleasure from it.

The decision analysed long-standing precedents on the construction of the quiet enjoyment covenant. A number of propositions were established. Firstly, the covenant was prospective and referred to actions of the landlord after entering into the tenancy. It did not cover pre-existing limitations or defects of the property. Secondly, and perhaps consequentially, the tenant takes the property not only in the physical condition in which he finds it, but also subject to the uses which the parties must have contemplated would be made of the parts retained by the landlord. Thirdly, the quiet enjoyment covenant could not be elevated to an onerous obligation to improve the premises. It reflects and maintains the grant of the right of uninterrupted possession in favour of the tenant in as sound a state as he/she found it to be at the outset of the tenancy. It cannot extend to a betterment to the tenant by improving the quality of the premise.

Applying these principles the House of Lords unanimously resolved that the covenant of quiet enjoyment did not

provide the desired remedy or require upgrading the premises.

Law of nuisance

Both of the principal opinions of the Law Lords found the appellants faced insuperable difficulties in succeeding on this argument. They did so having regard to fundamental characteristics of the cause of action.

First, the law of nuisance was primarily directed against the persons whose activities created the nuisance. In this case the proper defendants were the adjoining occupiers of surrounding flats. They were behaving reasonably in using the premises. A claim against the landlord was misconceived unless the council had somehow connived at its tenants' unreasonable behaviour. On the facts it had not.

Secondly, from the principle that nuisance presumes unreasonable disturbance of the property rights it followed, the appellants again failed. Were it otherwise adjoining neighbours A and B would have equal rights of suit against each other albeit both behaved reasonably and considerately. It was neither of their faults that the ordinary sounds of living wafted through the thin party walls. No restraint could be made by one upon the other short of effectively terminating the other's right of reasonable occupation. The law of nuisance did not extend that far.

Policy considerations

None of the judgments expressed themselves unsympathetic with the tenants' plight. However, they were not only mindful of the long-standing legal precedents concerning the restricted rights which tenants have against landlord (other than explicitly granted under the lease or statute) but also two wider public policy issues.

The first relates to a history of legislation which required new construction to comply with certain minimum standards. It was argued that these should set some current reasonable standard to which a landlord must conform. However, none of these included soundproofing (albeit now an expected part of modern living) nor could those standards apply other than to construction which predated the coming into effect of the relevant statutes. Our laws are not retroactive and could not impose upon the landlord an obligation to upgrade unless that were specifically provided for. It was not.

The second is apparent from the brief but poignant apologia which ended Lord Millett's speech:

> These cases raise issues of priority in the allocation of resources. Such issues must be resolved by the democratic process, national and local. The Judges are not equipped to resolve them. All that we can do is to say that there is nothing in the relevant tenancy agreements or current legislation, or in the common law, which would enable the tenants to obtain redress through the Courts.

Commentary

The lay reader of the lease may justifiably argue that a covenant for quiet enjoyment would be expected by the common man to provide both quietness and, at some level, enjoyment. They would be wrong. It is a very short step from there to descend to calling the law an ass. Yet the decision is plainly right both in precedent and principle. The parties have contracted and in doing so fix both their risks and rewards. The Court should be slow to employ devices from the common law on some social basis implying terms to reform the parties' contract.

Finally Lord Millett is quite correct in restricting the Court's role to interpreting and enforcing the contract. Courts should rigorously abstain from delivering to the parties some new and revised set of rights out of sympathy for one of the parties but at the unfair cost to the other; unfair because it was never committed to at the time.

WRINKLE IN ADLS STANDARD FORM

The form of Agreement for Sale and Purchase of Real Estate approved by the Real Estate Institute of New Zealand and the Auckland District Law Society is widely used nationally. The 7th edition was issued in July 1999 and effects substantive changes in the relationship between vendors and purchasers. Real care is needed to ensure that the new terms are precisely analysed and adequate advice given to clients. It is dangerous to assume that past practices merely continue.

Clause 6.1 of the revised Agreement deals with vendor warranties relating to governmental or local body requisitions or notices received from tenants. The previous form of Agreement restricted purchasers' rights to a warranty that no such notices had been received and/or lack of knowledge of any relevant requisition or requirement relating to the property sold.

The new form of wording, after referring to substantially the same events of requisition requirement, notice or demand extends the obligations twofold. First, there is now given a warranty of no consent or waiver to any application under the Resource Management Act 1991. Secondly, and perhaps more insidiously, the clause extends the warranty not only to any notice which directly relate to the property but also to a notice:

> which directly or indirectly affects the property and which has not been disclosed in writing to the purchaser.

The word "indirectly" seems prone to extend the warranty to notices, requirements consents or waivers which may not relate to the subject property but which yet may affect it such as an application for resource consent relating to an adjoining property which may affect the benefits to be enjoyed by the purchaser. An example may be the intensive redevelopment of an adjoining site creating noise and or loss of view issues. In such a case any consent or waiver given by the vendor to his or her neighbours will need to be disclosed.

Nor is the Agreement entirely clear what is meant by "waiver". If the vendor had a right of objection which he or she does not take up does that qualify as a "waiver"? Or must it be some formal signed waiver filed with the relevant authority?

In modern urban environments these issues can be the source of real concern to purchasers when things go wrong. Vendor's advisers need to take real care to ensure their clients understand the scope of the obligations under this clause and have fulfilled their obligations adequately.

This issue is by no means the only potentially radical change between the former form of Agreement and the new edition. It is illustrative only. It exemplifies the re-learning process which the profession must go through in ensuring the public is adequately advised on the new rights and responsibilities arising from the new form of Agreement. ❑

DISPUTE RESOLUTION IN NEW ZEALAND

ALTERNATIVE DISPUTE RESOLUTION

edited by Carol Powell

Dispute Resolution in New Zealand, Peter Spiller Ed, OUP April 1999, provides an overview of four of the more traditional forms of dispute resolution in New Zealand: negotiation, mediation, arbitration and litigation. There are also chapters on "Maori disputes and their resolution", "Dispute Resolution in Statutory Context" and "dispute resolution across cultures".

The book provides a chapter on each of the four processes, generally written by one or more expert practitioner in the field. It also contains some practical material on communication skills and client interviewing.

Each of the chapters follows a similar format: a discussion of the process; issues and approaches; how the process works and finally a short practical exercise. Content covers techniques and differing approaches, factors to be taken into account when selecting the process and strategies for success in the process. It also covers the relevant ethical issues and legal rules.

It is the exercises which distinguish this book from a number of others on the subject. Each exercise consists of a practical scenario with a series of questions and exercises designed to enable the practitioner to practise the skills discussed in the chapter. These will be a very useful practical check for the reader to ensure that the principles discussed in the substantive part of the chapter have been understood and can be applied in a practical manner.

The negotiation chapter adopts an unusual approach for an ADR text. It discusses two types of negotiation style: competitive and collaborative (being interest-based or principled negotiation). The writer suggests that negotiators should use both styles, selecting the appropriate approach on the basis of the particular circumstances of the negotiation. It also suggests that in some cases a hybrid approach can be adopted. This is certainly a different theory from the conventional wisdom, which is to use solely an interest based or a principled negotiation style. None the less the chapter covers the issues in an even and thorough manner and the practitioner can make an informed decision about the style to adopt.

The mediation chapter is the collaborative effort of several of the leading mediation practitioners in New Zealand. It commences with a useful section differentiating the mediation process from several other processes which are commonly confused with mediation, namely litigation, conciliation, counselling and facilitation. The chapter recognises that there are many different styles of and approaches to mediation and provides a useful discussion of the common elements of mediation as well as some of the differences between styles. It sets out the phases and skills of mediation using the term "windows" to describe individual steps, drawing an analogy with the use of windows on a computer screen, which can be open or partially opened simultaneously. This approach allows for styles of mediation which do not use certain techniques, such as caucus, or do not follow a fixed or model, while still identifying common elements. The chapter also provides a brief but comprehensive discussion of commonly raised ethical issues in mediation.

The arbitration chapter is a juxtaposition of academic theory and practical discussion. It provides a thorough overview of the Arbitration Act 1996, putting the Act in context with previous New Zealand legislation and the UNCITRAL Rules, which have been adopted for much international arbitration. It also looks at the practical steps to be taken in arbitration and the rights and powers of the parties as set out in the Act. The final part of the chapter discusses hybrid arbitral processes, namely negotiation-arbitration, mediation-arbitration, co-med-arb, final offer arbitration, evaluative methods and mini-trial. These processes are discussed briefly in two or three paragraphs providing an overview of each process, more as a contrast to arbitration than as a full discussion of the use of the processes themselves.

The litigation chapter endeavours to enhance understanding of the litigation process so that it may be most effectively utilised and provides cross-references to texts which provide discussion of the procedure of the Court system. The chapter was written after discussion and consultation with a number of very senior members of the legal profession and the judiciary. It operates on two levels, one offering an understanding of the basic features of litigation and the other (by incorporating the footnotes) offering a fuller grasp of the points in more depth.

The chapter looks at the role of litigation, discussing the need for litigation within the New Zealand constitutional system and the limits of litigation. It then looks at advocacy and adjudication as two separate sections. In the advocacy section it discusses the adversarial system and the various professional duties and responsibilities owed by an advocate. It also provides practical advice on the practice of advocacy covering preparation, the writing of submissions and delivery of argument. The section on adjudication covers issues such as legal principles and authorities (statute law, case law and overall realities) as well discussing issues such as fairness and the balancing of rights and interests.

The remaining three chapters each deal with ADR within New Zealand. The statutory context chapter discusses

some of the statute recognised ADR processes and their application. The Maori disputes chapter provides a sensitive understanding of some of the issues surrounding disputes involving Maori. Finally the chapter on dispute resolution across cultures explores the contexts in which differences of culture may shape the process of dispute resolution and negotiation and endeavours to provide core principles for responding to those differences. The exercises at the end of this chapter will be very useful as a first step for practitioners to analyse their own cultural expectations as a step towards working with cross-cultural issues.

The book takes a holistic approach to disputes, recognising that they are capable of resolution by different processes. It endeavours to provide the reader with sufficient information about each process to enable them to select the most appropriate process for any given dispute and to operate with some confidence within that process.

The book does not cover the full range of ADR processes in depth, but focuses on those which are considered to be mainstream. This would be one small criticism of the book as a whole reference guide. There are a number of processes which are now being commonly used in the commercial world, which ideally could have been covered in more depth. These include med-arb, mini-trial, conciliation (which could have formed part of the chapter on dispute resolution in a statutory context), expert appraisals and expert determinations. However, the text does not purport to be a full ADR reference guide, but aims to provide a comprehensive overview of the main forms of dispute resolution operating in New Zealand. There is no question but that the book achieves this goal and it will be a very useful handbook for practitioners in the dispute resolution field.

OPTION GENERATION IN MEDIATION

One of the key aspects of both the problem-solving model of mediation and interest based negotiation, is the ability of the parties to "enlarge the pie".

What this means is that the parties create a selection of outcomes or potential parts of a settlement, which will then give them a range of possibilities to work with in the final stage – reaching agreement.

In some cases options will have been raised during the process, and the parties can move directly into negotiation. However, this can often take place during a specially dedicated phase in the mediation process. The independent mediator can note options as they occur during earlier parts of the process, and can assist the parties to work together to generate options.

The key to this phase of the mediation is to allow the parties to brainstorm, without commitment and to encourage the parties to focus on the future. The options themselves should focus on meeting the needs and interests of the parties.

There are many different ways of undertaking this part of the process including asking each party to make a list of possible options and to then share the lists, working through the issues list asking all parties to contribute potential solutions or to simply brainstorm.

What is important is that the options that are suggested come from the parties themselves, not the mediator, and that every party contributes to the options list. The options are not criticised or evaluated as they are suggested, but are merely recorded by the mediator for future discussion.

The benefit of this process is that it allows options to be put forward without taking the form of an offer. As the parties do not evaluate each option as it is suggested, the possibility of a party rejecting an offer and creating a stalemate, at a time when there is no other possible solution available, is avoided.

