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POLICE AND TRAFFIC

The announcement that specialised traffic patrols are to be developed within the police produced a flurry of response, mostly ill-informed. Two refrains were that this was a reversion to a separate traffic patrol and that police should be concentrating on more important things than traffic enforcement. Both are wrong.

Any consideration of the role of police must begin with three basic tasks, and in this order of importance:

- the protection of life and property;
- keeping the peace; and
- the prevention and detection of crime.

For most people, the most significant threat to life and property that falls within the police sphere is from traffic accidents. In 1999 there were 509 deaths on the roads as against fewer than 100 culpable homicides; the ratio for serious injuries and broken lives will be similar. The value of damage to motor vehicles and other property from road accidents will far outweigh the value of criminal damage.

Traffic enforcement therefore is and always was a police responsibility. Even in the days of the MOT Traffic Patrol, police investigated fatal accidents.

Furthermore, traffic enforcement cannot be separated from normal policing. Traffic stops bring young constables into contact with a wide range of people from the most respectable to wanted violent criminals. This requires rapid assessment of people and flexibility in dealing with them appropriately. Traffic stops are therefore excellent training for police work generally.

The figures also make clear that those with multiple convictions for drinking and driving frequently have convictions for burglary and crimes of violence. Enforcement is likewise interactive. Burglars require to be able to drive and disqualification for drinking and driving means that they can be arrested as soon as they do so. Traffic officers routinely looked for stolen cars and attended major incidents to assist police. In *Goodbye Pork Pie*, the roles of police and traffic officers were largely interchangeable.

It may be objected that traffic work does not require the same level of skills as does much other more marginal police work. But to extrapolate from this that it would be better to employ a separate group of people to undertake traffic enforcement is to fail to take into account two matters.

The first is that while most of a traffic enforcer's time may be taken up with black and white technical matters, it is critical (not least for the officer) that on the occasions when the driver of a car turns out to be an armed and dangerous escapee or wanted criminal, that the officer deals with the matter competently. The occasions a traffic enforcer needs the full training and powers of a police officer may be infrequent, but when they occur, they are critical.

The second is the need for a relatively large force of flexible personnel capable of undertaking the full range of police duties in major emergencies. In fact it is only in the major cities in Great Britain that the traffic division is concerned almost solely with traffic matters. In rural areas the double manned traffic cars are also the back-up cars for the village police. Even in London, your editor had occasion to call for urgent assistance on his first night out on his own as a constable and the first car to arrive was a traffic car.

The conclusions must be then, that traffic is a police responsibility and that there is a world of difference between a police officer who specialises in traffic work and a person employed and trained solely as a traffic enforcer.

This brings us to the campaign to improve enforcement of the drinking and driving law. Unfortunately, the government has its eyes on the wrong ball. There are two respects in which law and judicial practice need to be changed. These are the penalties and the procedures.

If the affair of John Tamihere MP tells us nothing else, it tells us that the penalties for drinking and driving are far too light. In the UK, not only is 12 months' disqualification from driving mandatory but imprisonment is normal after three offences. It seems grotesque that someone can receive six convictions and not be sentenced to imprisonment.

The other area where reform is desperately overdue is procedure. *Rae* (CA 99/00, 10 August 2000) is just the latest in a tawdry line of fatuous appeals over details of drink-drive procedure. Almost every week *The Capital Letter* has a note of yet another appeal to the High Court or Court of Appeal. These cases provide nothing more than a living for the most valueless section of the legal profession.

The current issue is the "ten minute rule", but the way in which the cases come in waves shows how the system works. One of the lawyers who make their living this way dreams up an unmeritorious defence. Others swarm in and use it until the Courts plug it, then they switch to another.

This can all be prevented by simple legislative reform, as was done in the UK twenty years ago. The sole question in a drink driving case should be whether the accused was driving with more than the permitted amount of blood or breath alcohol. Any test result available should be admissible as evidence. This is the practical effect of the British reforms. There is also no need to consult a lawyer at any stage since, as at least one High Court Judge has pointed out in a judgment, the only advice the lawyer can give is to obey the police instructions. This is just one of several useless rorts operated by the lower end of the legal profession. ❑

BATTERED DEFENDANTS

Judge Margaret Lee, the Law Commission

introduces the Law Commission preliminary paper

The Law Commission's publication *Preliminary Paper 41 Battered defendants: Victims of domestic violence who offend* is the first stage of a project undertaken in response to criticism that the law fails to deal adequately with the situation of those who commit criminal offences in response to violent abuse from their intimate partners. The terms of reference are to:

- examine how the existing law applies to those who commit criminal acts in circumstances where they are victims of domestic violence, in particular, the defences of self-defence, provocation, duress and necessity;
- consider developments and proposals in other jurisdictions, in particular, the defences of self-preservation, diminished responsibility and judicial discretion in sentencing for murder;
- make proposals for reform, if appropriate.

Although the paper recognises that there can be male victims of domestic violence, the discussion necessarily centres on what appears from research and case law to be the typical battering relationship: a woman abused by her male partner.

The paper begins by tracing the development and criticisms of the concept "battered woman syndrome" as it was originally formulated. It notes that in the main, the term is currently used to refer to a wide range of information about the psychological, social and economic situation of victims of domestic violence who appear before the Courts. The question whether "battered woman syndrome" is a diagnosable condition is discussed but left unanswered in favour of the view that what is more important is to ensure that relevant evidence about battering relationships is presented in a way most helpful to the fact-finder.

The paper then examines several legal defences as they apply to battered defendants. The paper cites research and commentary to the effect that self-defence is sometimes out of reach of battered defendants because of the factors the Courts consider to be relevant when assessing the reasonableness of the force used – imminence of danger, lack of non-violent options and proportionality of response. By the time danger is imminent, it is often too late for a physically weaker victim to defend herself against the superior force of her abuser. For a battered defendant, running away from an immediate attack may only be a temporary reprieve from an abuser determined to find and kill her. The most dangerous time for a battered women is when she is on the point of leaving or has just left a violent relationship. Victims of domestic violence therefore may resort to surprise attacks. The paper suggests that for many battered defendants, it may be more realistic to think in terms of the inevitability of the threatened danger rather than its imminence.

The paper discusses the intractable difficulties with the "hybrid person" test in the defence of provocation as formulated in s 169 of the Crimes Act 1961 (see the judgments of the Court of Appeal which split 3-2 over this issue in *R v Rongonui* [2000] 2 NZLR 385, Lord Hoffman in *R v Smith* (HL) 27 July 2000 said the defence had "serious logical and moral flaws"). It sets out the reasons given by the Criminal Law Reform Committee in 1976 for abolition of the defence and replacement with a sentencing discretion for murder (the Crimes Consultative Committee in its 1991 report on the Crimes Bill 1989 supported those proposals). In relation to battered defendants, research shows that women who kill their violent partners tend to do so because of fear and despair, which are less likely than anger to lead to a sudden explosion immediately following provocation. Furthermore, because of the disparity in physical strength, it is often unsafe for them to meet force with force. Battered defendants may not therefore exhibit signs of losing the power of self-control, as required by s 169.

Arguments in favour of and against the partial defences of diminished responsibility and excessive self-defence are set out, and a number of new defences specifically aimed at battered defendants discussed. Lastly, the paper considers compulsion and necessity from the perspective of battered defendants and discusses options for reform.

The Commission does not at this stage express a preference for any proposal but seeks input from the public. The preliminary paper will be followed by a report with recommendations to the Minister of Justice, taking into account the submissions from the public.

The Commission's approach throughout this paper is that domestic violence does not justify or excuse retaliatory killing or wounding any more than non-domestic violence. Generally, the law does not allow victims of violence to take the law into their own hands. But the law recognises that there are extraordinary situations where retaliatory violence may be justified or excused. These situations give rise to the legal defences. If aspects of a defence work against battered defendants, that is not in itself evidence of unfairness. It would only be unfair if the motivation and circumstances of the offending fall within the reasons for allowing the defence, but the offenders are unable to avail themselves of the defence because of the way the defence is constructed.

The Law Commission is eager to hear from interested organisations and individuals. Because of the technical nature of the subject matter, comment from the judiciary and the legal profession will be especially welcome.

Submissions may be made in writing, by telephone or e-mail and should reach the Commission no later than 23 October 2000. For a copy of the Battered Defendants Preliminary Paper contact Colleen Gurney 04-473 3453, cgurney@lawcom.govt.nz, Level 10, 89 The Terrace, PO Box 2590, Wellington. The paper is also available on the Commission's website: www.lawcom.govt.nz. ❑

ASIA-PACIFIC ECONOMIC LAW FORUM

Bernard Robertson

reports on the fifth APELF held in Bangkok on 8 July

The Asia-Pacific Economic Law Forum is now in its fifth year and has managed to retain its single stream character. This differentiates it from numerous other conferences and means that the group can discuss the day's business as a whole during meals and breaks and means that connections can readily be made from one session to another.

The phrase "economic law" is more familiar in Asia than here. It does not connote "law and economics" but law impacting on business and business regulation. This note will focus on papers of potential interest to New Zealand practitioners. This does not necessarily mean papers presented by the strong New Zealand contingent as some were descriptive of current New Zealand issues, eg the radio-spectrum auction (Cheryl Britton of UNITEC) and insider dealing (Pam Nuttal of UNITECT). Others, such as by Terry Reid of UNITEC and Gordon Walker of Canterbury University related to specific overseas jurisdictions (Laos and Malaysia respectively) although all these papers reflected on issues raised in the opening session on the nature of rules and property rights.

Michael Ferguson and Adul Majid (Chinese University of Hong Kong) surveyed decisions to sue auditors. A key factor was the nature of the firm of auditors. Creditors and shareholders are more likely to decide to sue one of the Big Five. This news may impact on the decisions some provincial branches of PriceWaterhouseCoopers, for example, are making on whether to remain part of the global partnership or to strike out on their own. It may also be of interest to lawyers deciding whether to team up with Big Five firms in multi-disciplinary partnerships. Another paper looked at the high fees paid by liquidators to solicitors. D K Srivastrava and Charu Sharma of the City University of Hong Kong reviewed the recent *Peregrine* litigation saga in Hong Kong which drew on the *Maxwell* judgment in the English Court of Appeal. Presumably this topic will also be of interest in multi-disciplinary partnerships where liquidators may be able to pay high fees to their legal partners.

Gael McDonald, Dean of the Faculty of Business at UNITEC gave a paper on bribery and corruption and the impact of the OECD convention on the subject which New Zealand will enact in due course. It seems that New Zealand business people typically have a much more pragmatic view of bribery than the authorities and business people where it is rife. This *Journal* hopes to publish an article by Dr McDonald on the subject shortly.

China and the WTO was the focus of two papers, one on the competition law of the PRC and one on government procurement in the Hong Kong SAR. The latter paper by Rajesh Sharma of the City University of Hong Kong explained that the HKSAR was the first government to have set up on line facilities for tendering for government contracts (as opposed to merely obtaining information). This potentially exposes local suppliers to world-wide competition and is in the spirit of the Agreement on Government Procurement. Needless to say, however, the government has found various ways of avoiding opening bids to overseas competition that exploit the loopholes in the AGP.

Mark Williams of the Hong Kong Polytechnic University spoke about competition law in the PRC especially in relation to the corporatisation of state owned enterprises. Much of the emphasis at present is on making the state owned enterprises go through the motions of participating in a competitive market rather than creating a genuinely contestable market. Another topic addressed is the tendency of local governors to protect local industries against "imports", a condition known as "administrative monopoly". This too is tackled by the PRC law on competition, but the question is how much attention will be paid by local governors to what emanates from Beijing.

Michelle Welsh of Monash University exposed more of the horrors of the way Australia is implementing GST by discussing pecuniary penalties under the Trade Practices Act 1974 for something called "price exploitation". The forum was agreed that no one knew what this was, but what the legislators probably mean is a representation to the customer that a price increase is solely the result of the imposition of GST. Ms Welsh also discussed the rationales put forward for civil penalties under Australian commercial regulation, referring to civil penalties imposable by regulators, rather than the windfall damages to plaintiffs discussed by Ms Nuttal in her paper. The arguments that Ms Welsh put for and against civil penalties would apply equally to the penalties that can be imposed by the Employment Relations Authority under the ERB.

David Western of Curtin University of Technology discussed the financial melt-down in Thailand and blamed it on a combination of under-government at the micro-economic level with poor disclosure and accounting requirements and even poorer enforcement, together with over-government at the macro-economic level with a pegged exchange rate creating an effective guarantee for overseas investors against their own folly.

A stimulating and well organised day finished with a splendid dinner on a terrace overlooking the river, at which, again, the benefits of being a single-stream conference showed themselves. The ice was by then thoroughly broken. The next APELF is planned to be held in Kuala Lumpur in 2001 and further details can be obtained from lwdk@cityu.edu.hk . ❑

A CHIEF CORONER

John Fogarty QC, Christchurch

comments on the Law Commission's Report No 63 Coroners

The most important recommendation of the Commission in its report on coroners released in August 2000 is that there be a chief coroner. A chief coroner is appointed in most territories in both Australia and Canada.

The "Office of Chief Coroner" would ensure that there was an independent person overseeing the operation of the Coroners Act, working to promote uniformity in practice, maintaining standards, and identifying an overview of patterns of sudden death and their fundamental causes, and considering whether additional inquiries are required.

The justification for this expense is derived from the underlying importance of coronal inquiries to identify practices that have cost human lives and then to modify or eliminate them. That has always been the underlying reason for the community to take an interest in the death of private individuals, and the reason which justifies officials intruding upon private mourning.

There can be no doubt that the Coroners Act saves lives, and establishes a process whereby the community can have confidence of an independent inquiry into unusual death where no one, professionals, industrial organisations or government enterprises (all with an interest and capacity to hide error), can hide from scrutiny.

Probably the most difficult aspect of the work of the coroner is to intrude upon private grief and to require a post-mortem examination of a body against the wishes of the deceased's immediate family. The Commission's report has a number of responses to this difficulty. First, the non-controversial.

The Commission recommends reinforcement of the powers of the coroners to have temporary control of the deceased's body and body parts until the post-mortem examination is completed and all body parts have been placed back inside the body of the deceased or otherwise have been dealt with by direction of the family of the deceased.

Secondly, the report recommends there be renewed attention to cultural sensitivity concerning the dignity of the deceased's body. That the deceased's family/whanau be given the option of having a family representative or kaitiaki remain with or be in close proximity to the deceased's body while it is under the coroner's control. This is of especial interest to Maori and the Jewish community.

The controversial recommendation is that the Coroner's Act be amended to provide families with a right to object to the High Court to the coroner's decision to authorise a post-mortem. At present families can object after a post-mortem by way of judicial review. The recommendation enables any family to effectively stop the post-mortem and override the judgment of the coroner, until the High Court hears the objection. That could take some time.

This recommendation raises squarely the question as to whether private individuals should be entitled to impede a public process. The Commission reports that the New Zealand Coroners' Council is opposed to the reform. The reform will undoubtedly be an opportunity for families who object to the whole post-mortem process on principle to impede it whatever the particular merits.