Once the brainstorming process is complete the mediator can work with the parties to evaluate the options and to discuss details of how an option could be incorporated into an agreement. This is the beginning of the negotiation process and is the time when some options are likely to be rejected and others explored. During this process the mediator will continue to ask the parties to consider the needs and interests of all parties and may assist in the modification of an option so that it meets those needs.

By this stage the parties are likely to be feeling positive about the likelihood of a settlement and the discussion gains momentum. The parties begin to work together to create a settlement which meets the needs of all. The mediator becomes less participatory and begins to track the discussion, recording points of agreement. From time to time the mediator may check that full agreement has been reached on all aspects of any point before the discussion moves on. The mediator may also intercede where there is an apparent impasse to move the parties on by summarising the points of agreement reached and focusing on needs and interests relating to the outstanding issues.

This is a critical stage in the mediation process and, where the parties have had their needs and interests met throughout, it will reflect a change in the parties' ability to work together to resolve their differences.

WHAT'S HAPPENING 2000

January 27-28
Arbitral tribunals or state courts – who must defer to whom?
Swiss Arbitration Association and IBA, Zurich

February 24-27
AMINZ Annual Conference
Waipuna Lodge, Auckland

Easter
Peace Conference
"Just Peace – peace building and peace making in the new millennium"
Massey University – Albany Campus, Auckland

May 17-18
Transformative Mediation Workshop
Joe Folger and Dorothy Della Nocce
LEADR, Auckland

July 28-30
LEADR 7th International Conference
Regent Hotel, Sydney

LEADR UPDATE

NEW Millennium;
NEW Executive Officer;
NEW Offices;
NEW Board

New Executive Officer

The New Year will see a fresh start for LEADR with the appointment of a new Executive Officer, Susan Wright. As the brief biographical information below shows, Susan has some outstanding skills to bring to the role. Her strong background in mediation enables LEADR to have a single executive officer role, as we have done through 1999, but with a greater emphasis on strategic functions.

Susan has a Masters in Business Studies (Dispute Resolution) from Massey University. This gives her a sound theoretical and practical understanding of the scope of ADR and the breadth of the processes that it encompasses.

Since her admission to the Bar in 1984, she has worked in general practice, commercial and company law. In recent years she has worked for Johnston Lawrence, specialising in dispute resolution.

Susan has a genuine interest and enthusiasm for the potential of mediation and is excited about the opportunity to be involved in the development of ADR. Her training, legal and mediation experiences equip her well to understand and meet some of the practical and philosophical challenges in sustaining ADR growth.

Susan has a particular interest in restorative justice – the topic of her Masters thesis – and is involved in the core group setting up a restorative justice structure in Wellington.

LEADR moves to Wellington

In the interests of demonstrating that LEADR is indeed a national, not an "Auckland" organisation (and because a particularly generous offer of accommodation was made, just as our Auckland lease expires), LEADR will be relocating its New Zealand office to Wellington.

From the New Year, LEADR will be located in the offices of Johnston Lawrence in Wool House in central Wellington. The new contact details will be phone 04-4700-110 and Fax is 04-4700-111. LEADR is extremely grateful to Johnston Lawrence for their kind offer of office space on very generous terms.

It is also timely for LEADR to thank Hesketh Henry and Law Link for housing our offices over the last three and a half years. It is with the assistance of firms such as these that a small organisation like LEADR can enjoy the benefits of proper office facilities.

Three new board members for 1999/2000

LEADR's newly appointed board features three new faces, and farewells two dedicated people who have given much to LEADR over recent years.

Bruce Cropper, Judy Dell and Carole Durbin are the three new board members. Bruce is a mediator working in private practice in Auckland. Judy – previously a lawyer for CYPFS – has recently started her own mediation and dispute resolution practice in Wellington, while Carole Durbin is a partner in Simpson Grierson's Auckland office.

Deborah Clapshaw was nominated as Chair of LEADR NZ for a second term. The Treasurer is once again Mike Crosbie. The full board is therefore as follows:

Chair Deborah Clapshaw – Auckland
Vice Chair and Treasurer Mike Crosbie – Tauranga
Roger Chapman – Wellington
Bruce Cropper – Auckland
Judy Dell – Wellington
Carol Powell – Auckland
Carole Durbin – Auckland
Geoff Sharp – Wellington

Nigel Dunlop and Allison Sinclair retired as members of the board at the 1999 election. Nigel gave an important contribution to the board in bringing a South Island perspective to the table. Allison has given a tremendous amount of her time and energy to the LEADR board since 1995. Of late, she has played a particularly important role as "link" between the Auckland local committee and the board.

CASENOTE

Cuthbert Stewart Ltd v Mark Alexander Jenkins

Court of Appeal,
20 September 1999
Keith J, Gallen J, Paterson J

This decision illustrates the care with which agreements reached at mediation must be recorded.

In this case an agreement was reached whereby Mark Jenkins (Jenkins) agreed to purchase Cuthbert Stewart Ltd's (CSL) interest in a company. The agreement provided that Jenkins was to confirm unconditionally by 1 December 1998 his purchase of CSL for the sum of $573,000.

The agreement then contained three clauses dealing with payment which was to be by way of an initial lump sum on 15 December, followed by twenty-three monthly instalments, with the sum payable by instalments to be guaranteed by a source outside the company. The agreement provided that if these three clauses were not satisfied by 1 December, then CSL agreed to purchase Jenkins' share of the company for $40,000 plus the transfer of a motor vehicle.

Jenkins confirmed within a mutually agreed extended timeframe that the agreement was unconditional pursuant to the "agreement following mediation". However, on 15 December Jenkins' solicitor advised that he was not in a position to settle and sought an extension of time. CSL responded on the same day that it exercised its right to purchase Jenkins' interest in the company. Jenkins refused to take the actions in terms of this purported right to purchase. CSL issued proceedings for specific performance and sought summary judgment.

Jenkins resisted the summary judgment on a number of grounds which raised issues concerning the meaning of the agreement. The Master at first instance found that the agreement was ambiguous and formed a preliminary

view on interpretation, which favoured Jenkins. On that basis he refused the application for summary judgment. CSL appealed.

The Court of Appeal upheld the Master's finding that in terms of the interpretation of the Agreement, CSL had not satisfied the Court that Jenkins had no defence. It then went on to briefly consider a policy argument that effect should be given to the agreement reached by mediation following a lengthy shareholder dispute. While the Court acknowledged the force of that argument it had difficulty in determining exactly what the parties had agreed to. The agreement left in doubt what would happen if Jenkins failed to make one of the scheduled payment.

This brings home one of the roles of a mediator during the agreement phase of mediation. During this stage the mediator is often not actively participating in the negotiation discussions, but is taking back seat – tracking agreement as it is reached. Once there appears to be agreement, this must be formalised in a legally binding manner. Where the parties have their lawyers present, the agreement can be formalised there and then. Where lawyers are not present there is a heavier onus on the mediator to ensure that the heads of agreement are accurately recorded and that the terms of agreement have been tested. Mediators need to ask the question – "what if ..." to check that the parties agree upon what will happen if any part of the agreement is not carried out or is incapable of fulfilment for any reason.

MEDIATOR PROFILE – FELICITY HUTCHESON

Felicity believes that the most important feature of the mediation process is the "exchange". This is the time the parties sit down together and start talking to each other in a full and frank way. It is at this time that a lot of the hard work of mediating is done – and it is a point in the process that is too often rushed. In Felicity's view there can be a tendency to move the parties into private session or "caucus" too soon because the mediator is more comfortable with the one-on-one dialogue.

Prior to becoming a mediator, Felicity worked ten years mainly in the field of social work and developed the life skills during that time that prepared her for working with people in conflict. She then completed a degree in Education in the late eighties having gone to university as an adult student.

From there she "sort of fell into mediation", wanting to use her skills in a "hands-on" way working with people she accepted a job as a Tenancy Tribunal Mediator with little concept of what it meant. In the late 1980s mediation was still in its infancy in New Zealand and many practitioners were still grappling with what it meant in both a theoretical and practical sense.

She has now worked as a mediator for ten years with the Tenancy Tribunal and believes that there's no training like experience. The wide range of conflicts and people that she manages as a mediator is constantly challenging for her. Because the model of mediation used is one where there is often minimal preliminary work done, the mediator often meets the parties and speaks to the parties for the first time at mediation. It requires quick assessment of the type of personalities in the room and "on the feet" skills to manage the process

While some practitioners may dismiss the Tenancy Tribunal mediators as lightweight, in reality the disputes can range from simple one-issue disputes through to multi-issue complex disputes and more often than not they have a high emotional content. It is one of the few places where a mediator can get lots and lots of practice.

The Ministry of Housing provides excellent mediation training. Twice yearly mediators spend at least 2-3 days sitting at the feet of some of the most prestigious trainers in mediation, who have included trainers from CDR & Associates and the Harvard Law School Mediation programme.

In addition Felicity completed the Diploma in Dispute Resolution through Massey University, in 1997. Felicity has found that the training she has received over the years in other fields has also added to the tool-kit she uses as a mediator, these include NLP training, Professional Skills Seminars through the Conflict Resolution Network of Australia, transformative mediation seminars and seminars designed to explore the relationship of the mediator working in cross-cultural contexts.

Felicity's style of mediation has changed over the years. Initially she held a view that mediation was a "cure all conflicts" process that was essentially "win/win" as promulgated in the textbooks. Over time she has come to believe that it is more of a "mostly ok/mostly ok" process. In her experience most parties have to give away something to get something.

Mediating in a statutory context also brings its own challenges. She finds that if parties are aware that she has knowledge about the law that relates to Tenancies, then there may be pressure brought to bear to give advice and information to assist them in their decision-making. She is becoming more and more convinced that the less a mediator knows about a dispute and/or the area of law it relates to, the easier it is to maintain the neutral/impartial perspective.

Felicity's personal attributes which she brings to mediation include her tolerance. Dealing with people in conflict day after day can be demanding and an ability to maintain the "meta position" ie to sit outside the conflict as the observer is important. But most of all she believes that a good sense of humour helps! ❑

LAW AND NAVAL OPERATIONS

Lieutenant Commander Chris Griggs, Royal New Zealand Navy

discusses his observations while serving as a legal adviser in the Multinational Interception Force in the Arabian Gulf

> *Decisions were impacted by legal considerations at every level, [the law of war] proved invaluable in the decision making process.* General Colin Powell. Report to the United States Congress following the 1991 Gulf War

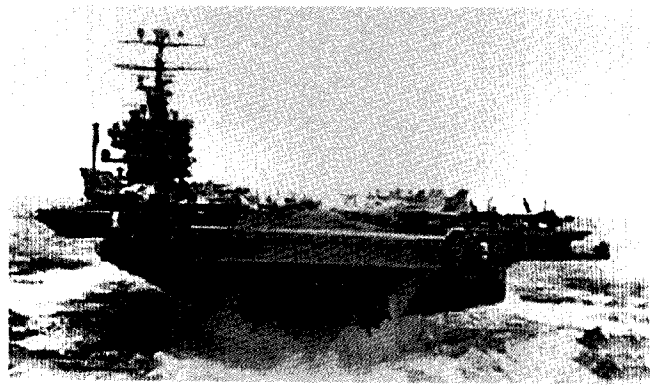
It is well known that, following Iraq's invasion of Kuwait on 2 August 1990, the United Nations Security Council imposed comprehensive sanctions on Iraq pursuant to Chapter VII of the UN Charter (resolution 661(1990) of 6 August 1990). On 25 August 1990, the Security Council noted that Iraq was violating the sanctions and called upon:

> those Member States cooperating with the government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990) .... (resolution 665 (1990).)

Thus was born the Multinational Interception Force (MIF), a force in which New Zealand has participated on three separate occasions. History shows that the MIF was not by itself sufficient to compel Iraq to comply with relevant Security Council resolutions (including, but not limited to, the sanctions regime), but nevertheless the MIF has operated in tandem with other operations such as Desert Storm and Southern Watch from its inception through to the present day.