I disagree with the recommendation. I support the view stated by an experienced coroner Mr Richard McElrea and reported by the Commission:

> A coroner's discretion in whether or not a post-mortem is ordered is an onerous one and should be exercised carefully. The process should allow appropriate input from families, but it is important that the coroner can override family issues in certain circumstances.

A compromise reform may be to give an opportunity to the family to object to the Chief Coroner, who be given the power to override the family's wishes. That is a policy more in favour of the Coroners' Council. In my view it is preferable to enabling a High Court process which could involve prolonged delays and ultimately put pressure on coroners to accede to the wishes of hostile families.

Such is the nature of our contemporary society that "family" now needs to be defined. There are recommendations in the report for a definition of "immediate family" which I hope will never have to be applied in a legalistic fashion.

There are many other detailed recommendations. Not the least is that the coroners be adequately reimbursed, rather than be expected to volunteer at least some of their time and often the resources of their practices, if they are lawyers. There is a recommendation that all coroners be lawyers. That is a judgment call of the Commission. It is not necessary for coroners to be lawyers, in my opinion. The most important requirement for coroners is to be independent, and to be seen to be independent.

The Commission is to be applauded for an excellent report, and especially for taking this ancient function seriously, and for having identified that the process is now too heavily dependant upon the goodwill of coroners across the country, and needs further resources from the taxpayer.

It is always a delicate task for the Law Commission to bring down recommendations which require more government spending. But in this particular case I think the Law Commission's detailed report is a compelling argument for more expenditure. ❑

STREET LEGAL

Ross Burns, Meredith Connell, Auckland

has been watching the latest legal drama

We criminal lawyers are the impact players of the legal profession. We have disgusting dinner table conversations, questionable personal habits, and keep the dubious company of police and villains. We don't know much about law office accounting, and think a closely-held company is attempted date rape. We are left by our commercial, civil and conveyancing colleagues to languish on the benches in the cold.

But whenever the profession comes under pressure the criminal lawyer is suddenly popular. We are called to the pitch, and sent on as the doughty upholder of individual liberties, the social conscience of the law. And somehow we pull it off. We are dragged blinking into the spotlight of moral rectitude, and we perform with distinction. The crowd loves us. But when the show is over and our purpose fulfilled, we are shunted back to the interview rooms and holding cells to ply our wicked trade.

Because we are less than agreeable professional company we have to practise alone. Without proper coaching, we learn our dark art from a variety of sources. The experience of years, for one. We get the experience, our clients get the years. Subtle judicial guidance, the forensic equivalent of barracking from the terraces. Other lawyers we see in action. And where does a busy young lawyer see others in action in these days of legal aid constraint? On television.

Crime is cool. It sells newspapers, elects politicians, and provides a good chunk of our television viewing. Where there's crime, there's lawyers. There's a now white-haired generation which grew up admiring Perry Mason. No one told them that it was just fantasy, that Crown witnesses don't confess to the crime. So they blithely insisted to Crown witnesses that they were the guilty party. Sometimes the witnesses even agreed. Every cop was a liar, every bystander mendacious, and every client wronged.

There's a grey-haired group which found Rumpole's approach laudable: forensic brilliance, bad personal hygiene, cigar ash, red wine, and rotund oratory. All forensic techniques now suffering the legal equivalent of midday re-runs on Prime.

LA Law gave us the two minute jury speech. The medium which destroyed the concept of attention span showed us how to compensate. The nation which gave us the President who didn't inhale also gave us Ally McBeal, the lawyer who doesn't digest. Pencil thin and neurotic, she is responsible for the overcrowded Court facilities full of bulimic barristers regurgitating their lunch.

British and American role models are all very well, but as we grope our way to republicanism perhaps we should have our own Kiwi versions. Not a transplanted colonial Irishman in the Hanlon mould, but someone who represents the new New Zealand, someone cosmopolitan, hip, cultured, and fond of coffee.

Street Legal (TV2, 8.30 pm, Tuesdays) fulfils our need. David Silesi (Jay Laga'aia) has it all. A scowl that reeks of integrity. A grasp of the need for contrast in Court (using the phrase "I humbly submit" while presenting a profile not unlike one of the more conceited Caesars). An unusual motor vehicle, refreshingly free from personalised plates. An ability to run, while wearing a suit, without holding on to his wallet.

From the pen of Greg McGee, *Street Legal* skilfully recognises that the everyday meat of criminal law holds more dramatic potential than the most contrived thriller. The witness blown away with a sawn off shotgun, the child refused conventional medical treatment by a parent of strong personal beliefs – situations straight from the pages of our newspapers, if not our files. The dialogue is sometimes banal (when did you last hear a thirty-ish lawyer use the expression "all piss and wind" other than to describe Wellington?) and the production tacky, but the action is at least human and identifiable. If the characters are stereotypical, that's because so much has to be crammed into the available viewing time. At 8.30 pm on Tuesday, who needs complexity? I want a nasty cop to brutalise a suspect in the first few minutes, so I don't have to waste time worrying about what sort of cop she really is.

Anyway, stereotypes are just reality repackaged for convenience. We all know the concerned family lawyer, the keen new practitioner and the cynical older lawyer. Whether we would want to share our offices let alone our bodily fluids with them is another matter. Silesi does, and they provide useful diversion from his unremitting intensity, intensity which would have most of us diving for the Prozac. In his intensity, Silesi is more real then reality. We who bury our true finer feelings beneath cynicism and flippancy salute the man who isn't afraid to show his.

A pedant could carp at the unreality of aspects of the show. The ethical propriety of offering to represent a man who has just slaughtered one's client under one's nose shouldn't bother the Law Society Disciplinary Committee for long. The pecking order in Silesi's firm (crime, family, and commercial property in descending order?) and the apparent unconcern with fees suggest either a very moral or very destitute legal consultant to the show.

On the other hand, who are we to insist on complete accuracy? Our own recollections of our professional pasts often owe more to fantasy than fact.

Tom Scott once remarked that we New Zealanders could be very proud of our thugs; they could foot it with any in the world. Now our thugs have their own time-slot, and so do our criminal lawyers. Watch David Silesi. Emulate him. But get your fees up front. ❑

RESTITUTION

Ross Grantham, the University of Auckland

reviews The Principles of the Law of Restitution *by Graham Virgo, Clarendon, Oxford, 1999*

In the last 30 years the law of restitution has emerged from the shadow of the law of contract to claim its place in the sun. The flowering of judicial and academic interest in the subject, which is both a cause and effect of this emergence, has generated an impressive body of literature. Where there was once only the magisterial work of Lord Goff and Professor Jones, there is now a host of academic and practitioner orientated texts. A new and important addition is *The Principles of the Law of Restitution*, by Graham Virgo.

Mr Virgo's central thesis is that, contrary to the assumption in cases such as *Lipkin Gorman (a firm) v Karpnale* ([1991] 2 AC 548, 578), gain-based or restitutionary remedies, such as money had and received, and account of profits, are not triggered solely by the principle of unjust enrichment. Rather, in his view, restitutionary remedies are triggered by three distinct principles: "(1) the reversal of unjust enrichment; (2) the prevention of a wrongdoer from profiting from his or her wrong; and (3) the vindication of property rights with which the defendant has interfered". (p 8.) The vast bulk of this sizeable book is devoted to an articulation of the substantive law of each of these principles. In this respect, *Virgo* differs from the many other texts on the law of restitution. While the majority of texts have focused only on the principle of unjust enrichment, Mr Virgo seeks to articulate all of the remedial application of restitution.

The discussion of the principle of unjust enrichment is entirely orthodox. His account follows closely the theoretical conception articulated by Lord Goff and Professor Jones (*The Law of Restitution* (5th ed, 1998) and Professor Birks (*An Introduction to the Law of Restitution* (1985)). While in his Preface the author eschews the overtly normative approach of Birks (p viii), and while Virgo is certainly less revisionist of the cases than Birks, his account of the law will necessarily stand or fall on the strength of the Birksian analysis.

Although the principle of unjust enrichment is usually regarded as central to the law of restitution, Mr Virgo's suggestion that restitution may be triggered by wrongdoing is nevertheless not entirely heterodox. In recent years, leading scholars have resiled from the suggestion that restitution and unjust enrichment are synonymous, such that the only justification for a restitutionary remedy is unjust enrichment. Thus, Birks now accepts that restitution may be a response not only to unjust enrichment but also to a range of legal and equitable wrongs ("The Law of Unjust Enrichment: A Millennial Resolution" [1999] *Singapore JLS* 318, 319-320).

In contrast, Mr Virgo's suggestion that restitution may be triggered by interference with the plaintiff's property rights represents a significant departure from the account of restitution championed by Birks. In Birks' view ("Property and Unjust Enrichment: Categorical Truths" [1997] NZ Law Rev 623), property rights are a category of response, which aligns with compensation and restitution, rather than a source of rights. Accordingly, property rights cannot justify restitution or indeed any other remedial response. It follows, in Birks' view, that even in cases where the plaintiff retains title, the doctrinal basis of restitution is unjust enrichment.

Virgo rejects this approach. Relying upon the contrary account of the place of property rights in the taxonomy of the private law developed by Charles Rickett and myself ("Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" [1997] NZ Law Rev 668. Now more fully expounded in *Enrichment and Restitution in New Zealand* (2000) ch 3), Virgo concludes that where the plaintiff retains title to an asset, restitution of that asset or its monetary equivalent is best and most simply explained in terms of the law's response to the plaintiff's property rights, not unjust enrichment.

Mr Virgo's articulation of the multi-causality of restitution, and his rejection of the lingering perception that if the response is restitution then the cause of action must be unjust enrichment, is to be warmly welcomed. However, the focus on the remedial aspects of the law of restitution does give rise to one major concern.

An exposition of the nature and operation of a particular remedy is useful only if there is a body of rules or principles common to that remedy regardless of the principle that triggers its operation. The necessary but only faintly stated premise of *Virgo* is that a concern with gain rather than loss is a sufficient commonality (p 18). With respect, this seems a weak foundation. Although undoubtedly sharing a focus on gain, restitution in respect of unjust enrichment means something quite different, and raises quite distinct issues, from restitution in respect of conversion or breach of contract. As a remedy for unjust enrichment the appropriateness and quantum of restitution are determined by the nature of the cause of action itself (restitution is obviously an appropriate response to unjust enrichment and the quantum is necessarily the value transferred to the defendant). However, this is clearly not true where restitution is sought in respect of other causes of action. Even if one accepts in principle that restitution should be available for conversion or breach of contract, there remain difficult questions both as to when such a remedy is appropriate and how the quantum is to be assessed.

Overall, *The Principles of the Law of Restitution* is to be recommended. In his Preface the author stated his aim to be to write a textbook, rather than a theoretical treatise. Judged by this standard the book succeeds. ❑

WORLD TRADE BULLETIN

Gavin McFarlane of Dechert, London

reviews current disputes and farewells Christopher Beeby

JUDGE BEEBY

When the WTO dispute resolution system was set up in the wake of the Uruguay round of GATT, it brought a new dimension to international trade law. The establishment of a formal system for the hearing of both sides to a complaint, coupled with (for the first time) the introduction of binding decisions which are enforceable by WTO approved sanctions, has done a great deal to enhance the status of the system for regulating the economic relationship of nations. The two tier machinery, with the first instance resolution panels, and the appellate body make up what has become an extremely busy forum, establishing a completely new jurisprudence. The effect which these decisions are having on the economic life of member states of the WTO becomes increasingly apparent, particularly in the EU and the US. Bitterly contested disputes between these two economic giants have brought wide ranging sanctions in their wake, which have affected many areas of industry, and the individuals which work in them.

The Judges who have sat to hear these cases since the establishment of the new system in 1995 have become pioneers in this new field, setting up fresh principles to govern a whole range of new situations at the cutting edge of economic life. It is with considerable sadness there that we must record the early death of one of the most distinguished of these groundbreaking new judicial figures. Judge Christopher Beeby died recently at the early age of 64 in Geneva, the location of the WTO headquarters and the dispute resolution system. He was a distinguished international lawyer who has taken part in eight sessions of the UN General Assembly, and in the UN Conference on the Law of the Sea before his appointment to the WTO appellate body on its creation in 1995. He sat in that capacity on the very first appeal, the *United States standards for reformulated and conventional gasoline* dispute. In all, Judge Beeby sat on 15 appeals, and was chairman of the appellate body in 1998. The judgments in which he has participated provide an eloquent memorial to a fine international lawyer.

EU TEXTILE LIBERALISATION?

The European Commission has announced that it intends as of 1 January 2002 to eliminate all remaining trade restrictions on the importation of 62 categories of textiles and other clothing products from other member states of the WTO. It puts this forward as an example of the EU's determination to implement as fully as possible its obligations under the WTO agreements finalised in the Uruguay round. The Commission claims that this removes the quotas and tariffs on 18 per cent of EU imports of textiles and clothing. The case put forward by the Commission is that it will be providing duty-free access to its market for "essentially all imports from the world's least developed countries". Brussels claims that prospects for these states to export have been enhanced, and that this fulfils its leadership role in efforts to set up a comprehensive round of multilateral trade negotiations. It claims that the EU's proposals for a new trade round reflect its wish to harness globalisation in the context of sustainable development for further growth and employment for the benefit of the world trading system at large. The least developed countries – the WTO categorisation of its poorest member states, the LDCs – dispute these figures vigorously.

The WTO Agreement on Textiles and Clothing (the ATC agreement) establishes that states which maintain import restrictions on textiles and clothing are to eliminate all such restrictions in four stages: 16 per cent by the start of 1995; 17 per cent by the start of 1998; 18 per cent by the start of 2002, and the remainder by the start of 2005. Although the current EU proposal will result in the elimination of 37 bilateral quotas involving other WTO member states, this is only one fifth of the total quotas which the EU maintains. The poorest countries claim that it is in the other four fifths that the majority of the goods which they wish to export to the EU fall. But the Commission claims that the access which third world countries offer to EU textile and clothing products in their markets is very limited. Brussels claims that the products of its member states in these categories face high tariffs as well as non-tariff barriers, which in a number of cases virtually prohibit access to some of these overseas markets. The situation remains far from satisfactory, but it is obvious that despite all the claims that markets around the world have been opened up by the process of globalisation, a great deal of protection remains.