The MIF is, as resolution 665 suggests, a multinational naval force. For the past eight years it has been operating in the Arabian Gulf under the operational control of the Commander, US Naval Forces Central Command. Most of the naval units participating are drawn from the US Navy; however, the force is truly multinational, with other recent participating states including Australia, Canada, Kuwait, the Netherlands, New Zealand, the United Arab Emirates and the United Kingdom.

New Zealand's first two contributions took the form of frigate deployments: HMNZS *Wellington* from October 1995 to January 1996, and HMNZS *Canterbury* from September 1996 to November 1996. Those ships acquitted themselves with distinction, and demonstrated New Zealand's commitment to collective security and the enforcement of the rule of law in international relations.



USS Carl Vinson at sea (US Navy Official)

In December 1998, the New Zealand Government decided to accept an invitation by the United States to send a boarding team and a legal adviser on operations law to join a US Navy carrier battle group, which was proceeding from its home port on the western seaboard of the United States to a three month deployment in the Arabian Gulf. That battle group was to relieve the USS *Enterprise* Battle Group as the kernel of the MIF, and the task force commander of all US Navy units operating in the Gulf.

When I stepped aboard the aircraft carrier USS *Carl Vinson* with my team on 10 December 1998, it was the first time that New Zealand had provided a legal officer for an operation in the maritime environment at the specific request of a third state. The presence of the New Zealand team clearly represented a further thaw in the bi-lateral military relationship between New Zealand and the United States.

This article discusses my observations of the impact of law on modern naval operations, in the context of the operations undertaken by the *Carl Vinson* Battle Group in the Arabian Gulf from December 1998 through to March 1999.

JUSTIFYING THE USE OF FORCE

Perhaps the most important and challenging issue for any operations lawyer, whether at home in a strategic headquarters or deployed in the area of operations, is the lawful justification for the use of force in any particular case.

By the end of World War II, war was no longer regarded as a legitimate tool for achieving foreign policy aims. In San Francisco on 26 June 1945, the member states of the United Nations underlined this by signing the United

Nations Charter. Article 2 contains the founding principles of the organisation, with perhaps the most important principle being that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

There are now two principal occasions on which a state may be justified in resorting to the use of force pursuant to a

Preparations for Operation DESERT FOX (USS Carl Vinson)

resolution of the Security Council acting under Chapter VII of the UN Charter, or as an exercise of the inherent right of individual or collective self-defence. This has not however prevented states from relying on other doctrines to justify uses of force since 1945. For example, it is apparent that the member states of NATO consider that their recent air strikes in Kosovo and other parts of Yugoslavia were justified by the doctrine of humanitarian intervention. (On 2 June 1999 the International Court of Justice declined jurisdiction in a case brought by Yugoslavia as a challenge to this use of force. The validity of NATO's actions are beyond the scope of this article.)

In the case of the MIF, the authorisation is unambiguous. However, the US battle group with which I served had other missions beyond that mandate. One of those missions was Operation Desert Fox the "degrading" of Iraqi capability in response to Iraq's continued non-compliance with the inspection regime imposed by Security Council resolution 687 (1991) of 3 April 1991, as part of terms of the cease-fire at the end of Operation Desert Storm, to ensure that Iraq could not maintain a capability to deploy weapons of mass destruction (WMD). This was a joint Anglo-American mission, however the justifications for the use of force cited by the United States and the United Kingdom were subtly different.

In his Statement to the Security Council on 16 December 1998 (on-line at: http://www.usia.gov/ regional/nea/gulfsec/burl1217.htm), Ambassador A Peter Burleigh of the United States Mission to the United Nations focused on the cease-fire mandated by Security Council resolution 687 (1991) and interpreted it as containing an implicit continuing authorisation to use force to compel compliance with the terms of the cease-fire. In short, it appears that the United States' view was that, if any member state considered that Iraq had failed to comply with the requirements of resolution 687, that state could lawfully recommence hostilities against Iraq on the basis that the cease-fire had been effectively repudiated.

While the United Kingdom also considered that the authorisation to use force in resolution 687 was revived by Iraq's continued non-compliance with its terms, the argument urged on the Security Council by British Permanent Representative, Sir Jeremy Greenstock, had an additional element:

> There is a clear legal basis for military action in the resolutions adopted by the Security Council. Resolution 1154 made it clear that any violation by Iraq of its obligations to allow the Special Commission and the IAEA unrestricted access would have severest consequences. Resolution 1205 established that Iraq's decision of 31 October 1998 to cease cooperation with the Special Commission was a flagrant violation of Resolution 687, which laid down the conditions for the 1991 ceasefire. By that Resolution, therefore, the Council implicitly revived the authorisation to use force given in Resolution 678. (On-line at: http://www. britain-info.org/bis/ukmis/speeches/17dec98.stm.)

While there are arguments for and against the validity of such implicit Security Council authorisations for the use of force, the British Permanent Representative's description of this justification as "a clear legal basis for military action" might perhaps be viewed as a little ambitious. (A very good exposition of this issue and argument against the validity of implicit authorisations is contained in Lobel and Ratner "Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-fires and the Iraqi Inspection Regime" (1999) 93 AJIL 124.) Interestingly enough, New Zealand along with the majority of Western states explicitly endorsed the Anglo-American strikes against Iraq in the days following the commencement of Operation Desert Fox.

International law in its most dynamic form, customary international law, is formed by the stated opinions of states that an international right or obligation exists, combined with state practice that manifests and underscores those opinions. In the last years of the twentieth century, the occasions on which authorities other than self-defence or explicit Security Council authorisation are being used to justify uses of force seem to be on the increase. Concepts such as humanitarian intervention and implicit Security Council resolutions may well threaten the very legal fabric on which international peace and security is based, even as the states citing those concepts as justification for the use of force attempt to deal with the great threats to peace of our time. The problem which increasingly faces the international community is whether to do nothing, and allow grave violations of international law to continue; or take action and accept the risk that the solution may itself be perceived as a violation of international law. This has important implications for all military commanders and creates a challenging legal environment for their legal advisers.

LAW OF THE SEA

The Law of the Sea is of great concern to any naval commander operating in confined waters such as the Arabian Gulf, because it acts as a constraint on his or her area of operations. The Arabian Gulf is a particular challenge in this area, because it presents a complex patchwork of excessive maritime claims, disputed islands and differing views on passage rights through the Strait of Hormuz.

Iranian straight baselines

The most significant excessive maritime claim in the Arabian Gulf is that of Iran. While Iran is not a party to the United Nations Convention on the Law of the Sea (UNCLOS), it is generally accepted that the parts of UNCLOS which prescribe the zones of maritime jurisdiction which coastal states may claim are declaratory of customary international law. Consistent with this, the territorial sea claimed by Iran in the Arabian Gulf, which stretches along the entire eastern coast and most of the northern coast of the Gulf, is 12 nautical miles in breadth. However, the baselines from which Iran measures its territorial sea have resulted in a territorial sea claim which exceeds, in part, the territorial sea which New Zealand and the international community recognise.

Baselines are essentially imaginary lines around the coast of a coastal state from which the various maritime zones (internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf) that that state may claim are measured. The normal rule is that the baseline is the low water line along the coast and its fringing reefs, as marked on large-scale charts officially recognised by the coastal state (arts 5 and 6). In certain circumstances, a coastal state may draw straight baselines along portions of its coastline, including where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity (art 7). The straight baselines are drawn between "appropriate points", which do not depart to any appreciable extent from the general direction of the coast. A coastal state may also draw a straight baseline across the mouth of a bay, if the distance between the low water marks of the natural entrance points is not greater than 24 nautical miles. However, in order to qualify as a "bay" under international law, its area must be as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of the bay (art 10).

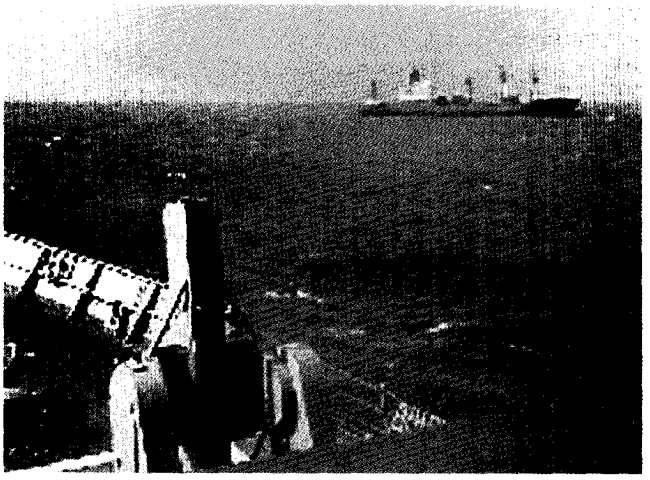
Along some parts of its coast, on the eastern shore of the Arabian Gulf, Iran has drawn straight baselines across the mouths of indentations which do not constitute bays under international law. The effects of this excessive maritime claim are two-fold:

- the area of water on the landward side of the baseline is internal waters. Foreign warships have no navigation rights through a coastal state's internal waters and normally require diplomatic clearance to enter those waters; and
- the area of the Gulf which is encompassed by Iran's consequential territorial sea claim is extended.

The area of water in an area of naval operations which constitutes the territorial sea of a non-engaged state is a vital consideration to the naval commander. Within that territorial sea, the commander's forces have only the right of innocent passage to rely upon. Transit under the right of innocent passage places severe restrictions on the commander's freedom of action – in particular, weapons practices and exercises are prohibited, as is the launching and recovery of naval aircraft. Military aircraft do not themselves have any right to overfly the coastal state's territorial sea.

Neither New Zealand, the United States, nor most maritime states, recognise the portion of Iran's claimed territorial sea which exceeds that which it could claim on the basis of baselines drawn in accordance with international law. However, the question as to what action the respective governments are prepared to take to demonstrate this non-recognition is another matter. The United States has the military capability to challenge such excessive maritime claims and has adopted a policy of doing so over the years, through its Freedom of Navigation programme, which was established following President Reagan's statement on US Ocean Policy of 10 March 1983 ((1983) 22 *International Legal Materials* 464).

The reasoning underlying the US Freedom of Navigation policy is that, if states act in a manner which appears tacitly to recognise an excessive maritime claim, that maritime claim may gain greater substance in customary international law over time.



Merchant vessel hove-to in the North Arabian Gulf, awaiting boarding team from USS Klakring (Lt Cdr Griggs)

Strait of Hormuz

The Strait of Hormuz is an interesting case study in the competing interests that characterise UNCLOS. On the one hand, the strait is the sole entry and exit point for the Arabian Gulf, and is therefore a vital strategic choke point for international maritime trade to and from the Gulf region. It is also a vital access point for Western naval forces proceeding into the Gulf for MIF duties. On the other hand, about 20 nautical miles of the strait is completely straddled by the adjoining territorial seas of Iran and Oman, whose sovereignty and security are obviously affected by the passage of significant numbers of foreign warships through those waters.

Articles 37 and 38 of UNCLOS resolve the conflict between the interests of Iran and Oman on the one hand, and the maritime states on the other, by providing that, in international straits such as the Strait of Hormuz, all ships and aircraft enjoy the unimpeded right of transit passage. Transit passage is defined by art 38(2) as: "freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait ...".

Warships and military aircraft exercising the right of transit passage may however do so in their normal mode (art 39(1)(c)). This is distinct from the regime of innocent passage in several important respects, because it is interpreted as meaning that submarines may transit submerged, and warships may steam in formation, launching and recovering naval aircraft in accordance with normal naval practice.

However, Oman's view of passage rights through the Strait of Hormuz does not entirely coincide with the strict letter of UNCLOS. When Oman ratified UNCLOS on 17 August 1989, it issued a number of declarations including

Declaration No 2, on the passage of warships through Omani territorial waters:

> Innocent passage is guaranteed to warships through Omani territorial waters, subject to prior permission. This also applies to submarines, on condition that they navigate on the surface and fly the flag of their home state.

The regime of innocent passage prescribed by UNCLOS applies to warships in the same manner as it does to merchant ships. The regime does not provide for prior permission to be sought by warships exercising the right of innocent passage through a foreign territorial sea. To that extent, therefore, the Omani Declaration No 2 appears to be in breach of art 310 of UNCLOS, because it purports "to exclude or ... modify the legal effect of the provisions of ... [UNCLOS] in their application to [Oman]".

If the differing views are supported by the state practice of the states holding those views through naval deployments, there is a real potential for delicate rendezvous between warships of the relevant states at sea

Through their state practice in conducting transits of the Strait of Hormuz, it is clear that neither the United States nor New Zealand recognise the "prior permission" requirement set out in the Omani declaration. It is equally clear that they do not recognise that passage through the Strait is limited to the exercise of the right of innocent passage. For example, the USS *Carl Vinson* Battle Group transited the Strait of Hormuz in the normal mode, exercising the right of transit passage, when it entered the Arabian Gulf in mid December 1998.

As well as the challenges from Omani naval vessels which HMNZS *Te Kaha* must expect when she transits the Strait of Hormuz later this year, United States warships have a further challenger to contend with. President Clinton signed the Letter of Transmittal for UNCLOS, recommending to the US Senate that it consent to accession to the convention, on 7 October 1994. Despite that fact, the United States has still not become a state party to UNCLOS. When Iran signed UNCLOS on 10 December 1982, it made a declaration stating:

> it seems natural ... that only states parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein. The above considerations pertain specifically (but not exclusively) to the following: The right of transit passage through straits used for international navigation. (See Roach & Smith *Excessive Maritime Claims* (US Naval War College Studies No 66, 1994), 189.)

The United States does not accept this "contractual approach" – it considers that the right of transit passage through straits used for international navigation exists as part of customary international law.

The importance of these conflicting views on the law of the sea to the naval commander is plain, especially in the Arabian Gulf. If the differing views are supported by the state practice of the states holding those views through naval deployments, there is a real potential for delicate rendezvous between warships of the relevant states at sea. This is frequently the case in the Arabian Gulf, particularly the Strait of Hormuz. This is the reason that officers of the watch on board most MIF warships carry aides-memoires with approved responses to relay to foreign warships or military aircraft challenging their right to be in a particular zone, or to exercise a particular form of passage through that zone.

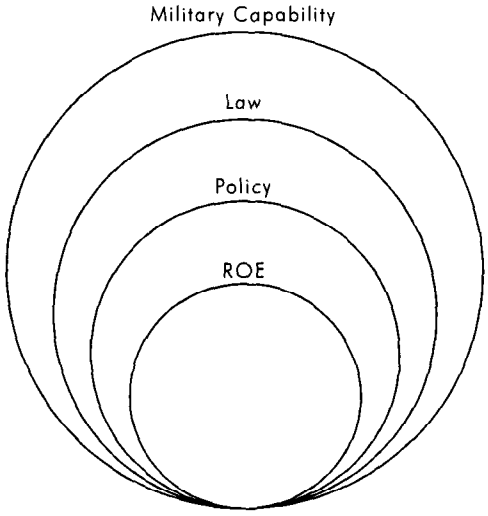
RULES OF ENGAGEMENT

Once any commander enters an area of operations, one of the matters uppermost in his or her mind is the parameters within which he or she may use force to achieve the military objective. These parameters are generally set by Rules of Engagement (ROE), prescribed by the sending state. This is even the case when the forces of various states are acting in combination under, for example, UN auspices. This reflects the fact that armed forces are the ultimate expression of a nation's sovereignty and the reluctance of states to subrogate authority over their forces to another authority, even the UN.

While ROE are not legal instruments as such in themselves, in the armed forces of states which respect the rule of law, they necessarily reflect the legal environment of the operations to which they relate.

In New Zealand, ROE are the product of three basic factors, which are applied to the essential problem of achieving a military mission. Firstly, what military capability is at the disposal of the government? ROE are practical tools. There is little point in the government prescribing a set of ROE which allows submarines to transit the Strait of Hormuz on the surface, because New Zealand does not possess any submarines! Once it has been determined what capability the forces have in any particular circumstance, the next consideration is to what degree it is lawful – either under domestic or international law – for that capability to be used to achieve the mission. For example, the RNZN has the capacity to use naval gunfire on targets ashore in a conflict. That gunfire could be directed against civilian targets, but to do so would be a clear breach of the Law of Armed Conflict. ROE cannot authorise a breach of the Law of Armed Conflict.

Finally, there are politico-diplomatic considerations. While the Armed Forces may have the capability to do something, and that action may be permissible at law, the government may elect not to authorise it for diplomatic or



political reasons. This last layer of control reflects the fundamental principle of civilian control over the military. For example, while it is unlawful to target civilians or civilian objects, it is not unlawful to attack a military objective. This is so even if damage to civilian objects and loss of civilian lives will necessarily result – as long as this collateral damage is not disproportionate to the military advantage to be gained. But in some cases, the government may decide that in the prevailing politico-diplomatic environment, no matter what the military advantage to be gained, no level of collateral civilian casualties is acceptable. These successive layers which lead to the formulation of ROE can helpfully be presented diagrammatically as a series of concentric circles, where the circles represent the amount of force or force options available to the commander:

Given that naval forces project sea power and have the potential of being involved in a use of force whenever and wherever they are deployed, some states (eg the United States and the United Kingdom) prescribe certain restrictive ROE which apply all the time. New Zealand has not. New Zealand's practice has been to only issue ROE for specific operations. Recent examples of this include New Zealand's contributions to the MIF, and HMNZS Te Kaha's deployment to the Southern Ocean in support of the Convention on the Conservation of Antarctic Marine Living Resources.

In operations other than war, one of the most important considerations in formulating ROE will often be the extent to which a state will exercise self-defence. The inherent right of self-defence is a long-standing part of customary international law, but one which is still controversial as regards differing views in the international community as to its nature and scope.

In the naval context, it is universally accepted that a warship which is attacked has the right to defend itself. As an agent of the state, the warship is permitted to do so within the terms of the right recognised by art 51 of the UN Charter:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations ...

This is not inconsistent with the principle of non-aggression prescribed by art 2(4) of the Charter, because self-defence is not aggression as a matter of international law.

However, the right as expressed in art 51 does not on its face confer a right to self-defence in response to an imminent threat of attack. This appears to be a narrowing of the customary international law of self-defence. As Professor O'Connell put it in his treatise:

> The law has not traditionally required a state to wait until it is actually attacked before taking measures of self-defence; and in considering whether pre-emptive reasons are legitimate or not, the capability of weapons, the reaction time and the strategic situation are all factors to be taken into account. (*International Law* (2 ed, London, 1970), 316.)

In modern naval warfare, commanders depend on the right of self-defence in cases of an imminent threat of attack more than ever before. With modern weaponry, a naval commander who waits until an attack has been made may not be capable of self-defence. State practice and naval manuals published since the UN Charter came into force appear to recognise that anticipatory self-defence is permissible under art 51, as long as the attack is imminent and no reasonable choice of peaceful means is available. (A notable exception is the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (International Institute of Humanitarian Law, 1995), 75, which reserves judgment on the issue.)

RNZN personnel serving with USS Klakring boarding party – February 1999 (Lt Cdr Griggs). Author front row, second from right

New Zealand state practice in recent naval operations has been to expressly state the right of self-defence in ROE issued to commanders. This is consistent with the approach that the right of self-defence is a right which inures in the state, and which the state then confers on its forces acting as its agents. As a corollary to this, the state may withdraw the right of self-defence from its forces or limit the exercise of that right in extreme circumstances. This is a reflection of the composition of ROE discussed above; while international law confers a right of self-defence which may normally be exercised by naval commanders as agents of the state, the final concentric circle of ROE formulation, policy, may dictate that that right be withdrawn or limited. This position is doubted by some Australian commentators, who suggest that "the right has transformed into an obligation under customary international law" (ABR 5179 *Manual of International Law* (Royal Australian Navy), para 7.7). Australia does not necessarily mention the right of self-defence in its ROE, as this is a non-derogable right as a matter of policy (ibid). The United States has prescribed self-defence as an obligation in its Standing ROE, although it reserves the ability to issue mission-specific ROE which could limit that right and obligation.

The fact that different views can be held by different states on issues fundamental to ROE, such as self-defence, is naturally of great importance to naval commanders in multinational operations. The watchword in every facet of such operations is interoperability. How can naval forces from different nations work together with their different communications suites, sensors, protocols, languages and ROE? The first step towards interoperability is understanding the differences. A clear understanding of international law as it will impact on the operation, together with an understanding of how one's coalition partners interpret that law, is a basic building block towards achieving the mission. ❑

(The author is grateful for the assistance of Lieutenant Colonel Kevin Riordan. The views expressed in this article are however personal and do not necessarily reflect the policy of the New Zealand Defence Force.)

ALL A SHAM?

Ross Holmes, Ross Holmes Lawyers, Auckland

argues that many New Zealand trusts are in practice shams

Trusts have become increasingly popular over recent generations as a result of the expansion in personal wealth which has occurred during that period.

Trusts have not only been extensively used, they have frequently been abused by advisers. In many instances the desire to sell an "additional product" without a detailed knowledge of basic trust law concepts could prove disastrous (with that factor not being known by most advisers or their clients as the trust has not been challenged).

It is not safe for advisers to rely upon words or procedures from the precedents which advisers have used in previous years, even if a Court has decided that such words or procedures were used successfully in previous decades. As Lindley LJ stated in *Re Hamilton* [1895] 2 Ch 370:

> You must take the [document] which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous Judges have said the contrary on some [document] more or less similar to the one you have to construe.

Recent overseas cases show that many trustees and their advisers are skating on very thin ice. Trust litigation is a growth industry in Australia and England.

Credibility

In *Potter and Monroe Tax Planning* 1st edn, 1954 p vii (Preface) the authors warned, in words which are as true today as when they were first written:

> A man cannot eat his cake and have it. Moreover, it is not the function of his lawyer to devise a scheme whereby this fact of life is falsified. If a man disposes of his property for another's benefit, certain tax results may follow; but the results cannot be achieved unless the disposition is in the first place effected not as a fiction but as a fact.

Credibility is created by acting genuinely, not by pretending to do so. Creditable estate plans are also created by acting genuinely, and not pretending to do so.

Promotional material

Professor Peter Willoughby in his book "Misplaced Trust" (1999), and at a seminar in Auckland in March 1999 "Misplaced Trust: Trustees and Fiduciaries under attack", noted than one of the most useful tools in setting aside trusts or trust transactions as "shams" was the promotional material used by those offering trust services. Lawyers involved in trust litigation retain all such promotional material and use it when necessary in future, in conjunction with an in depth analysis of the trust's minute book and the decisions made by the trustees, to show that the settlor and trustees did not understand basic trust law concepts, and therefore there was not a trust.

By way of illustration the following statements, which conflict with the fundamentals of the trust concept, appeared in a recent newsletter of a law firm:

> While the joint trust is not popular, parallel trusts, each holding the same amount of assets but one controlled by one partner and the other by the other ....
>
> If a change in law makes your existing trust less efficient, the assets can be resettled into a new trust ....
>
> you may add, if appropriate, additional beneficiaries to your trust, remove beneficiaries or change your trustees; and ...
>
> You can comply with a beneficiary's wish that his or her share be paid not direct but to the beneficiary's own trust or company or children.

While the authors will no doubt regard my criticism as carping, it is the trustees who control the trusts in that capacity, and not the settlor, even though the settlor is usually a trustee as well. The use of the words "you" and "your trust" used often enough in such a context could be interpreted to indicate retention of control by the settlor in that capacity, and is unwise.

The solicitor's client, in the case of a trust (after establishment), becomes the trust, and not the settlor. It is normally the trustees who add and remove beneficiaries, acting honestly and in good faith, and not the settlor. It is the trustees who must make decisions about distributions to beneficiaries acting honestly and in good faith. The use of precise language in all promotional material, avoiding any possible implication that it is not the trustees who are in control, is essential.

GUIDANCE FOR TRUSTEES

As P Tesiram, of Russell McVeagh McKenzie Bartleet & Co correctly stated:

> the existence of a coherent system of administration is the only way of ensuring that trustees fulfil their duties under the law and avoid liability for breaches of trust: "Administration of Trusts" (1999) New Zealand Law Society Trusts Conference at p 165.