FOOD SAFETY; ANIMAL AND PLANT HEALTH

These topics are with justice high on the political agenda in many areas of the world, as public concern over safety of what they consume continues to grow. No doubt this reflects rising educational standards and access to media discussion, for it is clear that previous generations were often confronted with some food products which the majority of people living in the western world at least would find totally unacceptable today. But although general life expectation continues to rise (and through this rise to threaten the stability of social welfare provision), levels of death from cancers and cardiac disease account for an increasing proportion of mortality rates. And at the same time the new phenomena of CJD and other diseases said to derive from the consumption of what have always been considered staple foods gives rise to increasing public concern. Among the various agreements which the WTO operates under the GATT system which it took over in 1995, the Sanitary and Phytosanitary agreement (SPS) seeks to regulate these areas in relations between the

member states. It may be that national authorities may soon be given WTO guidelines to help them to treat risk consistently in the measures which they introduce on food safety and animal and plant health. The administration has produced a draft for guidelines which attempt to deal with the problem of consistency. These guidelines, which are not legally binding, are intended to help officials follow art 5.5 of the SPS agreement when they make decisions on levels of health protection, and adopt or implement measures on food safety, or animal or plant health. Article 5.5 of the agreement requires states to be consistent when they deal with risk over a range of measures and products, so as to avoid disguised protectionism for specific products. The key is the concept of the "level of protection" in measures which member states provide in their domestic legislation for food safety and animal and plant health. These levels are not easy to specify, measure and compare. The new guidelines suggest ways for domestic authorities to try to deal with these problems. One solution canvassed is that when new measures are introduced or existing measures modified, the authorities could as a matter of course compare these with other measures which they have adopted. The EU in considering the suggestion has emphasised that the principle should not be employed to justify arbitrary measures by particular states. There is also some concern that there might be a weakening of WTO rules by reducing the certainty and predictability which has been built into them. A balance of rights and obligations had been achieved in the Uruguay round, and if this were to be tampered with, it could allow states to use precaution as an excuse for protectionism.

The topic of science is at the heart of many of these discussions about food safety, as recent scares about health and safety have made obvious. The public debates which have been sparked off by these issues raise the question of whether the SPS agreement's preference for scientific evidence goes far enough in dealing with possible risks for consumers and producers alike. The EU-US dispute over beef hormones in the WTO is a case in point, and similar issues have arisen about salmon. One notion which has come into discussions is that of the "precautionary principle", which is said to be a kind of safety first approach to deal with scientific uncertainty. There is some effort to address this in art 5.7 of the SPS agreement. This provides that – "In cases where relevant scientific evidence is insufficient, a member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organisations as well as from sanitary or phytosanitary measures applied by other members. In such circumstances, members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time." Some of the WTO members have indicated that they would like to see this principle strengthened. It goes to the heart of the debate about beef hormones, on which neither side seems at present prepared to give way.

DISPUTE SETTLEMENT ROUND UP

Ecuador was one of the Latin American states which had joined with the USA in bringing its complaint to the WTO over the regime which the EU operates for the importation of bananas from those areas which do not include former colonies of European states. It has however always operated a slightly independent approach to the question, as it controls its own exports of the fruit, unlike the situation in the other Hispanic complainants, which do all their exporting through the medium of the major US giant corporations which dominate the field in those countries. Ecuador has now produced an estimate of the damage which it claims to have suffered as a result of the EU's restrictions, and this amounts to US$201.6 million. It claims that this did not take into account the indirect damage to other sectors of its economy such as unemployment and displacement of rural population. Ecuador has stated that it was a small country confronted by a giant trading partner in the shape of the EU, but it has started the retaliation process to encourage Brussels to amend its banana importation regime in a way which was consistent with WTO rules. Brussels has said that it recognises the right of Ecuador to retaliate, but that the EU was committed to implementing a WTO consistent banana regime as soon as possible, and that this commitment was not affected by retaliation which could be effected by a big or small trading partner.

Elsewhere, a complaint has been referred back to the original panel which issued a decision on Korea's complaint about the anti-dumping duty which the USA has imposed on its dynamic random access memory semiconductors (DRAMS). Korea now contends that the United States has not implemented the recommendations of the dispute settlement body. It complains that the new US standard on revocation of anti-dumping duties and the continued application of the US anti-dumping order on Korean DRAMS without substantial evidence were not in line with the recommendations of the panel. Washington however has replied that it feels that it has fully implemented the recommendations of the dispute settlement board.

The dispute settlement board has adopted the finding of a first instance panel on a claim by the EU that Canada did not provide sufficient protection to patents of pharmaceutical products as required by the TRIPS agreement. The panel held that the use by Canadian firms of patents without the consent of the patent holders in preparation for seeking regulatory approval of competing products once the patents expire was covered by art 30 as an exception within the TRIPS agreement. But the panel also held that this exception did not permit the advance stockpiling of competing products for sale after the expiry of the patents. Both Canada and the EU have indicated that they will now join in a consensus in adopting the panel's report.

New panels for first instance hearings have recently been set up by the dispute settlement board at the WTO to examine fresh complaints made by member states. Japan has lodged an allegation that findings of dumping made by Washington in respect of importations from Japan of hot rolled flat rolled carbon quality steel products were in violation of WTO provision, as were the underlying US laws and regulations. The United States has said that it will defend these allegations, and that its determinations were consistent with WTO rules. Canada, Chile, the EU and Korea have all indicated that they reserve the right to intervene as third parties in the panel's proceedings. Another panel has been set up to examine a complaint brought by Brazil against transitional safeguard measures which have been introduced on certain importations of woven fabrics of cotton and cotton mixtures which originate from Brazil. A Mercosur arbitration panel is also looking into the question, and Brazil would like to see the matter settled before the WTO panel looks into the question. Argentina has responded that the proceedings in Mercosur (the South American free trade area to which both Brazil and Argentina belong), is a process which is distinct from the WTO proceedings. ❑

TAX UPDATE

Jan James and Craig Nelson, Simpson Grierson, Auckland

discuss likely changes to the draft Bill on FBT, SSCWT and the FIF rules

The Taxation (FBT, SSCWT and Remedial Matters) Bill 2000 (discussed in its original form at [2000] NZLJ 95) was reported back to Parliament on 31 July 2000. The Finance and Expenditure Committee (FEC) has recommended that changes be made to the superannuation withholding tax, fringe benefit tax and foreign investment fund rules contained in the Bill. The following is a summary of those recommendations.

SUPERANNUATION FUNDS

As discussed in our tax update in April 2000 the government is looking at implementing a specified superannuation contribution withholding tax regime (SSCWT). The scheme taxes withdrawals from superannuation schemes at five per cent on every dollar withdrawn (on top of the 33 per cent withholding from contributions) in order to protect against avoidance on the introduction of the new top marginal tax rate of 39 per cent.

This tax is imposed on the superannuation fund by including within the fund's gross income a deemed amount equal to 15.15 per cent of the amount withdrawn. When taxed at 33 per cent this gives rise to a tax liability to the fund equal to five per cent of the amount withdrawn. This liability will be recovered from members.

Many amendments have been made to the original Bill in relation to SSCWT. So many, in fact, that only some of the notable amendments recommended by the FEC can be discussed here. Some of these recommendations are:

- those earning less than $60,000 per annum should be exempted from the withdrawal tax. This amendment was made as many felt the original Bill was unfair in that those earning less than $60,000 would still be taxed on withdrawals, thus effectively paying the higher tax rate of 39 per cent. This exemption is effected by reducing the deemed income of the fund resulting from a withdrawal by 25 per cent for each year in the four years preceding the year of withdrawal the member's income (including superannuation contributions) was less than $60,000;
- the withdrawal tax should be due in the year following the year of withdrawal from a superannuation fund, except in the year a superannuation fund winds up. This measure is designed to avoid problems with the provisional tax regime and use of money interest, due to uncertainty in estimating likely withdrawals at the beginning of an income year, and therefore residual income tax. By delaying income recognition for a year, amounts will be known, and provisional tax will be able to be calculated with certainty;
- the rules provide an exemption from withdrawal tax if withdrawal is necessary to alleviate significant financial hardship. The definition of significant financial hardship should be extended to include types of events that give rise to significant difficulties in this regard – for example illness, disability, inability to meet expenses, incurring various costs etc;
- the two year rule, included in the original Bill, stated that withdrawals upon the cessation of employment will only be subject to the withdrawal tax if the member has not been employed for two years, or if in the two years prior to the cessation of employment employer contributions exceeded 150 per cent of the previous year's contributions. It has been recommended that those employed for less than two years should be able to lock in their contributions for two years subsequent to ceasing employment – these amounts will not be subject to the withdrawal tax upon withdrawal. Also, any withdrawal tax payable on the cessation of employment should be limited to the last two years' contributions, or the time the employee has been with the current employer, whichever is shorter;
- various amendments have been made so that increases in employer contributions for the purposes of determining the 150 per cent threshold referred to above that do not represent an increase as a percentage of salary, or that are required by a trust or contract existing before 1 April 2000, or that make up for previous underpayments, are not included in the 150 per cent;
- members should be exempted from withdrawal tax if they receive the withdrawal in the form of an annuity which provides payment over a period of not less than ten years, or use the funds withdrawn to purchase such an annuity;
- those who are nearing retirement may wish to partially retire and make withdrawals to fund that partial retirement. Such withdrawals should be exempt subject to certain conditions such as maximum remaining hours worked, there being a genuine intention to retire, and contributions to the fund ceasing;
- loans from, or against an interest in, superannuation funds to members should be exempt from withdrawal tax. The benefits of reducing this type of avoidance were considered to be outweighed by the costs of preventing it, and provisions dealing with concessionary loans are already present. However, such loans will be monitored by Inland Revenue and action will be taken if there is evidence to suggest that such loans are being used for significant avoidance activity.

In addition, concerns have been raised about the effect of the withdrawal tax on investment statements and prospectuses – failure to refer to the tax may render these statements misleading, until they are amended. In answer to these concerns the Securities Commission has indicated that it has the power by Order in Council to temporarily exempt

superannuation funds from a requirement to refer to the withdrawal tax.

The Bill now has an application date of 31 July 2000 (changed from 1 April 2000), although the 1 April date is still relevant as the "benchmark" date for a number of grandfathering provisions. The Bill is expected to be passed sometime in September.

FRINGE BENEFIT TAX

As discussed in our update in April 2000 the government recognised that a flat 64 cent FBT rate was inconsistent with a system of progressive income tax rates. For this reason a three tier FBT regime was proposed.

Submissions on the Bill highlighted several problems with this proposed regime. The first problem was with the way in which FBT rates were to be applied. The original Bill required FBT payable to be calculated by using FBT rates equivalent to the total cash remuneration received from the employer providing the benefits. If, for example, an employee's cash remuneration is $55,000, any attributable fringe benefits received by that employee are taxed at the flat FBT rate of 49 per cent, notwithstanding that the value of the fringe benefits, if included in remuneration, could mean that the employee's marginal tax rate increases to 39 per cent (an equivalent FBT rate of 64 per cent). Two problems were identified with this approach:

- because the FBT rate is a flat rather than a marginal rate, a one dollar increase in remuneration could result in the employers having to pay more than one dollar in increased FBT liability. This is because once a threshold is reached, all fringe benefits are taxed at the rate applicable to that threshold, not just the benefits which exceed the threshold;
- The approach may also result in some level of tax avoidance by employers and employees negotiating to cap cash remuneration below a tax threshold (eg $37,999 or $59,999). The employee could then be paid the balance of their remuneration as non-monetary benefits. By doing this employers would be liable for payment of FBT at a lower rate.

The alternative approach recommended by the FEC is a net remuneration method. Under this method the value of attributed benefits is taken into account in calculating the FBT payable on those benefits. In other words the proposed calculation supposedly results in the same amount of tax being paid as if the entire remuneration package consisted of cash payments, irrespective of the proportion of fringe benefits in the package.

Another area of significant amendment is the treatment of subsidised transport. It was submitted and accepted that fringe benefits in the subsidised transport category should be able to be pooled and taxed at 49 per cent. This would occur where all staff are entitled to the same or similar subsidised travel entitlements and would prevent subsidised travel being substitutable for salary or wages. It was accepted that this would have negligible revenue effect while saving significant compliance costs.

These new rules will apply to benefits provided or granted on or after 1 April 2000.

FOREIGN INVESTMENT FUND RULES

The Foreign Investment Fund (FIF) rules are part of New Zealand's international tax rules. They bring to tax in some cases unrealised gains on interests held by New Zealand residents in offshore funds. Amendments are being made to these rules to clarify how the FIF rules apply when a resident entity migrates from New Zealand and becomes an offshore fund. Problems have occurred under the FIF rules as originally enacted with this type of migration. The amendments recommended go some way to minimising these problems, but do not eliminate them altogether.

The best way to explain the problems is by way of a recent high profile example involving Brierley Investments Ltd. BIL recently moved its headquarters to Singapore and its incorporation to Bermuda. In doing so it brought its local shareholders under the FIF regime, as holders of interests in what had become an offshore fund.

Under the FIF regime any shareholder with more than $20,000 worth of shares in such a fund is subject to tax on unrealised gains from this investment. Approximately 5000 of the 75,000 New Zealand shareholders in BIL are thought to have been caught by this $20,000 threshold. At the time of the move BIL's share price was 40 cents. If a shareholder originally paid an amount in excess of this for his/her BIL shares – say $1, and subsequent to the move BIL makes gains and the price rises above the 40 cents per share to 45 cents, the shareholder would be liable to pay tax on the unrealised five cent per share unrealised gain even though he/she would actually over the term of holding the shares have made a 55 cent per share unrealised loss on the investment.

Submissions suggested that upon migration an investor should be able to elect initially to value their investments at cost price rather than market price – ie the $1 rather than the 40 cents, thereby giving rise to a deductible loss when comparing this with market values. This submission was rejected as it was considered that it was an established tax principle that when assets move from one set of tax rules to another they do so at market value.

The only concession provided (introduced in the original Bill) is to allow holders on revenue account to access pre-migration losses.

In order for the FIF rules to apply to a taxpayer, that taxpayer must have an interest in a fund worth more than a threshold figure. The Bill increases this de minimis threshold from $20,000 to $50,000. As an example of the effect of this change, the number of affected BIL shareholders would drop from 5000 to 400.

The application of this threshold to trustees was considered, but not resolved by the FEC. The concern is that some taxpayers with large interests could side-step the threshold by holding their shares in several trusts. However, if all trustees were excluded from the application of the threshold then inequities could result in the case of, for example, family trusts. It is likely that this issue will be revisited within the next two years.

The original FIF rules established a maximum threshold of $100,000 for use of the deemed rate of return method for calculating FIF income (one of the four methods available, subject to various conditions). Although this method of calculation is considered to be the least reliable of the four methods it is also the simplest. As such, using this method creates the potential for significant compliance cost savings. The FEC suggests that increasing the threshold to $250,000 would address concerns as to the reliability of the method by sufficiently limiting its applicability, yet would still be consistent with the aim of reducing compliance costs.

These amendments apply retrospectively to the 1999/2000 and subsequent tax years. ❑

ENGLAND'S PROCEDURAL REVOLUTION

David Cairns, B Cremades & Asociados, Madrid

asks how relevant Woolf *is to New Zealand*

For five years the reform of civil procedure has occupied a prominent place in legal debate in England. This debate began when Lord Woolf's *Access to Justice: Interim Report* ("*Interim Report*") appeared in June 1995. The *Interim Report* was followed in July 1996 by *Access to Justice: Final Report* ("*Final Report*") and, after widespread debate and consultation, the promulgation in 1998 of the new Civil Procedure Rules ("CPR"). The CPR apply at both County Court and superior Court levels, substantially replacing the rules of the Supreme Court and the County Court Rules. Since coming into force on 26 April 1999 there has been a stream of refinements and additions to the CPR, adding detail to the new system. The discussion continues unabated: features, interviews, survey results and comment abound in professional journals and the client newsletters of the major law firms (*The Interim Report* and *Final Report* are available at http://www.open.gov.uk/lcd/majrepfr.htm. The CPR and their accompanying Practice Directions are available at http://www.beagle.org.uk. The CPR are divided into "Parts" dealing with discrete topics, which in turn are divided into rules. Many Parts are supplemented by Part-specific Practice Directions).