In New Zealand in the case of trusts intended to be administered by non-professional trustees sham trust and sham transaction problems are arising because very few advisers give such trustees any practical advice on the basic trust law requirements which those trustees must follow for the trust to be a valid trust, and little practical guidance on what is required to administer the trust (such as a minute book and draft future minutes for the usual trust transactions).

The following example (taken from the guidance notes supplied by a New Zealand law firm to clients) is an example of the extent of the guidance usually given:

> While trusts are relatively informal and do not have any formal reporting requirements it is usually a good idea to keep a minute book in which can be recorded any decisions which are made during the trust year. Where there are investments the trust should keep a separate bank account so that income streams can be easily identified.
>
> Only the trustees may decide on income and capital distributions. They may exercise their powers as they see fit. ....We advise trustees to record their considerations in writing in the minute book and to provide some reasons for their decisions .... The minute book should be kept as a day-to-day record of the trust, in the same way as a company's minute book is maintained.

What professionals often fail to recognise is that non-professional trustees do not know what is required for a decision of trustees to be valid. Without guidance they will rarely keep adequate minutes.

Failure to observe basic concepts or provide practical advice

The failure of advisers to observe basic trust law concepts and to provide trustees with practical guidance could (and has in many cases) contribute to findings that trust transactions, or the trust itself was invalid and a "sham" due to:

- It never being the settlor's intention to establish a trust, or one or more of the elements essential to the creation of a valid trust were absent; or
- The trustees having failed to properly administer the trust, thereby evidencing an intention not to comply with the legal rights and obligations imposed by the trust deed or the law of trusts;
- The trustees failing to make decisions correctly, thereby resulting in the invalidity of that decision.

Accordingly not only must the settlor intend to create a trust, and in fact create a trust, but the trustees in administering the trust must comply with the legal rights and obligations imposed by the trust deed or the law of trusts. The trustees must not act as agents or nominees of the settlor.

In every case a trust is set up as part of an estate plan in case dangers which could occur do occur. If the estate plan does not provide any protection in the event of such worst case scenarios occurring, it has not fulfilled its function. Illustrations of the problems which could arise are as follows:

Future relationship protection

John married Janet in 1989, confident that the house and investments owned by the trust which he had established, prior to the relationship, was not matrimonial property, and that Janet would get no share of the home if their relationship failed. He even entered into a pre-relationship agreement recognising that Janet had no claim to the trust's assets.

His usual lawyer (who had carried out all his varied legal work well for him for years), advised him that it was essential that he had an independent trustee. John had read New Zealand financial planner Martin Hawes' book "Trusts" which also advised that independent trustees were essential for credibility. John and his accountant were appointed as trustees of the trust. He believed that having an accountant as an independent trustee would ensure that the trust was properly administered.

John's accountant did not inspect the home, prior to signing the agreement for sale and purchase, by which the trust agreed to purchase the house, but had seen the valuer's report which John had obtained to fix the sale price. The house and investments were sold to the trust for their current market value, but the independent trustee did not consider whether these were appropriate investments for the trust (and nor did John's solicitor advise that this was necessary). The trustees did not obtain any opinion from a share broker or investment adviser.

Apart from preparing a minute for the purchase of the initial investments, John's solicitor gave him no instructions on the running of the trust, prepared no minute book, and no draft future minutes for the trust's decisions.

John carried on as before, changing his investments regularly on his own, but using the trust's cheque book. He heard nothing over the years from his solicitor about the trust. He met with his accountant once a year to approve and sign the accounts which had been prepared by his accountant for the trust for the preceding year. He assumed, as a result, that there was no need to consult the independent trustee about changes in the trust's investments or payments to beneficiaries. The accountant had, after all, pre-signed trust cheques for that purpose, and signed minutes prepared by the accountant at the end of each year, treating those payments to beneficiaries as their income (for income splitting purposes).

Janet left John in 1999. Through her solicitor she claimed that the trust was a sham, that the house and investments were as a result held by the trustees on a resulting trust in favour of John, and that she was entitled to 50 per cent of the house (but not the other investments which were John's separate property).

The Court is likely to agreed on the basis:

- There was no intention by John to create a trust. He had acted throughout as if he still owned the trust's assets;
- The independent trustee had not given any consideration as to whether the initial investments of the trust were appropriate, and had therefore not acted honestly and in good faith. There was accordingly no valid purchase by the trust of the home or investments;
- The independent trustee had not taken part in the subsequent investment decisions, or the distributions to beneficiaries, which were all invalid;
- The trust assets, and the payments to the beneficiaries, were therefore held on a resulting trust for John, the home was the matrimonial home, and Janet was entitled to half of it.

Long-term geriatric care costs

Exactly the same situation would arise, in such circumstances, if John required long-term geriatric care after age 65. In the event of the Work and Income Support Service treating the trust as a sham, and determining that there is a resulting trust back to John, all of the trust assets (and indeed every payment made out of the Trust over the years to the beneficiaries) will belong to John.

Those assets will then have to fund John's long-term care, until they are reduced to $15,000 (if he is single) before he will qualify for a residential care subsidy.

Estate duty and inheritance taxes:

Exactly the same situation would arise, in such circumstances, if John died and estate duty had been re-introduced before that time. In the event of the Inland Revenue Depart-

ment succeeding in setting aside the trust as a sham, there will again be a resulting trust back to John, with all of the trust assets (and every payment made out of the Trust over the years to the beneficiaries) forming part of John's estate. Estate duty or inheritance tax will be then be imposed on those assets as part of John's estate, if his estate exceeds estate duty or inheritance tax limits.

In each of these cases, if John had been the sole trustee, and one of a number of beneficiaries, the trust and its transactions would have been valid, so long as he, in his capacity as trustee, had acted honestly and in good faith. The minutes prepared by his accountant after the transactions would not have been shams, as they would have recorded what had earlier been decided by John. The decisions would also have been valid had all trustees genuinely taken part in the decisions.

When making a decision as to who the trustees should be it must be remembered that the trustees are required (amongst other things):

- ***To keep full records of all decisions made.*** There is a widely-held view that trustees need not, and if well advised, should not, give reasons. (*Re Londonderry's Settlement* [1964] 3 All ER 855, [1965] Ch 918, applied in *Wilson v Law Debenture Trust Corp plc* [1995] 2 All ER 337 by Rattee J.) The correct position is that the principles on which the Courts must proceed are the same whether the reasons for the trustees' decision are disclosed or not, but it becomes easier to examine a decision if the reasons for it have been disclosed. This position was put succinctly by Lord Normand in the *Dundee Hospitals* [1952] 1 All ER 896 at 900.
- ***To act honestly and in good faith.*** One of the most important of all of the trustees' duties (and one which not one of the trustees of the many hundreds of trusts which I have reviewed had been told about by their advisers) is the obligation to act honestly and in good faith in relation to the trust property for the benefit of the beneficiaries. (*Scott v National Trust* [1998] 2 All ER 705; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 per Lord Reid at 904.)
- ***To ensure that all trustees take part in all decisions unless otherwise permitted by statute or the terms of the trust deed.*** Or the decision will be invalid. The practical requirements of this rule were summed up by Robert Walker J in *Scott v National Trust* 717 to 719.

  > Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts.

- ***To consider whether their discretion should be exercised.*** Another important obligation of which not one of the trustees of the many hundreds of trusts which I have reviewed had been told about by their advisers is the obligation to take part in decisions and to apply their minds to the exercise of the discretions entrusted to them. If the trustees (or any of them) fail altogether to exercise the duties of consideration, the Court can set aside the purported exercise of their discretion, if satisfied that the trustees never exercised the power. The trustees' decision in that event will be a nullity. (*Target Holdings Ltd v Redferns* [1995] 3 All ER 785; *Turner v Turner* [1983] 2 All ER 745, *Re Pilkington's Will Trusts* [1961] 2 All ER at 341, *Re Abrahams's Will Trusts* [1967] 2 All ER at 1191, *Re Hastings-Bass (decd)* [1974] 2 All ER 193 and Sir Robert Megarry V-C in *Re Hay's Settlement Trusts* [1981] 3 All ER at 792.)
- ***To observe the terms of the trust deed.*** The trustees must understand the terms of the trust deed, and other estate planning documents including the entitlements of the beneficiaries. Failure to carry out the terms of the trust deed, so long as its requirements are legal, is a breach of trust. It is not relevant that the trustee did not have an improper motive. (*Clough v Bond* (1838) 3 Myl Cr 490.)
- ***To treat all beneficiaries fairly and impartially.*** Trustees must treat all beneficiaries fairly and impartially, put aside personal interests and consider the overall interests of all beneficiaries. (*Edge v Pensions Ombudsman* [1998] 2 All ER 547, 567; *Nestle v National Westminster Bank plc* [1994] 1 All ER 118; *Cowan v Scargill* [1984] 2 All ER 750 at 760, [1985] Ch 270 at 286-287.)

In my experience these fundamental obligations are not brought to the attention of, and therefore rarely observed in practice by non-trustee company "independent" trustees. Such "independent" trustees are rarely independent. They are often selected because advisers have told the settlor that "independent" trustees are necessary. In practice they often act as "rubber stamps" who are not consulted or not genuinely consulted before decisions are made. Such decisions are "sham" transactions and invalid. If that happens frequently enough this provides evidence that there was never any intention to create a trust, which may therefore be invalid and a "sham".

This has occurred in many cases because of the failure of many "independent" trustees to realise the need to genuinely take part in decisions, and a failure on the part of the "client" trustees to understand what a trust is, and how to exercise the duties of trustees.

To give one actual illustration (with the names of the parties changed for the purposes of anonymity):

> Mr F, a partner in a law firm, established trusts for a couple Mr G and Ms P in 1994. Mr G was settlor of the trust set up by him, with the trustees being Mr G and Mr F. Ms P was settlor of the trust set up by her, with the trustees being Miss P and Mr F. The residence owned by Mr G and Ms P was sold to the trust (subject to an occupation lease incorrectly entered into on the date of the sale), for a consideration calculated on the basis of the then three years old government valuation (and not based on the then current market value). Mr F did not view the property, and "rubber stamped" the purchase. These transactions were accordingly invalid.
>
> No written guidance was given to the trustees on their duties as trustees, or on the need to involve Mr F in all future decisions of the trusts. Ms P and Mr G heard nothing about the trusts from Mr F for the next five years. Substantial investments were acquired in the names of both trusts over that five year period, without

the knowledge of Mr F. All such investment decisions were invalid as a result. No gifting was carried out during that period, and the trust deeds and trust records were not reviewed by Mr F.

This is merely one of the many cases which I have seen in practice. Historically New Zealand independent trustees (including lawyers and accountants) have a poor track record of genuinely carrying out their obligations. Independent trustees should exercise their functions in a proper manner and not as a nominee or agent for the settlors.

A sham may exist at the outset or emerge over time

In an article on sham trusts in my web site *www.estateplanning-trusts.com* I state:

> Unfortunately with many poorly prepared estate plans:
>
> - trust transactions could be set aside as shams because of the way in which the trust is run (and total lack of guidance on the day to day administration of trusts);
> - there may be no valid trust, and the arrangements may be a mere agency agreement or nominee arrangement;
> - often potential taxation and gift duty liability is created by non-experts.

When referring to that article in a seminar paper, "Asset protection/Estate Planning/Trust-Busting" (1999) New Zealand Law Society Trusts Conference at p 223 Mr W Patterson maintained:

> The thrust of the Internet item referred to at the commencement of this section appears to be that the failure by the trustees to observe the terms of the trust may lead to the trust being a sham. If, however, the trust was not a sham ab initio it is this writer's submission that the "sham emerging" doctrine as set out in *Marac* will not render it void. At best it may enable a claim to be made against trustees by outsiders or by beneficiaries. These should, in the writer's opinion, more properly be dealt with under the law relating to breaches of trustees' duties.

In practice the Courts in construing and characterising the transaction always have regard to the surrounding circumstances. The manner in which the trustees take part in, and record, trust decisions plays an important part in determining whether the Court will find that there is a sham.

A trust can be either a sham at the outset or become a sham because the parties have departed from their initial agreement and yet have allowed its shadow to mask their new arrangement. In both cases the consequences are the same. The Court will remove the cloak and give effect to the true agreement.

This is established by *Marac Finance Ltd v Virtue* [1981] 1 NZLR 586 (CA), which held that where the genuineness of the documentation is challenged a document may be treated as a sham:

- where the document does not reflect the true agreement between the parties in which case the cloak is removed and recognition given to their common intentions; and
- where the document was bona fide in inception but the parties have departed from their initial agreement but have allowed its shadow to mask the new arrangement.

This applies equally where the document is a trust.

In *Marac Finance v Virtue* the Court held that the transaction was a loan, despite the documentation prepared by the parties stating otherwise. In reaching that conclusion the Court examined what had occurred since the signing of the documents. Richardson J stated at p 588:

> The interpretation issue
>
> The legal principles governing the determination of the first question are well settled and were recently canvassed by this Court in *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 and *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485. And see also *Cash Order Purchases Ltd v Brady* [1952] NZLR 898, *Bateman Television Ltd v Coleridge Finance Co Ltd* [1969] NZLR 794 and *Paintin and Nottingham Ltd v Miller Gale and Winter* [1971] NZLR 164. They can be stated quite shortly.
>
> The parties are free to choose whatever lawful financing arrangements will suit their purposes. The forms they use are not decisive. It is a matter of determining the true character of the transaction. Its true nature can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. Consideration must be given to the whole of the contractual arrangement; and, if the transaction is embodied in a series of interrelated instruments all the agreements must be considered together and one may be read to explain the others. In construing and characterising the transaction regard is had to the surrounding circumstances: not to deny or contradict the written agreement but in order to understand the setting in which it was made and to construe it against that factual background having regard, too, to the genesis and objectively the aim of the transaction. Where the essential genuineness of the documentation is challenged a document may be brushed aside if and to the extent that it is a sham. There are two such situations: (1) where the document does not reflect the true agreement between the parties in which case the cloak is removed and recognition given to their common intentions; and (2) where the document was bona fide in inception but the parties have departed from their initial agreement and yet have allowed its shadow to mask their new arrangement.

The same principles were applied by Richardson J (with Gault J concurring) in *NZI Bank Ltd v Euro-National Corporation Ltd* [1992] 3 NZLR 528, 537 (CA), by the Court of Appeal in *Buckley & Young v* CIR, *Mills v Dowdall* [1983] NZLR 154 per Richardson J at 159, in *National Westminster Finance New Zealand Ltd v South Pacific Rent-a-Car Ltd* [1985] 1 NZLR 646 per Casey J at 647(affirmed by the Court of Appeal), in *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 per Richardson J at 706 and McMullin J at 711, and in *Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 per McGechan J at 626.

The genuine intention of the parties

It is the intention of the parties to the transaction which determines whether the act or document was intended to operate in the manner detailed in the document or whether it was a disguise. (Clarke J in *Northumberland Insurance Ltd (in liq) v Alexander* (1984) 8 ACLR 882, 888-9.)

The intentions of the parties are to be ascertained by reference to their actual intentions whether by direct evidence or by inference from the circumstances of the transactions. (*Sharrment v Official Trustee* (1988) 82 ALR 530 at p 539 per Lockhart J.)

In arriving at that determination all the circumstances and incidents of the apparent transaction may be taken into account. Before any issue of sham arises, it is important that a systematic and objective approach is undertaken to ascertain the true nature of the transaction. (Richardson J (with Woodhouse J concurring) in *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 (Court of Appeal) at pp 167-168.)

The decision of the Court of Appeal in *Buckley & Young v CIR* gives a detailed outline of the evidence which can be taken into account when determining whether there is a sham. Richardson J at pp 489-491 in delivering the judgment of the Court stated:

> Thus, while it is legitimate to take into account surrounding circumstances and to refuse to be blinded by terms employed in documents, the documents themselves may be brushed aside only if and to the extent that they are shams, in the sense of not being bona fide in inception or of not having been acted upon, and are only used in whole or in part as a cloak to conceal a different transaction or if required by a provision such as s 99 of the Income Tax Act 1976.
>
> The starting point is to consider the documentation embodying the transaction ....
>
> The Court must then determine whether the substance of the transaction as reflected in the documentation is the true legal arrangement between the parties, or whether the documentation is used as a cloak intended by them to conceal, in whole or in part, the true arrangement. In that situation the Court may take into account all evidence which bears on that question and is not limited to consideration of evidence admissible in the ordinary course of construction of documents. Finally, in some cases the parties may have departed from the documents, in which event questions of a new agreement or estoppel or sham in operation may arise.

The Court may receive oral evidence as to the intentions of the parties. In *Hawke v Edwards* (1947) 48 SR (NSW) 21, at p 23 Jordan CJ said:

> oral evidence is admissible in such proceedings that the parties intended themselves to be bound only by a contemporaneous oral agreement and that the document was brought into existence as a mere piece of machinery for serving some other purpose than that of constituting the real agreement between them. Oral evidence may also be given that the document is a sham - that it was never intended by the parties to be operative according to its tenor at all, but was meant to cloak another and different transaction ....

The decision of the Court of Appeal in *Marac Finance v Virtue* establishes that (paraphrasing Richardson J):

> a [trust] may be brushed aside if and to the extent that it is a sham. There are two such situations: (1) where the [trust] does not reflect the true agreement between the parties in which case the cloak is removed and recognition given to their common intentions; and (2) where the [trust] was bona fide in inception but the parties have departed from their initial agreement and yet have allowed its shadow to mask their new arrangement.

The consequences of the invalidity of a trust or trust transaction

When a trust fails for uncertainty of subject matter or of persons or objects, (unless there is an absolute gift of property in the first instance on which trusts are subsequently imposed), or the trust or a trust transaction is a sham:

> the trustee cannot take beneficially, but will hold the trust property on a resulting trust for the settlor, or, where the trust arises under a will, for the persons entitled to the residue, or on intestacy, as the case may be. (Pettit, *Equity and The Laws of Trusts*, Butterworths, (1993), p 50.)

The result is that the trust assets are still the settlor's and available for claims by creditors, former partners under matrimonial laws, and Inland Revenue authorities.

In relation to individual trust transactions, the documents evidencing those transactions may be disregarded to the extent that the documentation amounts to a sham and the true arrangement between the parties to the sham is given effect. (*Buckley & Young v CIR.*)

If the settlor is dead those then entitled to the trust assets are the beneficiaries under the settlor's will, or if there is no will those entitled on full or partial intestacy. If for instance the settlor's will leaves all assets to a trust, which is invalid, there will be a full intestacy.

If the settlor is bankrupt his or her creditors will benefit if the trust is invalid.

If the settlor's marriage or de facto relationship ends his or her former partner may substantially benefit if the trust is invalid and what would otherwise have been safe from challenge becomes matrimonial property open to challenge.

In the case of Inland Revenue authorities the consequences of the finding of a sham can be severe due to the imposition of tax penalties and interest on unpaid taxation, as a result of the income becoming the settlor's.

The consequences are disastrous. Every payment out of the trust to beneficiaries must be repaid by the trustees to the settlor, and the settlor must be placed back in the same position as if the trust had not been established (whether or not the loss was foreseeable). Any limitation of liability clauses in a sham trust perish with the sham trust.

CAN INVALIDITY BE CURED?

Once it is determined that the trust was a sham, the assets of the trust are held on a resulting trust for the settlor. The invalidity cannot be cured.

If this occurs, and if the settlor is able and willing to do so, a new trust will need to be established, and the assets sold by the settlor at their then current market value to the new trust. This will not be possible if the settlor is deceased, bankrupt or incapacitated.

CONCLUSION

Many problems with trusts have, and are still, arising due to a lack of understanding on the part of the advisers forming trusts of the basic trust law requirements for the creation and administration of a valid trust, and a failure to provide practical guidance to trustees on what is legally required to administer the trust thereafter.

A trust which meets the requirements for validity, which the parties intend to take effect, and which takes effect in accordance with its tenor, will not be a sham. It is essential that all trustees genuinely take part in decisions, and that detailed records of trustees' decisions are kept, to avoid sham trusts and sham trust transactions.

The chapters I am writing for Butterworth's text on Trusts (to be published in 2000) will deal with these issues in greater detail. ❑

THE HEALTH AND DISABILITY COMMISSIONER

John Skinnon and John McDermott, The Open Polytechnic of New Zealand

review the development of this new regime

The Health and Disability Commissioner's office has been in operation for just over three years, and seems to have created an increased awareness of health and disability consumer issues. In part this is due to the Commissioner's strategy of promoting the Code of Health and Disability Consumers' Rights (the Code) at point of service. (The Code is a regulation made under the Health and Disability Commissioner Act 1994 (the Act).) The office has also achieved a high profile through cases such as *Nicholls v Health and Disability Commissioner* [1997] NZAR 351. *Nicholls* was an unsuccessful challenge to an "own initiative" investigation into patient deaths at Christchurch Hospital, vindicating the Commissioner's use of investigative powers in relation to hospital policy and practice. Thirdly there has been regular media coverage, such as Sandra Coney's articles in the *Sunday Star-Times*. For an analysis of the Code's ten rights, see R Paterson, "Relief for injuries – Accident Compensation, civil claims, disciplinary proceedings and The Code". (NZLS CLE seminar, 1997.)

Following formulation of the Code the Commissioner's main work since has been, "... to promote and protect the rights of health consumers and disability services consumers ..." and "to secure the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights ..." (first part of the Long Title to the Act).

Under the Act, only the Commissioner can form the opinion that a particular Code right or rights has or have been breached in respect of a particular complaint. Once the Commissioner's process has been concluded the case may be handed over to the Director of Proceedings, who may take proceedings before a number of tribunals and the Courts and who is required by s 15(2) to act independently of the Commissioner. A full time Director was appointed in 1998.

In this article we analyse the case reports the Commissioner has placed on the Internet – their structure, trends revealed, and the remedial steps recommended. We conclude that the reports perform a valuable information function, but suggest ways in which they could be improved.

Discussion of the Commissioner's remedial steps leads us to discuss the problem of obtaining damages from the Complaints Review Tribunal (CRT), discussed recently by Potter J in *Director of Proceedings v Nealie* [1999] 3 NZLR 603. Some guidance is given in the case on how to administer this new regime.

For the sake of brevity, the inclusive "consumer" will be used in place of phrases like "health and disability service consumer". Similarly, "provider" will be used in place of "health care provider and disability services provider".

THE COMMISSIONER'S CASE REPORTS

Reports published

During the first year the Commissioner, Robyn Stent, began releasing some of her written reports on cases decided. During the 1998 financial year, a greater number of reports were released. The 39 reports read for this article cover the period July, 1996 to March, 1999. Reports are available at the Commission's Internet web site (http://www.hdc.org.nz).

Not all reports conclude that breaches of rights have occurred. Occasionally, there is a finding of no breach; more commonly a breach of some but not others. For the busy practitioner, case report 97 HDC 3419, involving multiple breaches of rights, would be useful to read, as it illustrates several features discussed in this part of the article.

The attached table summarises a selection of the case reports where a breach was found. To save space the rights are not fully stated.

Provider anonymity – for the time being

The Commissioner has power to publish party names. In the words of the Act, the Commissioner may "... make public statements and publish reports in relation to any matter affecting the rights of ... consumers ... including statements and reports that promote an understanding of, and compliance with, the Code or the provisions of this Act" (s 14(1)(d)). However, there are safeguards in s 67 for "persons affected" requiring reasonable opportunity to be heard, and providing a right to publication of a written statement to appear with any Commissioner report.

Yet the first striking structural feature of the Commissioner's case notes is that they are published with information identifying parties removed. Each case is simply identified by a number. However, the Commissioner recently stated that she "will be publishing investigation outcomes more extensively in the future – including names where necessary". (*Report of the Health and Disability Commissioner*, year ended 30 June 1998, p 6.)