The CPR have frequently been called a "procedural revolution". In his *Foreword* to the new rules the Lord Chancellor, Lord Irvine LC, suggests common law procedure is at its most significant period of development since the merger of law and equity and the emergence of the recognisably modern civil procedure in the Judicature Acts of the 1870s.

Lord Woolf's *Interim Report* and *Final Report* are written in a direct style, and do not shrink from identifying the faults of civil procedure, or pointing the finger of blame. The three key problems they identified with civil justice were cost, delay and complexity. These problems were interrelated and stemmed from "the uncontrolled nature of the litigation process". Lord Woolf attacked an "adversarial culture" "in which the litigation process is too often seen as a battlefield where no rules apply". Existing rules were "flouted on a vast scale"; timetables were "generally ignored", pleadings, "whether through incompetence or deliberation" often failed to establish the facts the rules required; discovery was "completely out of control"; there was excessive resort to interlocutory hearings, and expert evidence was undermined by partisan pressures. The powers of the Courts, he said, had "fallen behind the more sophisticated and aggressive tactics of some litigators". The blame for excessive delay, "an additional source of stress to parties who have already suffered damage" was placed squarely on the shoulders of the legal profession. "Delay is of more benefit to legal advisers than to parties. It allows litigators to carry excessive caseloads in which the minimum possible action occurs over the maximum possible timescale. In a culture of delay it may even be in the interest of the opposing side's legal advisers to be indulgent to each other's misdemeanours. Judicial experience is that it is for the advisers' convenience that many adjournments are agreed." (*Interim Report*, ch 3, paras 1-11, 30-31, and 41.)

Lord Woolf said the intention of his reforms was to change fundamentally the landscape and "culture" of litigation. The features of the new landscape moulded by the CPR are to be:

(a) litigation is to be avoided wherever possible;
(b) litigation is to be less adversarial and more cooperative;
(c) litigation is to be less complex;
(d) the timescale of litigation is to be shorter and more certain;
(e) the cost of litigation is to be more affordable, more predictable, and more proportionate to the value and complexity of individual cases;
(f) parties of limited financial means are to be able to conduct litigation on a more equal footing;
(g) there are to be clear lines of judicial and administrative responsibility for the civil justice system;
(h) the structure of the Courts and the deployment of Judges is to be designed to meet the needs of litigants;
(i) Judges are to be deployed effectively so that they can manage litigation in accordance with the new rules and protocols;
(j) the civil justice system is to be responsive to the needs of litigants.

The indications after one year are that the CPR are achieving their objectives. Fewer proceedings are being issued; more proceedings are being settled sooner; the judiciary is using its discretion under the new case management regime, showing less tolerance towards delays and, significantly for the long-term efficacy of the new regime, willingly disregarding old precedent. In *Biguzzi v Rank Leisure plc* [1999] 4 All ER 934, for example, Judge Kennedy QC adopted this robust approach to House of Lords precedent in considering an application to strike out a statement of case (at 936-937; the House of Lords authority concerned was *Birkett v James* [1977] 2 All ER 801):

> it is my firm belief that authorities decided under the old procedure should not be taken as binding or probably even persuasive upon this Court, any more than looking

> back to the old rules to interpret the new should be so. This is a new regime ....
>
> I have to say that this Court's view, after extensive training and a good deal of discussion and thought, is that the new order will look after itself and develop its own ethos and that references to old decisions and old rules are a distraction.

The appeal came before a Court that included Lord Woolf MR, who endorsed the approach of the Judge (at 940):

> In relation to the decision of the Judge which is under appeal, I can see no failure on his part to recognise the relevant principles. He took the right course as to the previous authorities. The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR apply.

Lord Woolf's proposals have been endorsed by successive Lord Chancellors, and both Lords Mackay and Irvine have seen them as part of a wider programme of the reform of civil justice. There was perhaps a change in emphasis when the Labour Government came to power – Lord Mackay had a more explicit market based approach, while Lord Irvine has emphasised accessibility to justice and "a faster, fairer, more open legal system". (See Lord MacKay LC "Civil Justice Breaking Through" in (1998) *Arbitration* s 70, 72; Lord Irvine LC "Keynote Address to the Law Society of England and Wales Annual Conference, Cardiff 18th October 1997"; reprinted (1998) *Arbitration* 246.) The pace and scope of change, however, has not been affected. The Access to Justice Act 1999 implemented further changes, reforming the legal aid system, encouraging conditional fee arrangements and expanding the rights of audience of solicitors and the powers of the Law Society to discipline professional misconduct. The reforms thus clearly link civil procedure, legal aid, and the structure of the legal profession as key determinants of the accessibility and affordability of civil justice. Reform is now spreading to specialist jurisdictions; changes have already been made to intellectual property legislation in the United Kingdom "to increase speed, lower costs and increase certainty" in Patent Office proceedings in accordance with the principles and recommendations of Lord Woolf's reports, and the Lord Chancellor has recently announced a comprehensive review of the accessibility, coherence and performance of administrative tribunals *(Patent Office Corporate Plan 2000*, p 2 and Tribunal Practice Notice (TPN 1/2000) "Practice in Proceedings before the Comptroller" – both documents available at http://www.patent.gov.uk/; press statement, Lord Chancellor's department, 18 May 2000 "Lord Chancellor Commissions Wide-Ranging Review Of Tribunals", available at http://213.38.88.195/coi/coipress.nsf).

RAMIFICATIONS FOR NEW ZEALAND

New Zealand's last comprehensive reform of civil procedure occurred in 1985 with the enactment of the High Court Rules. Refinement is an ongoing process through the Rules Committee, and recently we have seen substantial changes through the progressive introduction of case management and a new regime for assessing costs. The High Court Rules appear to be regarded, within the profession at least, as adequate. There are, however, a number of reasons why New Zealand practitioners and all those involved in the administration of justice should interest themselves in the revolution in civil procedure in England:

- the apparent success of the CPR, particularly their incentives to early settlement, commands respect and compels attention to whether the reform of civil procedure might deliver similar cost and efficiency savings in New Zealand. A year after their introduction the CPR reportedly boast an approval rating of 80 per cent amongst solicitors, a reduction in new proceedings in excess of 20 per cent, and enthusiastic claims that a change in litigation culture has been achieved (see *The Lawyer*, 8 November, 1999 ("Woolf Court cases fall by third"); *The Lawyer*, 15 May 2000 ("litigators are content after the reform"); *The Times*, 2 May 2000 ("Verdict on Woolf: it's a qualified success"). The reduction in new proceedings must, of course, be interpreted with care until it is clear that it is permanent);
- the English reforms place civil procedure in a wider context than it has traditionally been perceived. Lord Woolf has stressed the "high constitutional importance" of access to the Courts. His *Interim Report* took as its starting point Lord Diplock's statement in *Bremer v South India Shipping Corp Ltd* [1981] AC 909 at 917:

  > Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are Courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.

- if the rules of civil procedure create unreasonable obstacles – including expense or delay – to attaining justice then the constitutional rights of the subject are violated. Civil procedure is being elevated from the professional to the constitutional domain;
- policy makers in England see civil procedure as firmly within the matrix of issues to be addressed to control the costs of civil justice. Lawyers might see legal aid or the structure of the legal profession as issues unrelated to, say, case management or discovery, but if policy makers view case management or the abolition of discovery as a source of substantial savings in civil legal aid then the legal profession must be prepared to address these issues on this basis;
- many of the underlying problems addressed in Lord Woolf's reports as causative of the vices of unnecessary expense, complexity and especially delay in litigation clearly afflict civil procedure in New Zealand. The High Court is not currently meeting its own expectations as to the timely resolution of defended proceedings – the *Department for Courts Annual Report 1999* (p 62) reported that 58.7 per cent of defended civil proceedings in the High Court were disposed of within 52 weeks, against a target of 65 per cent, a variance of – 9.7 per cent, – and given that New Zealand has accepted in principle the key philosophical change proposed by Lord Woolf of universal case management, it seems an appropriate time to consider the contribution that a partial or total revision of the High Court Rules might make to the efficiency of the administration of justice;
- a premise of Lord Woolf's reports is that the legal profession was failing the administration of justice. Lawyers are the villains of the reports. Considerable responsibility for the excessive cost, delay and complex-

ity of litigation, and therefore the inaccessibility to justice of many people, is laid at the feet of aggressive lawyers willing to use civil procedure as a tactical tool to advance their clients' interests;

- Lord Irvine LC has even suggested one of the beneficial side effects of the reforms of civil justice will be to help to rehabilitate the public reputation of lawyers (see *Keynote Address*, 252). If the conduct of civil litigation can have such a profound effect on the public confidence in the legal profession, then it should be a matter of concern to all lawyers;
- the sphere of shared procedural concepts of New Zealand and England has been drastically reduced. New Zealand practitioners accustomed to referring to "the White Book" for contemporary English authority on procedural issues will find it increasingly less helpful in future;
- the reforms signify a transfer of responsibility within litigation from counsel to the Judge. The CPR initiate a move from an adversary system to a system of managed justice. This is likely to have a significant long-term impact not only on civil procedure in England but also advocacy, the role of the Judge and the nature of the trial. The adversary system is one of the most distinctive features of common law justice, and signs of its abandonment in the land of its birth deserve close attention;

In a future article I propose to consider five key features of the CPR: case management, the statement of truth, discovery, expert evidence and incentives to settlement. All these involve areas where civil procedure in New Zealand either is evolving or should evolve in the same direction as England. I will begin, however, with brief reference to two features of the CPR – plain English and the overriding objective – which are so fundamental to the philosophy of the reform that they cannot be by-passed without comment.

KEY FEATURES OF THE CPR

Plain English

The CPR are drafted in plain English. This has meant the demise of much familiar terminology in favour of plainer alternatives: plaintiffs are now claimants, discovery is now disclosure, statements of claim are now claims, and pleadings are statements of case; an Anton Piller order is a "search order" and a Mareva injunction a "freezing injunction". Further, the CPR contain, in addition to the definition section, a "Glossary" as a layman's guide to the meaning of certain common legal expressions retained in the CPR (such as affidavit, counterclaim, injunction, and privilege).

The use of plain English is not simply a cosmetic change nor is it intended, as in the plain English drafting of banking and insurance contracts, to facilitate the comprehension of the text while leaving the substantive meaning unchanged. Rather the use of plain English serves two functions integral to the philosophy of the new rules. Firstly, it emphasises the *new constitutional significance* of civil procedure. Access to justice is a constitutional right and therefore the rules which define access to the Courts should be readily comprehensible by the ordinary citizen. Secondly, plain English eliminates much legal terminology encrusted with precedent, thereby achieving *a radical break with the past* and privileging the text of the CPR over common law practice. A dramatic illustration of the simplification and break with the past achieved through plain English is in Part 18 which consists of two rules relating to "Obtaining Further Information". The provision of further information pursuant to Part 18 replaces the historic concepts of interrogatories and particulars, and makes irrelevant all the accumulated case law relating to these defunct concepts.

The overriding objective

Part 1 of the rules states an overriding objective. Rule 1.1 provides:

(1) these rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly;

(2) dealing with a case justly includes, so far as is practicable:

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate:

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

The Courts are accustomed to interpreting legislation to give effect to its objectives. Further the content of the overriding objective is unexceptionable, simply "embodying the principles of equality, economy, proportionality and expedition which are fundamental to an effective contemporary system of justice". (*Final Report*, s I ("Overview"), para 8.)

The significant feature of the overriding objective is that it is more than a statement of purpose or guide to interpretation. Rather it imposes positive obligations on the Courts and the parties. Rule 1.2 provides that the Court must seek to give effect to the overriding objective when it exercises any power under the rules or interprets any rule, and R 1.4 adds that the Court must further the overriding objective by actively managing cases. Therefore dealing with cases justly is imperatively linked to active case management.

Further, R 1.3 states that the "parties are required to help the Court further the overriding objective", an innovative duty that must logically impose new obligations on legal advisers. This duty is expressed in rather weak language, and is a little puzzling. Parties to litigation rarely appear on the "equal footing" to which R 1.1(2) aspires and it is difficult to see how they are expected to make themselves more equal; similarly, the parties often have highly subjective perceptions of the importance of their own cases, and see proportionality in an entirely different light to the Court. A solicitor may counsel reasonableness to difficult clients and advise them of the possible costs consequences of their actions, but in the final analysis has an obligation to represent them. The ambit of the R 1.3 duty is thus uncertain, but is likely to prove to include compliance with any applicable pre-action protocols, frankness and cooperation regarding the elements in R 1.1(2) during the case management process, compliance with timetables, proper preparation so as to ensure cases are ready to proceed on their scheduled dates, and reasonable efforts towards settlement. In this way the responsibility to deal with cases justly in fact remains with the Court, and properly so. ❑

THE ILO: TIME FOR CHANGE

Anne Knowles, chief executive of The Employers' Federation

reflects on her visit to the ILO

A recent trip to the International Labour Organisation in Geneva summed up for me some of the difficulties facing the ILO as it attempts to improve employment conditions round the world.

My main work there in June was negotiating the revision of the Maternity Protection at Work Convention as spokesperson for employers from the ILO's 174 member states.

The story of this particular convention is also the story of many other ILO conventions – but more on that later.

First, the ILO itself. It is a tripartite institution, with all the strengths and weaknesses of such institutions.

It was set up in 1919 in order to bring governments, employers and organised labour closer together and to develop internationally acceptable labour standards. Each member country is represented by government, employer and union delegations, which vote to create the conventions.

Not unexpectedly, many conventions are initiated by the organised labour representatives. Also not unexpectedly, there is a greater rate of convention ratification by centre-left than centre-right governments. This is true of New Zealand's history with the ILO.

The tripartite balance of the institution has a moderating influence. Extreme arguments can be reined in or forestalled. This tripartism is helpful in nudging governments, employers or unions towards internationally acceptable norms, and is one of the greatest strengths of the ILO.

The commensurate weakness is the cautious rate of reform, especially of labour standards in the context of economic liberalisation. In my view, this is the area where the ILO needs to catch up, and is where my particular interests lie.

Having been set up in the early twentieth century, the ILO's conventions passed over succeeding decades serve as a commentary on the labour issues of the times. Early conventions covered the basics – hours of work, night work, minimum age of workers and so on. The post-World War I period saw conventions on accident compensation, inspection of migrants, forced labour, and sickness and old age insurance. After World War II concerns turned to issues like competency certification and the right to freedom of association.

The modern era is characterised by conventions on chemicals, asbestos, radiation, occupational cancer, guarding of machinery and prevention of major industrial accidents. Social concerns of this era are reflected in conventions on wage fixing, paid holidays and home work.

Some of our ideological battles here in New Zealand are represented in the ILO's annals.

The convention on hours of work, limiting workers to eight-hour days and 40-hour weeks, was initially ratified by our first Labour government, but rescinded by the fourth Labour government as our interest moved to more flexible working arrangements in line with other deregulation.

Subsequent deregulation was the subject of a complaint to the ILO by New Zealand's Council of Trade Unions, which alleged that the Employment Contracts Act contravened ILO conventions on collective organising and freedom of association.

This was a very interesting case. The results were largely inconclusive but the ILO's final report traversed some issues that are relevant to today as we enter a new employment relations era.

With regard to collective organisation, the ILO was somewhat flummoxed by the fact that the Employment Contracts Act allows collective bargaining rather than promoting or encouraging it. For the record I believe this is the correct approach and am hopeful that over time this will become more obvious to the international community.

The CTU had alleged that the ECA's banning of strikes in support of multi-employer contracts was antagonistic to collective bargaining principles. The ILO's response was to recommend that strikes in support of multi-employer contracts should be lawful, but also to conclude that member states should respect the principles of freedom of association.

There is a contradiction between these two positions. By definition, if employers are forced by strike action into multi-employer contracts against their will, their freedom of association has been compromised.

It is a contradiction that will rear its head again once the Employment Relations Bill comes into force in October. One of the major differences between the ECA and the new legislation is that the former banned multi-employer strikes, while the latter makes them lawful.

The principle of freedom of association should cut both ways. It is used by unions in support of their claim to organise and bargain collectively. It should also be capable of applying to employers to protect their rights in collective bargaining situations.

If employers can be compelled by strike action, sanctioned by law, to negotiate a multi-employer agreement, then their freedom of association is clearly breached. I believe the ILO should be capable of hearing a complaint to this effect.

The ILO's position that strikes in support of multi-employer contracts should be lawful, and that member states should respect the principles of freedom of association is an

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DISMANTLING ADVOCATES' IMMUNITY

Duncan Webb, Victoria University of Wellington

wonders whether barristerial immunity should survive in New Zealand

As a result of the decision of the House of Lords in *Arthur J S Hall v Simons* (20 July 2000) barristers are now liable to be sued for negligence causing loss to their lay clients. Prior to *Hall* barristers were immune from claims in negligence for wrongs committed in Court or intimately connected with the trial. This position was duplicated in New Zealand and protected both barristers and solicitors acting in litigation: *Rees v Sinclair* [1974] 1 NZLR 180. A panel of seven in the House of Lords in *Hall* has decided unanimously that the immunity is no longer appropriate in respect of civil cases, and by a majority of four to three that it is no longer appropriate in criminal cases. This decision, by virtue of s 61 Law Practitioners Act 1982, applies to New Zealand advocates.

The result is that a lawyer can be sued in negligence for wrongs committed in the conduct of a civil trial. In respect of alleged wrongs in a criminal trial there appears to be a strong if not irrebuttable presumption that a defendant can never bring an action in a civil claim the success of which depends upon a finding that the final decision of the criminal matter was wrong. However, where a defendant has successfully appealed or the conviction has been otherwise overturned it will be possible to bring an action against an advocate whose conduct caused loss.

THE SHIFTING FOUNDATIONS OF IMMUNITY

Contrary to some views (eg Hodder 23 TCL 27), the immunity is, in its current form, of relatively recent origin. An anonymous case from 1435 found in the Year Books (14 Hen VI fol 18 pl 58) established that there were no special rules excluding liability for practitioners of law. That case decided that where a serjeant accepted a Brief but took no further action the client could bring an action on the case. The position of a serjeant at law was equated with that of a carpenter or a farrier – liability was to be determined on normal principles. There is a wealth of evidence that advocates could sue and be sued into the seventeenth century. Richard Brownlow's "*Declarations and Pleadings*" 2nd ed 1693 contained a precedent by which counsel could sue for recovery of fees (and by implication be sued for misfeasance in assumpsit). As late as 1845 it was held that an attorney could be sued for gross negligence (*Purves v Landell* (1845) 8 ER 1332).

The immunity of counsel from claims in negligence had little to do with public policy prior to *Rondel v Worsley* [1967] 1 AC 191. Rather it was justified by recourse to the absence of a contractual nexus between barrister and lay or professional client. The absence of a contract between barrister and client seems to have its genesis in the adoption of the Roman Law tradition that advocates did not act for reward but only for an honorarium. This claim first appears in the preface to the reports of John Davys in 1615 but clearly it did not represent the law at the time. Blackstone's *Commentaries* (published between 1765 and 1769) adopted the position as law and it is around this time that the rule appears to have become established. The full articulation of the rationale behind the rule had to wait until *Kennedy v Broun* (1863) 13 CS (ns) 677, 143 ER 268. That case held that "the relation of client and counsel renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation".

The line of cases which used this lack of contractual nexus between counsel and client as a basis for the immunity from claims in negligence started with *Fell v Brown* (1791) 10 Peake NP 166, 170 ER 104. Perhaps its clearest articulation is to be found in *Swifen v Lord Chelmsford* (1860) 5 H&N 890, 157 ER 1436. Of additional interest in that case are the references to the special duty to the Court owed by the barrister, and to the doctrinally separate privilege of a barrister from claims in slander.

This contractual foundation of the immunity collapsed completely with the decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 which decided that the absence of a contract was no bar to a claim for loss caused by negligence.

This meant that a new justification had to be found if the immunity was to continue. The House of Lords in *Rondel v Worsley* turned to the line of cases referred to in *Swifen v Lord Chelmsford* which protected participants in Court from claims in slander. Initially that immunity was limited in respect of barristers to statements pertinent to the matters in issue: *Brook v Montague* (1605) Cro Jac 90; 79 ER 77. However in *Munster v Lamb* (1883) 11 QB 588 it was held that the privilege was absolute and protected the barrister from action even where the words were irrelevant to the action and spoken mala fides. Most importantly, the reasons given for the absolute privilege were firmly based in the public policy that Judges, witnesses and counsel should be able to speak without fear of a claim against them in respect of those words (per Brett MR p 605). The House of Lords in *Darker v Chief Constable of the West Midlands Police* recently affirmed this in respect of witnesses (27 July 2000). It was this foundation of public policy which enabled the House of Lords in *Rondel v Worsely* to rebuild the immunity in 1967 after it had been effectively dismantled by the law of negligence. The decision and reasoning in *Rondel* was unanimously adopted by the New Zealand Court of

Appeal in *Rees v Sinclair* in 1974. For a detailed history of the immunity see Roxburgh "*Rondel v Worsley*: The Historical Background" (1968) 84 LQR 178.

ABOLITION

It was against this setting that the House of Lords in *Hall v Simons* asked whether the continued existence of the immunity afforded to advocates was justifiable. Importantly Their Lordships accepted that when *Rondel* was decided it accorded with the needs of public policy at that time and was good law. The question in *Hall* was whether the public policy demands of society had changed to such an extent as to render the immunity inappropriate. The argument that such a change ought to be left to Parliament was rejected. Lord Hoffmann stated that barristerial immunity was Judge created and it was therefore appropriate for the Courts to decide policy. In the words of Lord Hobhouse of Woodborough, "the Judges have a legitimate competence to declare where the public interest in the achievement of justice lies and what is likely to be the impact of one rule or another upon the administration of justice". This was perhaps surprising given the fact that the rules governing lawyers and the practice of law in England have been progressively overhauled by the Courts and Legal Services Act 1990 (UK), the reforms to that Act contained in the Access to Justice Bill 1999, and the Woolf reforms resulting in the Civil Procedure Rules of 1999 (CPR). None of those reforms considered abolishing the immunity. Indeed s 62 of the Courts and Legal Services Act 1990 extended the immunity to solicitor advocates.

All the Law Lords agreed that the continued existence of the immunity was no longer consistent with the demands of modern society. The standard arguments for the immunity were rejected one by one. It was noted that the cab rank rule (that barristers may not refuse clients who they are competent to represent and are able to pay), cannot justify the immunity in respect of solicitor advocates (who are not bound by it in England), yet it has always been accepted that any advocate can claim the immunity. It was also noted that the impact of the cab rank rule on the way in which barristers practice is minimal.

The risk of vexatious claims has always been raised in support of the immunity. It was however noted that there exist ordinary rules of procedure to dispose of such claims (which are more stringent under the recently implemented Woolf reforms of the CPR: RR 3.4(2)(a) and 24.2). Moreover claims of this kind are a risk which any person in a trade, business, or profession must accept. The mere fact that lawyers may be harassed by unfounded claims by the abolition of the immunity is no public policy reason for its retention. This argument is often linked to the observation that unlike other business people barristers cannot choose their clients under the cab rank rule however it falls apart when the real impact of the cab rank rule in practice is appreciated.

The ethical demands placed on counsel, and in particular the existence of an overriding duty to the Court, have often been pleaded in favour of the immunity. The possibility of a conflict of duties between client and Court has been considered a justification for a total ban on claims against barristers in respect of work in Court. One flaw in this argument, observed by the House of Lords, is that such conflicts exist elsewhere. Doctors may well have duties to the public and to the client which conflict (such as the duty of confidence and a duty to disclose that a patient has an infectious disease). Moreover, Lord Hoffmann observed that solicitors will also have such conflicting duties, as in the case of the duty to ensure full discovery, but this has never been thought to be a ground for any immunity. Adherence to the primary duty to the Court at the expense of the interests of the client can never be negligence in any event. Lord Steyn went further and stated that if an advocate's conduct is "bona fide dictated by his perception of his duty to the Court there would be no possibility of the Court holding him to be negligent".

An associated argument is the claim that the existence of liability will result in advocates acting less effectively (the "defensive advocacy" argument). In rejecting this claim as empirically unfounded Their Lordships looked to other jurisdictions such as Canada and the United States where the absence of the immunity has no appreciable adverse effects. The existence of liability in tort is generally considered to be an incentive to take a level of care that is efficient – if anything the absence of liability might explain the fact that there is "room for improvement" of standards at the Bar in the words of Lord Steyn. The argument that the immunity was needed to maintain the reputation of the judicial process and avoid exposing the trial process to unflattering scrutiny was rejected. Indeed it was observed that if anything public confidence would be eroded by the existence of the immunity because of the perception that the legal fraternity is protecting its members.

The suggestion that the immunity was a natural corollary of the privilege of Judges and witnesses in the trial process was also rejected by the majority. Lord Hutton, however, was of the view that lawyers who are "discharging important public duties in the administration of justice should be protected from harassment by disgruntled persons who have been tried before a criminal Court". The contrary stance was taken by Lord Hoffmann who asserted that the privilege of Judges and witnesses is a narrow one and is designed to ensure that witnesses and Judges can express themselves freely in Court and the transformation of that privilege into a wholesale immunity for advocates by analogy was rejected. Both of Their Lordships relied on *Munster v Lamb* in reaching their conclusions.

The most persuasive argument for the immunity looks to the effect abolition may have on the administration of justice by virtue of the ability of a disappointed litigant to mount a collateral challenge to the decision of a Court through an action against counsel. Lord Steyn observed that, while persuasive, the argument does not explain the extension of the immunity to the conduct of counsel outside of Court in some instances, or to protect decisions of the Court that involved no deliberations (such as consent orders). In any event where a claim does amount to a collateral challenge to the decision of a Court it may well be prohibited as an abuse of process pursuant to *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, or be prohibited under the doctrines of res judicata and issue estoppel. On this view there is no blanket ban on an action against counsel for the conduct of a trial. Rather each case will be considered separately and tested to determine whether it falls foul of the prohibitions in those doctrines.

CHANGE IN SOCIAL CONDITIONS

Many of the arguments accepted in *Hall* undermine the reasons given by the House in *Rondel*. However the Lords in *Hall* clearly stated that it was the change in public policy which led to the conclusion that the immunity must be

abolished. The commercialisation of legal practice was one aspect of that change. Equally important was the change in the expectation of consumers that redress for wrongs by any professional ought to exist. The context in which law is practised has also changed. Lord Hoffmann observed that the Courts are much more wary of vexatious claims and are equipped to prevent them progressing. In England, where a criminal conviction is considered unsafe it may be considered by the Criminal Cases Review Commission and referred to a Court for reconsideration. The English Courts are empowered under s 51 of the Supreme Court Act 1981 to make wasted costs orders against lawyers for misconduct of a trial – a development which been replicated by the Courts in New Zealand in civil cases: *Harley v McDonald* [1999] 3 NZLR 545. Also of relevance in the English situation is the ability to take actions on a contingent fee basis and the corresponding limitation on obtaining legal aid for claims in negligence. It is to note however, that these sweeping reforms are not generally reflected in New Zealand.

Their Lordships also abolished the immunity against the background of art 6 of the European Convention on Human Rights, which provides that "in the determination of civil rights ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Most recently the European Court of Human Rights found that a public policy immunity of the police for failures in investigation of crime was in breach of the convention: *Osman v UK* (1998) 20 EHRR 245. That Court has also made it clear that nature and degree of any limitation on the right to pursue a civil claim must be proportionate to the policy objectives sought: *Lithgow v UK* (1986) 8 EHRR 329, 393. It is widely thought that the immunity of advocates would not survive a challenge before the European Court of Human Rights.

CRIMINAL CASES

Their Lordships were divided as to whether the immunity should continue in respect of the conduct of advocates in criminal trials. The central problem in allowing such claims is that in at least some cases the success of the claim will depend on a finding that the decision in a prior criminal proceeding was incorrect. The policy objection to such judicial disagreement also exists in respect of civil matters, but is arguably more potent in cases where the decision of the Court has led to a criminal conviction and possible incarceration of the defendant.

Lord Browne-Wilkinson considered that the problem could be resolved by an application of the *Hunter* prohibition on abusive collateral challenges. In particular he considered that the Court can strike out as an abuse any action which seeks to relitigate a matter that a competent Court has already decided where such relitigation would bring the administration of justice into disrepute. Thus he held that the only permissible challenge to a criminal conviction will be by way of appeal and therefore the continuance of the immunity was not needed to protect against such abuse.

Lord Hoffmann considered that a civil challenge to a criminal decision will frequently be an abuse adopting the view of Ralph Gibson LJ in *Walpole v Patridge & Wilson* [1994] QB 106, 116. He noted that in some cases striking out such a claim was more likely to bring the administration of justice into disrepute than letting it proceed and enabling the conduct of the judicial process to be examined. Most importantly he did not accept the reasoning of the Court of Appeal that considerations such as whether the matter was criminal or civil, or had been fully heard or decided without trial, were to be weighed in deciding whether a matter was an abuse. Rather the question under the *Hunter* principle was whether the claim would bring the administration of justice into disrepute.