Releasing party names "where necessary" is a step far short of publication as a general rule. At an earlier stage the Commissioner stated: "I am becoming convinced that I should begin to publish the full facts of every breach case, naming the provider, so the public and the profession can decide for themselves whether my decision was fair" (*NZ General Practitioner*, date unknown). That threat appears to have been motivated by exasperation with some general practitioners in particular who suggested her process was unfair, and who prematurely aired their dissatisfaction

through the media while the Commissioner had to maintain silence during the course of an investigation.

Why the Commissioner initially chose not to publish provider names at all may have been to avoid impeding the development of an improved consumer culture among providers. This is similar to the judicial allowance made when radical new laws come into effect, and those subject to it are on a "learning curve". But where new systems have had time to be put in place, the honeymoon is over, and a satisfactory level of compliance is expected.

There may be providers who, at the end of the Commissioner's process, refuse to implement the Commissioner's recommendations. It is said that some health professionals see a Commissioner investigation as a private dress rehearsal for a later hearing before the particular professional disciplinary body. Given that the process of investigation will have moved through a provisional opinion process (where the facts will have been checked and the provider had opportunity to put its case), through to a final opinion, the threat of publishing party names in the context of what is only a privilege seems fair. The occasional resort to publication may act as a lever. For the provider seeking redress against the Commissioner's decision, there is opportunity to make a complaint to the Office of the Ombudsman, and to make application to the High Court for judicial review.

The Commissioner has power to publish provider names. Clearly, a move to limited publication is evidence of an intention to get tough. It will give the Code more teeth, and assist it to achieve greater respect.

Language

These reports have enormous educative value. The Commissioner is to be commended for exploiting the Internet. Many of the reports are sent on to professional and other bodies for wider dissemination. However, the way in which some reports are written could be improved.

In some cases the language is rather stolid. For example, reference is sometimes made to a "provider" when it is clear we are dealing with, say, a doctor. The reports would be more readable if straightforward words could be used.

Sometimes it is difficult to read a case report because of the way the information in it is ordered. For example, case 97HDC3419 (included in our table), concerned the treatment of a five-year-old admitted to a public hospital for removal of a dermoid cyst, and involved breaches of several rights including the right to informed consent (right 7(1)). One critical fact – that the risk of meningitis was not stated on the form entitled "Agreement To Treatment" — is not mentioned till the second to last page of the report. This material fact should have been stated early on to enable the reader to understand the complaint.

There is also the regular use of acronyms and fairly heavy use of unexplained medical language: something of a barrier to comprehension. Case 3419 also illustrates this problem with its unexplained references to "dermoid cyst", "meningitis" "lumbar punctures" and "central venous catheter".

We raise this point because these reports are not just read by professionals, who may be expected to understand the jargon. Others, such as the affected consumer, and a more diffuse general readership may also read them, and may be unfamiliar with medical and legal terms.

We suggest minimising factual jargon (or add one to two sentence definitions), and improving the ordering of the material itself. These are relatively minor changes, and should not have significant financial implications.

Reliance on experts

The Commissioner is, not unnaturally, reliant on independent expert advice to assist in forming an opinion. Clause 1, Second Schedule to the Act gives the Commissioner the power to employ experts.

There will be some testing of expert opinion as the Commissioner formulates a final opinion. But this testing of expert evidence will not be as rigorous as that undertaken in a Court, where full cross-examination of expert witnesses occurs. So this reliance may lead to errors; this is the price to be paid for this kind of decision making.

This weakness applies also to non-expert evidence. For example, the allegation of fact relating to pregnancy in Case HDC 5946 seems to have been accepted by the Commissioner, but was firmly rejected by the Complaints Review Tribunal. (See *Nealie*.)

Right 4

The outstanding feature arising from our analysis is that the greatest volume of right breaches involve Right 4: Right to Services of An Appropriate Standard. Eighty per cent of the case reports published by the Commissioner on the Internet involve allegations of breach of this right. For this reason, our table sets out all five aspects of Right 4, and also provides six illustrations of breach.

We see this as significant. Breach of professional standards is the most serious problem for consumers. It follows that the Code of Rights has quickly become the key vehicle for voicing these types of complaint. There were 1,102 complaints received in the financial year to June 30 1998. We do not know what percentage overall involved breach of Right 4. But if our sample is indicative, it will be high.

We note that cases 3240 and 3383 involve breach of "reasonable care and skill" (Right 4(1)). This is the established common law formula which now also appears in relation to the provision of services, in s 28 Consumer Guarantees Act 1993. The 1993 Act represents an alternative to proceeding under the Code of Rights.

Voicing complaint, and putting pressure on providers in relation to standards is one thing; adequate remedy, possibly including financial compensation, is another.

Commissioner's remedial actions

The Commissioner's most frequently sought remedy is a letter of apology to the aggrieved consumer. Our table shows this. The letter is usually sent, in the first instance, to the Commissioner's office. Presumably, this is to ensure that a proper apology is actually sent to the consumer. We assume the Commissioner has the opportunity to scrutinise it in order to see that the provider has not taken the opportunity to qualify an earlier admission, or otherwise revisit the circumstances. A letter of apology is a valuable remedy for hurt feelings.

The Commissioner regularly forwards reports to the relevant professional body, or other relevant institution, for wider circulation amongst providers. The purpose is to educate. This will be of some limited comfort to the aggrieved consumer, in that the problem is less likely to recur.

In 1997-98 there were 12 referrals to professional bodies. Six were successfully prosecuted in disciplinary hearings. A professional may be struck off, have restrictions placed on practice, or be suspended. Alternatively, or in addition, they may be required to pay a fine to the professional body. There is no compensatory benefit to the consumer.

It is not necessary to first commence proceedings before a professional body. Section 49(1)(a)(i) of the Act states that action can be taken in the CRT, or before a disciplinary body in any order, or concurrently. One of the potential attractions of the CRT is that it gives access to substantial financial compensation – damages up to $200,000. But there are access problems relating to the accident compensation bar, and the possibility that, where a case has first been successfully prosecuted before a disciplinary body, the CRT might view a professional as "punished enough" (*Nealie*).

DAMAGES IN THE CRT

"It was the practice this year to take action before a disciplinary body and not issue proceedings before the Complaints Review Tribunal, until receiving notice of the penalties given before the disciplinary body" (*1998 Annual Report*, p 31). But simply receiving notice of penalties on its own is not enough. *Nealie* points up a number of factors to be weighed in deciding what is an appropriate case to take on to the CRT. Otherwise, as happened in this case substantial costs may be awarded against the Commission.

A summary of the facts in *Nealie* is given in our table in case report 97 HDC 5946. Following a hearing before the Medical Practitioners Disciplinary Tribunal, the respondent was struck off the Register, paid a fine of $10,000 and met costs in the vicinity of $10,000. The Director then chose to take the case on to the CRT, seeking compensatory and exemplary damages under s 57(1) of the Act.

Sections 52(2) and 57(1)

Key parts of s 57(1) read:

> (1) Subject to s 52(2) ..., in any proceedings under s 50 or s 51 ... the Tribunal may award damages against the defendant for a breach of any of the provisions of the Code in respect of any one or more of the following:
>
> (a) Pecuniary loss suffered ... and expenses reasonably incurred ...;
>
> (b) Loss of any benefit, whether or not of a monetary kind, ...;
>
> (c) Humiliation, loss of dignity, and injury to feelings ...;
>
> (d) Any action of the defendant ... in flagrant disregard of the rights of the aggrieved person.

Any damages recovered go to the aggrieved person (sub (2)). Costs may be awarded against the defendant (s 54(2)). It shall be no defence that the breach was unintentional or without negligence (s 54(4)).

The opening words of s 57(1) "Subject to s 52(2) ..." are critical. Section 52(2) restates the statutory bar:

> Where any person has suffered personal injury (within the meaning of the Accident Rehabilitation and Compensation Insurance Act 1992) covered by that Act, no damages (other than punitive damages ...) ... (a) May be sought ...: (b) May be awarded ....

The appellant in *Nealie* argued for a "fair large and liberal" interpretation of s 52(2), urging the Court to assess whether the complainant was adequately "covered", in the colloquial sense of "compensated", for the personal injury (p 16). Counsel drew attention to some dicta in two Court of Appeal cases. But these were dismissed by the Court with the words "... which, viewed in isolation, could be said to support the approach argued by the appellant" (p 13).

The CRT refused to award any compensatory damages under paras (a) to (c) of s 57, and the Court agreed that the CRT indeed did not have jurisdiction to do so given the right interpretation of the bar in s 52(2). The Court said that the colloquial sense of "covered" contended for by the appellant "is not the sense in which the word is used in s 52(2), and that approach is not the correct one" (p 16). In support the Court cited the Court of Appeal in *Brownlie v Good Health Wanganui Ltd* (unreported, CA 64/97, 10 December 1998, p 11) when it was addressing the same word in the context of the ARCI Act: "It can be noted that it is the existence of cover under the Act which is the requirement, not the extent of the cover".

Though the Court dismissed the appeal on this point on the same basis as the CRT, nevertheless, it had some sympathy for the appellant, stating: "that questions are raised by Parliament authorising the Tribunal to make awards for the losses specified in s 57(1)(a)-(d) of the Act, but at the same time disempowering it from making such awards if a person also receives limited cover from ACC, which in no way compensates for the losses specified in s 57. Again, however, those are issues for Parliament" (p 16).

What role then may s 57(1) have? Many of the examples in our table are situations where there will be accident compensation cover. In cases where there is no such cover, why not take up a claim for s 57 damages before the CRT? Are cases such as numbers 6528, (angry doctor who also discusses patient's spouse's health problems), 4401 (pharmacist shouts out personal information), or 7400 (GP insists on using prayer as part of consultation), too trivial?

It is arguable that the legislature meant what it said in s 57(1) – that damages are available for any specified breach. Even in these less traumatic cases there will be, humiliation, loss of dignity and injury to feelings (s 57(1)(c)). Is this the role intended by Parliament for s 57(1), albeit limited?

The decision in *Nealie* that there can be no "top-up" of compensatory damages where a person had suffered personal injury covered by the ACC legislation may be overturned by legislation. The Commissioner has recommended to the Minister of Health, as part of her early 1999 review of the Act and the Code of Rights, that s 52(2) be removed and s 57 be amended to ensure the Tribunal has the power to award compensatory damages whereby particular consumers can recover total costs. (*A Review of the Health & Disability Commissioner Act 1994 and Code of Rights for Consumers of Health and Disability Services*, p 57.)

Commentators, such as Corkhill ("Interface between ACC and the common law: Miscellaneous issues", in *Relief for Injuries – accident compensation, civil claims, disciplinary proceedings and The Code*, NZLS, 13, 26), point out our ACC legislation is now but a pale shadow of its 1972 original. Pay outs have been whittled away. There is now no lump sum compensation for loss of bodily function and arguably no compensation for pain and suffering.

But we would be surprised if a change in fundamental principle (the bar against any other action for compensation) succeeded without a considered review of the implications. One obvious implication is that to open a door in one statutory area encourages its opening in others. Though some might question why that should not occur if a fundamental principle has become unfair.

This brings us to the Director's exemplary damages claim. The Court was also not prepared to overturn the CRT's ruling rejecting a claim for $40,000 under para (d). The Court noted that such damages are discretionary.

Interestingly, even if it was proved there had been a "flagrant disregard of the rights of the aggrieved person" (para (d)), a discretion to refuse exemplary damages still existed. The discretion was exercised in this way in *Nealie* because in the words of the CRT, the respondent had been "punished enough".

The Court's comments concerning the substantial costs award against the Commissioner by the CRT ($23,000 reduced by the Court to $21,000) are also worth mentioning because they point the way toward choosing appropriate cases to take on to the CRT.

The CRT was critical of the way in which the appellant had conducted the case, an approach that resulted in unnecessary costs for the respondent. There was a failure to make full and proper discovery of documents (also at issue in *Health and Disability Commissioner v Medical Practitioners Disciplinary Tribunal* [1999] 2 NZLR 616 (HC); there was a complainant lacking credibility; and there were genuine offers by the respondent to settle or negotiate outstanding issues (suggesting inefficient complaint resolution and need for better use of s 61 mediation).

CONCLUSIONS

The Commissioner's administration of the Act is a developmental process. There is an element of trial and error. The Commissioner is to be commended for placement of summarised case reports on the Internet. The reports are generally satisfactory, though improvements could be made in the way the information is ordered, and minimising factual jargon of a medical nature. The Commissioner's threat to publish names in some cases seems fair and may be useful in getting providers to comply with the Act.

One built-in limitation of this kind of decision making though is that the testing of evidence during the formulation of the final opinion will not be as rigorous as that undertaken in a tribunal or Court. This may contribute to error.

The high (80 per cent occurrence) level of breach of Right 4 is a revelation. The Code has quickly taken a preeminent place among other mechanisms of redress such as Codes of Ethics and the Consumer Guarantees Act.

Forms of redress used by the Commissioner include a letter of apology, sending reports to professional and other bodies, and the taking of proceedings before professional disciplinary bodies. Yet, though the Office has been in operation for just over three years, and has received well over a thousand complaints against providers, only 12 cases (1997-98) were taken to professional bodies for disciplinary proceedings, and only one subsequently to the CRT. This may speak well for the low level mediation process, also an important part of the resolution work. But this result overall, in terms of consumer redress, seems disappointing. However, there are signs of a more expansive approach. A full-time Director of Proceedings was appointed in 1998.

Other forms of redress are compensatory and exemplary damages through the CRT under s 57(1). However, in light of *Nealie*, for the time being, no compensatory "top-up" damages are possible for people who suffer personal injury and who have cover under ACC legislation. Where action for exemplary damages, in terms of s 57(1)(d) is contemplated after a successful case before a tribunal, care is needed to take only those cases that are "appropriate". *Nealie* also gives some clues as to how to gauge that. ❑

TABLE OF CASE NOTES

Selected HD Commissioner's edited opinions 1996-99

CODE RIGHT 1

"To be treated with respect"

Total occurrences: 3

Case 97 HDC 6528

Complainant: Consumer

Provider: GP

During visit to general practitioner, Doctor angrily talks through gritted teeth, stamps feet and pumps fists up and down. Also attempts to talk of the client's spouse's health problems. **Breach 1(1)**

Commissioner recommendations and other action: Copy of the Commissioner Report sent to Medical Council. Letter of apology from doctor.

Case 96 HDC 4401

Complainant: Consumer

Provider: Pharmacist

During visit for repeat prescription, Pharmacist shouted name of drug across pharmacy to confirm prescription; and when challenged said "no one else seems to have a problem with this". **Breach 1(1) and 1(2). Also 4(2)**

Commissioner recommendations and other action: Apology. Better use of customer repeat forms available at counter.

CODE RIGHT 2

"To freedom from discrimination, coercion, harassment and exploitation"

Total occurrences: 3

Case 97 HDC 5946

Complainant: Consumer

Provider: GP

Patient began sexual relationship with GP. History of sexual abuse. Awareness by GP of marital difficulties. Allegation of pregnancy terminated, believing GP was responsible, as husband had had a vasectomy.Two attempts at suicide. No arrangements for psychiatric assessment.

Breach Right (2) – exploitation – notwithstanding her consent. Also sexual relationship is breach of medical ethics 4(2).Inadequate medical service re suicide attempts and lack of proper entries on medical file **breach 4(2)** and lack of cooperation with other professionals. **Breach 4(5)**

Commissioner recommendations and other action: Referred to Director of Proceedings. Copy of report to Medical Council.

Case 97 HDC 4373

Complainant: Consumer

Provider: Chiropractor

During consultation provider attempted to interest consumer in perceived "pyramid magazine selling" scheme. Invited consumer to a later presentation. Financial exploitation?

Commissioner recommendations and other action: Letter of apology sent via Commissioner. Copy of report to NZ Chiropractic Board.

Case 97 HDC 7400.

Complainant: Consumer

Provider: GP

GP insisted on offering prayer as well as normal service, despite request to stop was exploitation of trust and coercion.

Commissioner recommendations and other action: Letter of apology. Written statement of all services offered to be given prior to first consultation and consent obtained.

CODE RIGHT 3

"To dignity and independence"

Total occurrences: 1

Case 96 HDC 7225

Complainant: Written complaint from unknown complainant

Provider: Resthome

While dressing residents resthome employee hits them around shoulders and one across buttocks. Also gave verbal abuse. Management accepted this as "serious misconduct" **Breach R3, (Also Rights 1 and 2)**

Commissioner recommendations and other action: Anger management course. Evidence of attendance to be forwarded to Commissioner. Employee also on notice of dismissal if another episode occurred.

Case 96 HDC 0024

Complainant: Unknown third party

Provider: Public Hospital

Two very difficult patients 15 years in hospital care. Young man autistic, intellectually handicapped and self-destructive – requiring restraint harness. Woman visually impaired and with Downs Syndrome. Poor environmental conditions, absence of structured day programmes for stimulation/recreation, restricting their development. (Flowers on tables and dressing in matching clothes are fundamental, not extras). **Breach of R3**

Note: Hospital and parental resentment of investigation.

Commissioner recommendations and other action: No action, as both consumers moved to new community care with different providers.

CODE RIGHT 4

"To services of an approriate standard"

1. reasonable care/skill;
2. comply with legislation and ethical standard;
3. consistent with needs;
4. minimise harm, optimise quality of life;
5. cooperation among providers to ensure quality and continuity of service.

Total occurrences: 31

Case 96 HDC 3240

Complainant: Parents

Provider: Hospital (CHE)

13-year-old received dose of Intragram as regular treatment for Immune Deficiency. Technologist issued quarantined product (possible CJD contamination) as if non-quarantined. **Breach 4(1), 4(5)**

Commissioner recommendations and other action: Various system improvements immediately, with confirmation to Commissioner and family. Letter and personal apology visit by CEO. Open ended free counselling.

Case 97 HDC 3949.

Complainant: Consumer

Provider: GP

Deep caries filling in tooth. Pain continued. Provider had not followed clinical best practice for saving a tooth, which was to use a second sealing lining – not just one. **Breach (4)(2)**

Commissioner recommendations and other action: Dentist to follow current accepted best practice.

Case 97 HDC 6528.

Complainant: Consumer

Provider: GP

Visibly angry doctor wrote prescription for patient's wife instead of patient. Error detected by dispensing pharmacist. **Breach (4)(2)**

Commissioner recommendations and other action: Letter of apology to consumer. Copy of report sent to Medical Council.

Case 97 HDC 4373.

Complainant: Consumer

Provider: Chiropractor

Chiropractor attempt to sell perceived "pyramid magazine selling scheme" during consultation. **Breach of 4(2)** – against Chiropractic Code of Ethics.

Commissioner recommendations and other action: Letter of apology to the Commissioner's office for forwarding on.

Case 96 HDC 0024

Complainant: Unknown third party

Provider: Public Hospital

Very difficult young man in care 15 years. Self-destructive tendency required restraining harness. Prolonged daytime use.Technique did not meet relevant health standards for use, eg evaluation and review at regular intervals which is recorded. **Breach 4(2), (3) and (4)**

Commissioner recommendations and other action: No action as consumer moved on to community care with a new provider.

Case 97 HDC 3883

Complainant: Parent

Provider: Pharmacist

Parent picked up prescription for Epilim for three-year-old child. Noticed name (Tegretol) and dosage on label was different. Told by pharmacy assistant that T not as strong as E and so dosage twice as much. Child given dose and fell asleep 18 hours. Pharmacist realised mistake next day and went to complainant's home. E and T different active ingredients. **Breach 4(1)**

Commisioner recommendations and other action: Apology. Procedure review and copy of Commissioner Report to Pharmaceutical Society.

CODE RIGHT 5

"To have effective communication"

Total occurrences: 6

Case 96 HDC 2842

Complainant: Family

Provider: Private hospital

Elderly frail patient moved into private hospital. Uncertainty about competence and ability to verbalise her own needs. Family visited frequently; easily available for consultations. Their suggestions about care were met by the giving of information about hospital policy, rather than their suggestions being followed. Family also not kept fully informed on patient management. **Breach 5(2)**

Commissioner recommendations and other action: Hospital CEO to write apology and implement new policy of a family meeting one month after admission.

Reminder from Commissioner that staff have obligation to initiate and maintain effective communication; and to respond to family.

CODE RIGHT 6

"To be fully informed"

Total occurrences: 7

Case 96 HDC 3240.

Complainant: Parents

Provider: CHE

13-year-old received quarantined Intragam for non-quarantined by mistake. **Breach 6(1)(b), 6(1)(e)**

Commissioner recommendations and other action: Provide parents with information about quarantined Intragam including associated risks.

Case 96 HDC 3813.
Complainant: Consumer
Provider: Private Hospital

Various complaints about service after heart operation. On discharge, given a cardiac booklet, containing information on exercise and on minor expected problems. Not sufficient – consumer subsequently went to a six-week rehabilitation course at a public hospital. **Breach 6(1)**

Commissioner recommendations and other action: Apology. Hospital gave a reduction in fee.

Case 97 HDC 4036
Complainant: Parent
Provider: Naturopath

Naturopath prescribed Ultrabifidus powder for baby suffering eczema. Label instructions – mix 1 ml to 100 mls of water. Seemed too much liquid. Father had to contact provider for advice to mix as a paste and give on spoon or dropper. **Breach** 6(1)(e) Full instructions had not been given.

Commissioner recommendations and other action: Copy of opinion to NZ Natural Health Practitioners Accreditation Board for information.

CODE RIGHT 7

"To make an informed choice and give informed consent"
Total occurrences: 5

Case 96 HDC 3240.
Complainant: Parent
Provider: CHE

13-year-old received quarantined Intragam. **Breach 7(1)** Intragam provided without consent of consumer or parent entitled to give consent.

Commissioner recommendations and other action: See other reference to this case.

Case 96 HDC 7400.
Complainant: Consumer
Provider: GP

Atheist visited GP who prayed for the consumer as well as providing normal service. **Breach of 7(1)** Ignored request to stop. Also Right 2.

Commissioner recommendations and other action: Letter of apology forwarded to Commissioner's office. Written list of services to be given to each patient prior to first consultation and consent obtained.

CODE RIGHT 8

"To presence of support persons of their choice"
Total occurrences: no case

CODE RIGHT 9

All the rights apply if consumer is or may participate in teaching or research
Total occurrences: no case

CODE RIGHT 10

"To complain"

eg –
1. in any form;
3. fair speedy resolution;
4. inform of progress;
6. have a complaints procedure;
7. written acknowledgement – ten day rule;
8. Final written decision with reasons and information re appeal.

Total occurrences: 3

Case 97 HDC 3949.
Complainant: Consumer
Provider: Dentist

Deep caries filling ineffective. Dentist not following clinical best practice. Complaint did not get past accountant at clinic. Told, "nothing the clinic could do to help her" **Breach 10(6), (7), (8)**

Commissioner recommendations and other action: Dentist's practice to improve recording advice given. Acknowledge complaint in writing. Practice to advise Commissioner of complaints procedure improvements. Copy of opinion from Commissioner to Dental Council for circulation.

Case HDC 3419
Complainant: Parents
Provider: Hospital

Five-year-old hospitalised for removal of dermoid cyst during which he contracted post op meningitis probably due to cerebrospinal fluid leakage.

"Agreement To Treatment" form did not mention this risk. Lack of co operation between hospital staff over insertion of a central line; lumbar puncture performed without parent consent, parent made to feel she had no right to complain. Staff failed to inform of internal complaints procedures CHE had in place – but meeting Right 6 more important. **Breach 10(6) (b). Also, 4(5), 5(1), 6(1), 7(1)**

Commissioner recommendations and other action: Apology for breaches sent via the Commissioner's office. Reminder of obligation to fully inform under the Code. Case draws attention to possiblity that failure to inform can constitute "medical misconduct". Copy of opinion to all Hospitals and Health Services. ❑

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