Strong dissent on this point came from Lord Hope of Craighead. He was of the view that risks to the efficient administration of the criminal justice system would result from the removal of the immunity for criminal matters and that the *Hunter* principle was not a satisfactory substitute for the immunity. He considered that in a criminal trial the integrity of the process, including the conduct of counsel, required special protection which could only be afforded by the continuance of the immunity. He also seemed to be of the view that it was more likely that an advocate would be "harassed by the threat of litigation at the instance of [criminal] clients who may well be devious, vindictive and unscrupulous ...". This view was shared by Lord Hutton who suggested that many criminal defendants "would be ready to sue their counsel if they knew that it was open to them". Underlying this argument of the minority appears to be the protection of advocates from vexatious suits rather than the protection of the criminal process per se.

Lord Hobhouse of Woodborough, also dissenting on this point, also observed that *Hunter* did not concern an action against an advocate at all but against the police (who it was alleged had beaten the defendants until they confessed). He argued that the immunity was quite separate from the prohibition on abuse of process and served different ends. He also argued that the need for fearless and independent advocacy was greater in criminal matters and that the remedy for a wrongful criminal conviction should always be the quashing of the conviction rather than a tort remedy against the advocate. It was also observed that Parliament (in the UK at least) has set out the grounds on which compensation is payable for wrongful conviction, the suggestion being that the state should bear the cost in such cases and not vex the defence advocate with any possible claims.

In the final and deciding speech Lord Millett concluded that the immunity ought to be abolished in criminal as well as civil matters. His Lordship made the important point that a distinction between the two is difficult to draw. Many regulatory offences carry little of the stigma normally attached to criminal matters and are not subject to the usual onus or standard of proof. Similarly some civil matters, such as matters of professional discipline, have all of the hallmarks of a criminal proceeding, but are procedurally civil. It would be anomalous if compensation could be claimed for wrongs which led to financial loss, but not for a more serious harm such as loss of liberty.

RETROSPECTIVE EFFECT?

Because the abolition of the immunity is premised on a shift in public policy considerations, a difficult question arises as to whether the immunity applies to wrongs committed prior to the judgment (or prior to the wrongs which were the subject of this appeal). Lord Hope of Craighead observed that none of the Lords suggested that *Rondel* was wrongly decided or ought to be overruled. As such he stated that "we should express our decision so that it applies only to the future – not to a period in the past as well, the commencement of which would be very difficult to identify". The suggestion seems to be that the effect of the change in the law is to run from the date of the judgment.

RESIDUAL IMMUNITIES

This does not mean that advocates will be able to be sued in all cases. It appears that there are some limited rules which will continue to protect advocates from certain claims. In general there will be no duty owed by an advocate to other parties to litigation: *New Zealand Social Credit Political League v O'Brien* [1984] 1 NZLR 84 (CA). This however is the result of an absence of duty rather than any immunity. An immunity of sorts may well exist for prosecuting advocates based on policy considerations: *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335.

The House of Lords took note of the immunity from claims granted to public defenders in many jurisdictions in the US. Lord Hobhouse of Woodborough noted "a new regime of legal representation by quasi-public defenders operating under strict monetary limits is proposed for criminal litigation and it is possible that such a change will so alter the role of the defending advocate as to favour (or even necessitate) unrestricted (sic) civil liabilities along the American pattern".

It may also be that the rule in *Munster v Lamb* – that advocates are privileged from claims in defamation for words spoken or written in Court proceedings – survives the demise of the immunity from claims in negligence. Certainly the policy reasons articulated in *Munster* remain pertinent today. However because this narrow rule has previously been subsumed into the more general immunity the question will likely have to come before the Court for determination.

APPLICABILITY IN NEW ZEALAND

Recent decisions of the Privy Council have repeatedly stated that the Privy Council is not competent to make changes to the law of New Zealand that are premised considerations of local public policy (*Lange v Atkinson* [2000] 1 NZLR 257, 262 per Lord Nicholls of Birkenhead). Such statements have been considered to suggest that the adoption of the decision in *Hall v Simons* as part of the law of New Zealand is doubtful (eg Hodder 23 TCL 27). However, the matter is settled by s 61 Law Practitioners Act 1982 which provides that "barristers of the Court shall have all the powers, privileges, duties, and responsibilities that barristers have in England". Such a linking of the governance of the New Zealand profession may be outdated and need revision in the imminent review of the Act, however on the law as it stands the abolition of the immunity of advocates effected by *Hall v Simons* is applicable in New Zealand. ❑

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oxymoron that should become more evident as time goes by. It indicates the ILO's collectivist mindset – hopefully one that will diminish as the realities of the new economy become more apparent in more quarters.

It is a mindset characteristic of the north European nations which tends to set the scene for rather rigid standard setting.

This leads to another difficulty – getting conventions ratified. In many cases the conventions are simply too prescriptive. Principles-based conventions, promoting reform without rigidly specifying how this must be accomplished, would be more workable.

"My" convention, on maternity protection at work is a classic example. It was one of the very early conventions, adopted in 1919 and revised in 1952, but by this year, only 38 countries out of a possible 174 had ratified it.

It required a country's domestic legislation to provide 12 weeks' maternity leave on at least two-thirds of a woman's previous earnings, to specify a compulsory period of leave, to stipulate breast-feeding breaks and to prohibit the dismissal of an employee during pregnancy or maternity leave.

Even countries with existing strong legal maternity protections, like Scandinavian nations, the US, UK, Canada or Australia, had been unable to ratify it.

Over the last two years the employers' representatives tried strongly to make the convention into a principles-based instrument that all countries, regardless of economic, social or cultural development, could adopt.

I was asked to guide another round of revision, and felt it important to get member states' buy-in to the principles of protecting the health of a woman and her child, recognising a woman's entitlement to a period of maternity leave with adequate means of supporting herself and her child and to protection from dismissal for reasons related to the pregnancy or maternity leave. How each country would then deliver these principles would be over to national law and practice.

But despite last year's strong plea from the ILO's Director-General for a principles-based approach to standard-setting, old habits die hard.

The Workers' Group approached the exercise with the firm view that "revision" meant the existing benefits and entitlements could only increase and anything that had been in place since 1952 must be specifically improved upon. This view was shared by a number of government representatives, with too many others simply developing a wish list – voting for prescriptive measures they knew there was not the slightest possibility of being able to deliver domestically.

The instrument finally arrived at is, to the disappointment of the Employers' Group, as prescriptive and probably as unratifiable as its predecessor.

For example, it excludes "enterprises" from the exemptions member states might wish to make. So member states whose national law or practice currently, for quite legitimate purposes given their social and economic contexts, exempts family businesses and small or micro enterprises or agricultural enterprises from the convention's scope, will not be able to ratify.

It extends the period of maternity leave to 14 weeks. Yet only 40 per cent of member states currently provide leave of 14 weeks or more; that is, 60 per cent of the membership will be unable to ratify.

It places the burden of proof solely on an employer in instances where employment termination is for unrelated reasons. Member states whose legal systems recognise a quite different approach to dispute resolution will not be able to ratify.

It requires breastfeeding breaks to be provided which are to be remunerated as time worked. This too is a major barrier to ratification. New Zealand's own legislation will therefore not enable ratification to occur.

The maternity protection case serves as a warning of how good intentions can be nullified by an overly prescriptive approach that fails to take into account social, cultural and economic differences between countries. Economic liberalisation in particular is a growing global phenomenon and institutions of all kinds must adapt to remain relevant.

I believe the ILO's strength as a standard-setter and moderator would only increase with such adaptation. ❑

UPDATES TO YOUR MATERIALS

STUDENT COMPANION

edited by
Lynne Taylor

COMMERCIAL LAW

Duncan Webb

Credit contracts

Greenbank New Zealand Ltd v Haas (CA 306/99, 27 July 2000, Tipping, John Hansen and Baragwanath JJ)

This case illustrates the difficulties facing a business person, and particularly one engaging in speculative investments, in gaining relief for oppressive conduct by the creditor under the Credit Contracts Act 1981. Mr and Mrs Haas, through their company, sought to purchase a block of land which, if subdivisible, would be highly lucrative. They did not have funding for the purchase so the company borrowed the $128,500 deposit from Greenbank to secure the contract. The Haases guaranteed the agreement. The terms of the agreement reflected its speculative nature with an interest rate of 21.7 per cent per annum and penalty interest of 25 per cent. The term of the loan was agreed to be no more than 60 days. A one-off fee of $45,000 was payable no later than 90 days after the advance. The effective finance rate was therefore 217.3 per cent.

The company was unable to repay the advance and the lender called on the guarantors. Greenbank agreed to take over the purchase agreement of the property and thereby avoid loss of the deposit. The amount that remained owing was $96,500 comprising mainly interest, fees, penalties and costs consequent on the default.

Master Venning had found that there was an arguable case that the arrangement was oppressive and refused summary judgment. The Court of Appeal reversed this decision finding that no oppression existed and entered judgment for Greenbank. Of the reasons of the Court of Appeal the most important seemed to be that the purchase of the land was highly speculative and that the loan was entered into by the debtor only to take advantage of the possibility of windfall profits. There was no economic compulsion to borrow the money. The circumstances of the loan and subsequent transactions revealed no inappropriate conduct by the lender. Indeed it appeared that the borrower, through Mr Haas, suggested the terms of the transaction. The borrower received legal advice throughout and was given plenty of time to consider the merits of the deal.

The interest rate and fees were large, but this did not of itself amount to oppression. It was relevant that objections to the cost of credit were raised only at a late stage. The fact that the lender had averted to the possibility of bankruptcy when the arrangement for the transfer of the sale agreement to Greenbank was made was not seen as particularly relevant, especially as the second transaction was very advantageous to the borrowers.

The Court of Appeal, in allowing the appeal and entering judgment for the creditor, observed that the purpose of the Act in protecting debtors from oppressive conduct "must be harmonised with the need to allow business people ... to be free to decide what contracts they should enter into and on what terms" (para [25]).

Commercial contracts

Fletcher Challenge Energy Ltd v ECNZ (HC Wellington, CP 412/98, 9 June 2000, Wild J)

Wild J found that a three and a half page heads of agreement for the sale of gas over 17 years, worth several billion dollars, constituted a binding contract. ECNZ negotiated with FCE to obtain a guaranteed long-term supply of gas to fuel the Huntly power station. These negotiations were given considerable urgency due to a closely related agreement concerning the purchase of a share in the Kupe gas field from an existing part owner. Those negotiations resulted in a heads of agreement and it was noted in the margins that certain clauses were "not agreed" and a variable in one term regarding liability for non-delivery stated in its text "to be agreed".

The issue before the Court was whether the parties had formed a binding contract. ECNZ argued that they had not on two grounds. First, the parties did not intend the arrangement to be contractually binding, and second, if such intention did exist, the terms of the agreement were too uncertain to form the basis of a contract.

The Court took note of a number of matters. The transaction was obviously important. The value of the gas supply was billions of dollars. The complexity of the transaction is also clear from reading the judgment, much of which centres around technical questions. However, also of importance to the Court was the urgency of the circumstances in which the agreement was reached. In the circumstances a comprehensive agreement was not a realistic possibility. Wild J eschewed the idea that if matters other than mere detail are left for later agreement there can be no contractual intent, observing that there will be occasions where important matters are left to be agreed, even though the parties intend the obligations that are extant to be binding.

The heads of agreement was regarded (perhaps surprisingly) as "towards the top end of formality on an imagined continuum of various documents". The finding of formality was of particular significance as the parties negotiated the agreement without the involvement of lawyers. Also important was the absence of any provision in the document expressly stating that it had no binding effect. Wild J observed such a clause would usually be present in a letter of intent that was not intended to be contractually binding. Two further clauses were

considered of particular relevance in demonstrating intent. First, the parties agreed that the document would not become unconditionally binding until the board of ECNZ had approved it: unless the document was intended to be legally binding this clause was meaningless. The agreement also contained a confidentiality clause and the subsequent conduct of the parties made it apparent that they considered themselves bound by a duty of confidence.

It was also relevant that the heads of agreement did not exist in isolation. It was linked to and prompted by the associated agreement concerning the tender for the share in the Kupe gas field. Also of relevance were communications by ECNZ to third parties. The heads of agreement were referred to as legally binding in correspondence between the CEO of ECNZ and the Minister of Finance. The existence of the agreement was also disclosed in the company's annual report, and disclosure was made to the Electricity Reform Transition Unit. It was found that applying *Spengler Management v Tan* [1995] 1 NZLR 120 that these considerations led to the conclusion that it was intended that the arrangement be legally binding.

A related but separate question was whether, given the finding of intent, the contract was sufficiently complete and certain to form a contract. In finding that the terms, while not entirely complete, were sufficient to form the basis of the contract the *May & Butcher v The King* [1934] 2 KB 17 line of authority was rejected. The *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 test of whether the contract as it stands is workable was preferred. Wild J's approach was that if it is possible for the agreement to operate, either on its own or by the Court filling in the gaps by implication, it is sufficiently certain to be a contract. This is the case even where, provided contractual force was intended, the parties have left matters for agreement. Wild J claimed that it was inconsistent to allow the implication of terms on which a contract is silent to give efficacy to a contract which is not workable without it, but to refuse to do so in respect of contract formation where the point has been expressly left to be agreed.

This case unequivocally prefers the line of authority which grants the Court wide powers to remedy uncertainty in contracts. It rejects as inconsistent and inferior those cases which suggest that where the parties have agreed to defer agreement on certain terms to a later date there is insufficient consensus for a contract. This much is likely to be regarded as an improvement in the law as it stands. This case demonstrates the latitude which the wide powers implicit in the *Hillas* approach necessarily confer on a Judge. In finding that the agreement was sufficiently certain to be enforceable as a contract, it is of note that Wild J was generous (to FCE) in requiring only the barest terms to be agreed, and even these were expressed in the broadest of terms. Moreover, His Honour constructed (under the auspices of implication) those parts of the contract which were needed for the agreement to work but had not been supplied by the parties.

COMPANY LAW

Lynne Taylor

Caretaker directors

Woonda Nominees Pty Ltd v Cheng (Supreme Court of Western Australia, 23 June 2000, Owen J)

Three shareholders and two directors (the applicants) of Prima Resources Ltd (Prima) sought an interim injunction restraining the implementation of a board resolution approving a placement of Prima's shares. The proposed placement was to occur just before an extraordinary meeting of shareholders. The extraordinary meeting had been convened to consider a board "spill". Prima's board of directors was effectively deadlocked because of the existence of two factions. The applicants represented one of the factions. A significant but not controlling block of shareholders supported each faction. The applicants' complaint was that the proposed placement of shares was to go to interests sympathetic to the other faction within the board making it likely that the voting power attached to these shares would be used to favour that faction at the extraordinary meeting.

The applicants attacked the board resolution approving the proposed placement of shares on a number of bases. The first was that the proposed placement was for an improper purpose, namely, to affect, improperly, the outcome of the extraordinary meeting. Owen J noted that if retention of control of a company by its directors was merely a side effect of an exercise of their powers then this was insufficient to make the proposed placement of shares an improper one. On the evidence before him, Owen J was not satisfied that the applicants' case, although arguable, was sufficiently strong to justify a finding that there was a serious question to be tried.

The applicants' second complaint was that the board resolutions were only passed because of the purported use of the casting vote of the chairman of the board when in fact the individual acting as chairman had never been appointed. Owen J accepted that here there was a serious question to be tried as to the validity of the board resolutions.

Lastly, the applicants claimed that board resolutions were invalid because once the meeting of shareholders had been requisitioned to consider a board "spill" then the board assumed a caretaker role and the proposed placement of shares was beyond the powers of a caretaker board. Owen J referred to two cases (*Paringa Mining and Exploration Co Plc v North Flinders Mines Ltd* (1989) 7 ACLC 153; *Utilicorp NZ Inc v Power New Zealand Ltd* (1997) 8 NZCLC 261,465) where in the context of a meeting of shareholders requisitioned by a controlling shareholder it had been accepted that a principle of caretaker directors either existed or, at least, might be evolving. However, as the respondents noted, these earlier cases were distinguishable because the present case involved no controlling shareholder. Owen J's conclusion was that there was a serious question to be tried as to the existence and, if so, the extent of the principle of caretaker directors in Australian law. On the extent of the principle the following questions required consideration. First, did the principle "only apply where the rights and interests of a controlling shareholder are affected or does it extend to an alteration of the balance between two significant, although not controlling, voting blocks?" Second, was it a requirement that it be established that the proposed action be not "otherwise necessary" for the running of the company? These same questions require consideration in New Zealand.

Having decided that there was a serious question to be tried on two issues, Owens J turned to consider the balance of convenience. He saw the interests of the company through its shareholders and the preservation of the status quo at the time the meeting of shareholders was requisitioned as being the primary matters requiring consideration. Both favoured the granting of an interim injunction restraining the implementation of the resolution.

Pooling orders

HEB Contractors Ltd v Westbrook Development Ltd (HC Auckland, M142-IM00, 10 May 2000, Salmon J)

HEB Contractors Ltd entered into a contract to complete subdivision infrastructure work with Westbrook Heights Ltd. HEB obtained summary judgment against Westbrook for outstanding amounts due to it under that contract of $435,848. HEB then successfully applied for an order that Westbrook be placed in liquidation. In this proceeding HEB sought summary judgment in the form of an order pursuant to s 271(1)(a) of the Companies Act 1993 that Westbrook Development Ltd pay to the liquidator of

Westbrook Heights moneys outstanding to HEB pursuant to its contract with Westbrook Heights.

HEB had submitted a tender to complete the subdivision work to Westbrook Developments. The tender was accepted but contract documentation was issued in the name of Westbrook Heights. The plaintiff did not notice the name change when it executed the contract documentation. The land that was the subject of the subdivision development was registered in the name of Westbrook Developments which made some of the progress payments due under the contract between the plaintiff and Westbrook Heights. Westbrook Heights had no assets.

Section 271(1)(a) gives the Court a discretion, if it is satisfied that it is just and equitable to do so, to make an order that a company that is related to a company in liquidation pay to the liquidator the whole or any part of the claims made in the liquidation. There was no dispute that Westbrook Developments and Westbrook Heights were related companies as defined in s 2.

Section 272 sets out guidelines for the making of an order under s 271(1)(a). The Court must have regard to:

- the extent to which the related company took part in the management of the company in liquidation. It was accepted that Westbrook Developments effectively assumed responsibility for Westbrook Heights' obligations pursuant to its contract with HEB;
- The conduct of the related company towards the creditors of the company in liquidation. HEB was Westbrook Heights' only creditor. It was accepted, inter alia, that Westbrook Developments received the benefit of Westbrook Heights' contract with the plaintiff but denied liability for it and that Westbrook Developments by its conduct had adopted the contract and thus had induced the plaintiff to continue performance of the contact;
- the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company. It was accepted that Westbrook Developments managed Westbrook Heights' contract with the plaintiff and that its failure to fund Westbrook Heights so that it could meet its responsibilities were circumstances that gave rise to the liquidation and which were attributable to the actions of Westbrook Developments;
- such other matters as the Court thinks fit. The Court accepted submissions that the improvements that the plaintiff had made to the land owned by Westbrook Developments had unjustly enriched Westbrook Developments and, further, that the Westbrook Development's actions gave the impression that it would accept liability under the contract. This in turn encouraged the plaintiff to continue with the subdivision work.

Summary judgment was entered in the plaintiff's favour and an order was made that Westbrook Developments Ltd pay to the liquidator of Westbrook Heights Ltd the amount of the judgment debt owed by Westbrook Heights Ltd to the plaintiff.

CONTRACT LAW

Maree Chetwin

Concurrent liability in contract and tort

R M Turton & Co Ltd (In Liq) v Kerslake & Partners (CA 169/99 6 July 2000)

The question was whether the contractual matrix precluded an engineering firm from being liable under *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

The case related to the building of a new hospital near Queenstown. The Southland Area Health Board engaged the architect firm of Gray Hesslan and Baxter to design the building, oversee the tendering process, and supervise the construction. That firm engaged the respondent to advise on engineering aspects of the project including preparing the mechanical services specification and the corresponding subcontract, and supervising the engineering side of the construction. The appellant won the head contract. George Mechanical Ltd, now in receivership, was the subcontractor for the mechanical services. The heating system did not perform to the specified standard. Remedial work was carried out by the appellant to fulfil its own contractual obligations. The question was whether the appellant had a right of action against the engineer founded on the tort of negligence in specifying component parts which could not perform to the required standard.

In the District Court and in the High Court it was held no duty arose in the particular circumstances. In the Court of Appeal, Henry and Keith JJ stated that the first step in the inquiry, and for the purposes of the appeal the only element of the cause of action which fell for determination was whether the respondent owed a common law duty of care to the appellant. The basis of the claim in tort was negligent misstatement which is founded in the House of Lords case, *Hedley Byrne*. "In short, did the engineer owe a duty to Turton to take reasonable care in drawing up the specification." Their Honours outlined the well-established law: "if the statement in question is made in a contractual setting, that setting will be relevant in determining whether a duty in tort is to be imposed. The modern doctrine of concurrent liability in tort and contract establishes that the mere fact that a defendant's alleged tortious liability arises from actions taken in respect of a contract, whether with the plaintiff or another does not of itself negate a common law duty of care. ... The authorities, however do show that the existence and terms of contracts under which work is carried out may militate against the existence of a separate duty of care".

The early decisions supported the theories of the primacy of contractual remedies over tortious ones, whereas the main and now accepted rationale behind the contractual matrix was concerned not with the existence of a contractual remedy, "but with the way in which the contractual intention can help to enlighten the often difficult question of when the relationship between two parties was such as to warrant the intervention of the general law of tort". The question was not simply whether there was an established contractual chain of rights, but whether the contractual chain shows or supports intentions regarding the assumption or allocation of risk and responsibility inconsistent with the claimed tort duty.

The contractual matrix was critical in this appeal. It was essential to consider the various contractual provisions between the various parties. The subcontractor was to satisfy itself and the appellant that it could perform the terms of the subcontract. The engineers' contract contained express terms limiting its liability. The overall contractual structure defined the relationship of the various parties and in the circumstances it would not be fair just or reasonable to impose the claimed duty of care. There was a comprehensive contractual relationship, and the Court should be hesitant to go beyond that relationship. A tortious duty of care should not be lightly imposed.

Thomas J's dissenting scholarly judgment (40 pp) relied largely on the Canadian case *Edgeworth Constructions Ltd v N D Lea & Associates Ltd* (1994) 107 DLR (4th) 169, which accepted the logical corollary of concurrent liability in contract and tort; and that a contractual matrix cannot preclude a cause of action based on *Hedley Byrne* (negligent misstatement) where the elements of that cause of action are made out. His Honour concluded by examining the policy considerations which underlie the argument that it is inappropriate to impose a tortious duty where the parties have entered into an intricate contractual scheme or matrix.

CRIMINAL LAW

Khylee Quince

Retrospective Sentencing

R v Poumako (CA 565/99, 31 May 2000, Full Court)

This case was an appeal against a sentence which provided for a higher penalty than that provided for at the time of offending, in contravention of both domestic and international law. This case has been fully discussed at [2000] NZLJ 293.

Overall Criminality

R v McDonald (CA 108-115/00, 10 July 2000)

The Court of Appeal revisited the issue of "overall criminality" in determination of sentence in this case involving six members of the Road Knights Gang in Invercargill. Each was convicted of four counts of unlawful possession of a pistol, and one count of possession of an explosive, which carry maximum prison sentences of three and four years respectively. Each defendant received three years' imprisonment, with the exception of Anderson. Anderson received a two and a half-year sentence that included a discount of six months due to his age.

The trial Judge approached his judgment on sentence utilising the Court of Appeal's approach from *R v Wright* (1991) 7 CRNZ 624. This method looks at the overall criminality of offending, rather than using either a cumulative or concurrent approach. The offending was considered in context – relevant factors being that the firearms were a ready arsenal of weapons found in fortified gang headquarters. Added to this was the background of recent gang violence in Invercargill and community outrage at such violence. His Honour then considered each party's role in this overall criminality of offending, and their individual circumstances in arriving at his sentence.

On appeal against sentence, the Court found that the trial Judge's method was entirely in line with authority and the sentences were not manifestly excessive having regard to the totality principle of sentencing. While noting that the same sentences could have been arrived at using either a cumulative approach spread over five charges, or a lead sentence with concurrent sentences on the remaining charges, the Court stated that the route taken by the Judge does not matter so long as the sentences reflected the overall criminality of offending.

Each appeal was dismissed, save Thompson's. He received a discount of six months for his reformative efforts, which included disassociation from the gang, and obtaining a loan to repay indebtedness to the gang. In reducing his sentence, the Court stated that his discount should be seen as an encouragement to others.

In terms of sentencing guidance, this decision gives a message that criminal offending in the context of gang activity is an aggravating factor and if established will be reflected in sentences. Once context is established and the individual's part in the overall criminality of offending is determined, individual circumstances will be analysed to determine whether any personal aggravating or mitigating factors exist.

EMPLOYMENT LAW

Graham Rossiter

Discovery and admissibility in Employment Tribunal

Crummer v Benchmark Building Supplies Ltd (EC, WC 28/00, 15 May 2000)

A mediation had been conducted on an understanding it would be "without prejudice" in confidence. A document was circulated in the mediation that explained the respondent employer's position with respect to its dismissal of the applicant. Subsequent to the mediation, counsel for the applicant requested disclosure of this document which was refused by the respondent. Because of the nature and importance of the issues the Employment Tribunal was joined as a party and evidence received from the Tribunal Chief.

The proceedings were removed into the Employment Court which sat as a Full Court to hear the applicant's discovery application. The applicant's case was, in essence, that there was an inconsistency between the respondent's formal "on the record" stated justification for the dismissal and what was, in part, said in the document produced in mediation. In this regard, the stated reason for the dismissal was the alleged threat of violence against another employee while the document in respect of which discovery was sought apparently indicated that other "background" matters had been taken into account.

The Court pointed to the distinction between discoverability of a document and its possible admissibility. The former will not necessarily lead to the latter. While clearly acknowledging the importance of protecting the integrity of the mediation process in the Employment Tribunal, the Court nevertheless allowed for exceptions to the privilege that will generally apply to statements made and documents produced in mediation. One such exception is where "there is a strong risk that the Tribunal would be deceived by the exclusion of the evidence" in question. The Court was satisfied that this test was met. It considered it to be its "duty to uphold the integrity of the legal process" and therefore concluded that a document that contained an admission may be produced where there is evidence from the pleadings that a party that made the admission intends to resile from it for the purposes of the adjudication and thus potentially mislead the Tribunal. However, notwithstanding its discoverability, the document could only be admitted into evidence at the adjudication hearing if the respondent gave evidence contrary to the "admission" made.

PUBLIC INTERNATIONAL LAW

Allan Bracegrove

Elitunnel Merchanting Ltd v Regional Collector of Customs (CA 305/98, 12 April 2000)

The issue was whether certain commissions paid by the appellant were to be included within the customs value of imported goods for duty purposes. The case turned on provisions in the 9th Schedule to the Customs Act 1966, since superseded by the 2nd Schedule to the Customs and Excise Act 1996. The schedule was first inserted in 1981 to implement treaty obligations under the 1979 Agreement on Implementation of art VII of GATT, the article concerned with Customs valuation, and now implements the 1994 Agreement which was adopted, in very similar terms, as part of the GATT/WTO Uruguay Round. Confusingly, neither Act made explicit that the schedule was implementing treaty provisions, and its drafting is by no means based directly on those provisions. As with much of statute law implementing GATT/WTO agreements, and some other treaties, one has to become something of a detective to locate all the treaty material in the first place and then to identify, track and understand its implementation in domestic law. This difficulty increases the prospects of inadvertent non-compliance with treaty obligations.

The schedule and the agreement included a provision regulating the position of commissions and brokerage for Customs valuation purposes. To assist it in determining whether the appellant could take advantage of an exception in the provision, the Court of Appeal, as had the High Court, referred to various materials including interpretative notes which form part of the international instrument, along with explanatory notes prepared by the World Customs Organisation and a textbook commentary on the application of the relevant provision. Although the international material appears to have been of limited assistance, it reinforced the Court in its interpretation of the legislation and its conclusion that the appeal could not succeed. ❑

RECENT CASES

ALTERNATIVE DISPUTE RESOLUTION

edited by
Carol Powell

Lafarge Redlands Aggregates Ltd v Shephard Civil Engineering Ltd (HL 27 July 2000)

This House of Lords decision looked specifically at the dispute resolution clauses in two well used engineering contracts in the United Kingdom, namely the ICE Conditions and the FCEC Standard form of Sub-Contract known as the Blue Form. The issues related to the interrelationship between the two contracts' dispute resolution clauses on the basis that the sub-contract provided that the sub-contractor had read the terms of the main contract, which contained an arbitration clause and agreed that where there was a dispute with the contractor which was already the subject of dispute between the employer and contractor, both disputes would be heard together in the same arbitration. While a good part of this case is specific to the two contracts to which it relates, there is one point which may well have general application.

The relevant facts of the case are that one of the clauses of the main contract provided a process for resolving disputes that involved seeking an Engineer's Decision. If one of the parties was unhappy with that decision it then had a fixed time frame in which it could commence arbitration proceedings. A dispute arose concerning extensions of time. The dispute affected both the employer/contractor relationship and the contractor/sub-contractor relationship. The contractor put the sub-contractor on hold and did not initiate the dispute resolution process under the main contract because it wished to negotiate a settlement with the employer rather than obtaining a formal decision of the Engineer with a view to referring the matter to arbitration. These negotiations became protracted. The sub-contractor served notice of arbitration and the contractor responded initially that this notice was premature. The situation continued for seven months and at the expiration of this time the contractor served notice requiring the sub-contractor to join its dispute into the arbitration with the employer.

The Court found that it was not unreasonable for the contractor to have embarked on negotiations with the employer. However, there was an implied obligation on the contractor to initiate the arbitration procedure within a reasonable time.

"I would readily accept that it may well be in the best interests of the parties to a dispute to attempt to settle their dispute by negotiation and agreement rather than embarking upon a process of litigation with a view to its resolution by means of an award by an arbitrator. The expense and delay which is inevitable in litigation has the effect of putting up costs and increasing overheads. The hardening of attitudes which results is not good for continuing business relationships. Everyone would agree that it is sensible to avoid those consequences by negotiation whenever possible. But a contractor who seeks to take advantage of the power under [a clause requiring any dispute between the subcontractor and contractor which the contractor has in common with the employer to be determined in the one arbitration] is not entitled to have regard only to its own interests in selecting a means of resolving its dispute with the employer. It must have regard also to the interests of the sub-contractor, which is being deprived of its power to make use of the procedure [enabling it to commence arbitration proceedings]", per Lord Hope of Craighead.

This case illustrates that care that needs to be taken both with drafting dispute resolution clauses and with implementing dispute resolution processes. Where there are to be negotiations prior to the implementation of a more formal process then it is safest to either provide an agreed upon timeframe for these negotiations, or to have the agreement of all parties (whether to the contract itself or otherwise involved in the dispute) that the right to continue with the residual steps in the procedure will be preserved during the time that negotiations take place.

Fifield v W & R Jack Ltd (PC 25 June 2000)

This case reinforces the doctrine of waiver by conduct in relation to arbitration proceedings and the right to commence proceedings outside the timeframe in the agreement to arbitrate when the conduct of the other party has been such that it was reasonable to assume that it would not require strict enforcement of the timeframe.

Fifields were the lessors and W & R Jack Ltd was the lessee of two commercial buildings in Auckland. Both buildings required refurbishment. It was agreed that Fifields would refurbish one building (No 194) and the rent would take this into account. W & R Jack Ltd was to fund the refurbishment cost of the other building (No 196) and to receive an appropriate credit in the assessment of the rent. These proceedings relate to No 194. The lease provided that the rents were provisional and were to be adjusted when the refurbishment costs were known.

The relevant provision in the lease provided that the lessor was to serve a notice in writing to the lessee specifying a proposed increase in the rent. The lessee then had 28 days in which to serve

a counternotice that was to require that the new rent be determined by arbitration, if he disputed the new rent.

The first rent review fell on 1 October 1988. On 30 June 1989 Fifields sent a letter to W & R Jack Ltd specifying their proposed adjustment to the rent both for the original provisional rent and the review of the adjusted rent as from 1 October 1988. Negotiations took place over the next four years. W & R Jack Ltd applied for the appointment of an arbitrator and subsequently in November 1995 made an application for an extension of time under s 18(6) Arbitration Amendment Act 1938.

Each party instructed a valuer and discussions took place between the valuers from July 1995. On 6 September the Fifield's valuer wrote proposing that "rather than getting into arbitration [he] would propose that [the parties] meet on mid-ground ...". On 15 September the valuer appointed by W & R Jack Ltd wrote refusing the modified rental figures and advising that they now wished to have the matter settled by arbitration. Negotiations continued with offers and counter-offers.

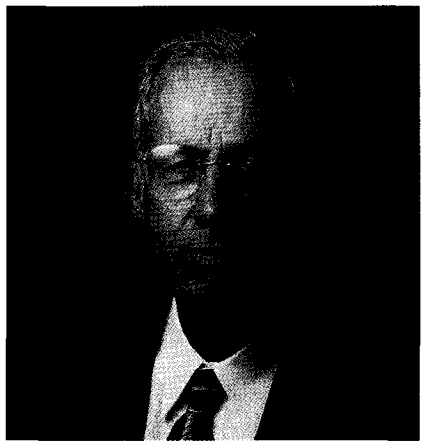
In January 1992 W & R Jack Ltd commenced arbitration proceedings and sought an extension of the time in which to commence arbitration proceedings.

The lower Courts granted an extension of the time to commence the arbitration proceedings pursuant to s 18(6) of the Arbitration Amendment Act 1938 on the grounds that in the circumstances of the case there would otherwise be caused undue hardship.

The Privy Council took a different approach and adopted an argument raised at both the High Court and Court of Appeal unsuccessfully, that of waiver. The Court found that the conduct of Fifields was only consistent with their having waived their strict right to rely upon strict compliance with the time provision and deemed acceptance provision of the lease. It was not thereafter open to Fifields to treat the proposed rents as having been deemed to be agreed nor to resist the enforcement of the arbitration clauses

MEDIATOR PROFILE
PETER DOOGUE

Peter Doogue had become sufficiently interested in mediation, through general reading, to attend a LEADR 4-day workshop in March 1995. He had spent most of the previous 30 years working as a commercial lawyer, the last two of these as a sole practitioner. Peter found the concepts and skills taught at the LEADR workshop to be intellectually stimulating because of their contrast with the somewhat partisan attachment to clients' interests to which he was accustomed. This experience decided Peter to "get into mediation".



Peter had lucky breaks early on in getting some invaluable opportunities to act as mediator. Mediation is such a successful dispute resolution tool because those who use mediation have a desire to reach agreement. Peter says that the parties managed to successfully settle all his early mediations except one. In that case one of the counsel involved, who had been one of Peter's early mentors in mediation, told him that the parties had settled their dispute on the morning following the mediation. Peter acknowledges that at the time he thought he might get some credit for laying the foundation for the settlement!

The encouragement Peter got from these early cases decided him to seek more mediation training and more mediation experience. Peter read what mediation texts he could find and, as they came along, he attended the Harvard Law School programme on dispute resolution; a LEADR workshop on cross-cultural issues; a CDR Associates, Boulder, programme on advanced mediation; an advanced workshop with Professor Baruch Bush; a CDR Associates programme on dispute management systems; a LEADR workshop on co-mediation; and many of the various learning opportunities provided by LEADR New Zealand. By early 1999 Peter had completed the mandated 150 hours of mediation and joined the LEADR Advanced Panel of Mediators.

At the outset Peter had no appreciation of the range of mediation philosophies and the very different practices associated with each of them and their hybrids. As he learned more about this he sought to ensure that he managed the mediation processes so that they would match, as far as possible, the needs of the particular case. Basically Peter saw this as trying to be sensitive to what was required and being flexible in approach.

Peter regards himself as a facilitative mediator who leaves control of the substance of the negotiations to the parties and their advisers. Peter says that it takes little mediation experience to become sensitive to the risks of misusing the power, and also the scope for manipulation, available to mediators through directive practices; and through inappropriate use of caucusing and shuttle mediation.

Peter is intrigued at the extent to which mediation has proved to be a constant learning experience. That is, learning about how people think and behave; about enhancements to mediation processes; about the skills of counsel; and about one's self.

In Peter's opinion the most important requirement for mediation participants is to have prepared well beforehand.

As a result of becoming involved in mediation Peter has been given work which might be styled facilitation. This has involved working with business organisations with recognised needs for changes made difficult because of conflicts or personality differences; or with a desire to diminish or avoid potential conflict arising from planned changes. This work requires many of the same skills as mediation.

Peter says that mediating can be particularly satisfying when the circumstances enable the parties to reach constructive agreement rather than just a bare settlement.

CONFLICT MANAGEMENT IN ORGANISATIONS

The growth and development of ADR processes and their incorporation into the commercial arena in the United States is at least a decade ahead of New Zealand. This gives us the advantage of being able to learn from and share the experiences of experienced dispute resolution professionals from the States. Christina Sickles Merchant is one such professional with particular expertise in the labour relations arena. Christina is most widely known for her work in fostering sustainable partnerships between labour and management throughout the private, public and international arenas.

Christina visited Australia in July to participate in the LEADR Conference as a keynote speaker. She then travelled to New Zealand where she presented a workshop on organisational conflict management.

Christina has been able to observe and participate in the evolution of organisational conflict management. She has identified the motivating factors for the change in the early 1980s as being global competition and the need to change in order to survive a changing market place. Companies which had previously had a stronghold in a particular market sector, were suddenly faced with imported goods that were competitive in price and which lured away part of the market share. In order to survive this development, employers needed to change, which meant in some cases downsizing or restructuring. This Christina labels a "crisis" situation. At the commencement of the crisis there were disputes between the employers and the labour force, which in themselves were costly and non-productive.

Organisations then faced this cost reality and by the mid 1980s there was a reduction in the costs of conflict and more emphasis was placed on the maintenance of ongoing relationships. This step in the evolution of conflict management Christina labels the "cost" factor.

By the early 90s people began to take the time to analyse what had been happening and to formalise the processes which had been successful. Hence "a sudden outbreak of common sense" (taken from a text by Andrew Acland of the same name). Mediation, facilitated discussions and agreement and other interest based processes emerged and became the norm for resolution of disputes. This phase is labelled the "compliance" stage.

These four steps: Crisis, Cost, Compliance and Culture, are the roads that any change will take within an organisation or community

Finally, this compliance was incorporated into the structure of government and business. The legislation and contractual arrangements that resulted reflected what was already happening within organisations and this then became the final stage "culture".

These four steps: Crisis, Cost, Compliance and Culture, are the roads that any change will take within an organisation or community.

This evolution is now complete in the United States and the focus in dispute resolution is on interest based processes.

What is an interest based process?

In order to identify whether true interest based processes are being used, it is necessary to consider what are the principles behind an interest based process. Christina Sickles Merchant lists five principles:

- the process will encourage the parties to focus on the issue;
- there will be an exploration of all interests underlying the issue;
- the parties will be open to possibilities and opportunities;
- the goal of the parties will be to satisfy the others' interests as well as their own; and
- the parties will use agreed upon standards to reach the best solution.

Issues

The issues are the subject matter that needs to be discussed. In order to achieve a clear understanding of what are the problems to be resolved, the issues need to be agreed upon by the parties. These issues need to include all parties concerns. The issues should be clearly defined to enable a clear understanding of what is to be addressed. The process should allow a distinct phase for setting the issues, which will effectively form the agenda for the process.

Exploration of interests

The issues should each then be explored in turn with a view to establishing the underlying interests. The "interests are the reasons why the issue is a problem". As part of this process it is important to establish what each party needs, in other words what is essential to enable a party to reach an agreement. Each party's fears, hopes and concerns should also be discussed and all of these interests should be given recognition as legitimate interests whether they are specific to one party or common to them all.

It is during this process that parties are able to understand the reasons why other parties are taking positions in a dispute. If the underlying interests can be identified, there is then the possibility of the parties finding alternative outcomes that will meet those interests and moving parties away from their original positions. For example, an employer may have a position on the maximum level of pay increase that it will agree upon. Underlying this position may be an interest to maintain the profitability of the business. If both parties can explore other factors that influence profitability and identify other ways in which profitability can be maintained or increased, the employer's position on pay levels may change.

Possibilities and opportunities

The possibilities and opportunities or options will become apparent as more of the underlying issues are discovered. Once the parties understand what needs to be achieved or why one party is taking a position on an issue, then

there is room for other possibilities and opportunities to be put forward.

Using the example in the previous paragraph, the parties may chose to brainstorm factors that influence profitability and may raise a number of options that would increase profitability if incorporated into the agreement. Some possibilities could include: varying the hours worked by employees, altering responsibilities within the workforce, cost cutting measures in other areas, incremental bonuses based on actual profits or profit sharing to name just a few. Within this selection there are a number of opportunities for the way in which the employer and the employees communicate and work together which could change so that they are both working towards a common goal.

Satisfying all parties' interests

An agreement will only last if all of the parties to that agreement have had their needs met by it. If the parties enter into a negotiated agreement in which they feel they have not achieved what they needed to achieve there will result at best resentment and at worst a lack of willingness to live by the agreement.

The mindset of the parties therefore needs to be focused on finding outcomes that meet the interests of both themselves and the other parties. While this sounds obvious, this is a major shift in the way in which bargaining or negotiation has historically taken place in our culture. In the employment arena, for example, this continual process of striking bargains, which don't meet the needs of both the employer and the employees, has created tension, which has sullied each subsequent round of negotiations.

Agreed standards to reach best solution

Once all of the possibilities and opportunities are on the table, then there needs to be a clear process for assessing those options. The parties need to agree upon what standards they will use to assess the options in order to achieve the best solution. This can be done in a variety of ways which could include, analysing whether the identified interests of the parties are met by the solution, applying an agreed upon formula or test, such as "is this fair?" or will the business achieve greater profitability under the proposed solution? By agreeing upon the standards and then ensuring that they are met, the parties ensure the longevity of the agreement.

New Zealand

For a number of reasons, the process of change in New Zealand, while following the same stages, has not been as uniform across all sectors. In some discrete arenas interest based processes, such as mediation and conciliation, have been part of statute for some time. For example, there are requirements for alternative dispute resolution processes provided for in:

- the Resource Management Act 1991;
- Children, Young Persons, and Their Families Act 1989;
- the Treaty of Waitangi Act 1975;
- the Family Courts Act 1980;
- the Human Rights Act 1993;
- the Residential Tenancies Act 1986;
- the Employment Relations Act 2000.

In some of these areas real interest based processes have developed and are used successfully, implying that this approach to dispute resolution has become part of the "culture".

In other areas there are processes, that may be either described or labelled without definition, which appear on their face to be interest based dispute resolution processes, but which in practice are often something else. Often these processes are facilitated by an appointed person in authority, who may have the power to make a decision at some stage in the process. There may also be limitations on the subject matter, which can raised during the process and there may well be severe time and cost constraints.

The overall picture for New Zealand is positive and it is hoped that we are gradually moving into the fourth stage of change towards interest based conflict management. The reality is that the number of private mediations that are taking place is increasing. In the area of commercial disputes it would be fair to say that many have reached the stage of "compliance". This is beginning to move into the next phase of "culture" with judicial recognition of mediation and the incorporation of reference to it in the High Court Rules. At the same time large organisations within New Zealand are actively investigating their existing processes with a view to change. ❑

WHAT'S HAPPENING

2000

September 12
AMINZ breakfast seminar – Balance of power in the mediation process
Auckland, Christchurch, Dunedin, Hamilton, Napier, New Plymouth, Palmerston North, Tauranga, Wellington

September 16
LEADR seminar – Narrowing the gap
Auckland

October 10
AMINZ breakfast seminar – Public policy
Auckland, Christchurch, Dunedin, Hamilton, Napier, New Plymouth, Palmerston North, Tauranga, Wellington

October 11-14
LEADR four day basic mediation workshop
Auckland

November 9
AMINZ seminar – Arbitration procedures under the new Act
Auckland

November 14
AMINZ breakfast seminar – Dangers and dilemmas of giving advice in mediation
Auckland, Christchurch, Dunedin, Hamilton, Napier, New Plymouth, Palmerston North, Tauranga, Wellington

December 6
LEADR NZ – Auckland Christmas function
Speaker Justice Robertson – Court assisted mediation
Chapman Tripp Sheffield Young
Auckland

TRANSACTIONS

APPEALS FROM ARBITRAL AWARDS

with
Jane Anderson

Appeal rights under the Arbitration Act Sch 2, art 5 were the subject of an earlier comment ([1999] NZLJ 370). The Court of Appeal has now considered the issue in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* CA 57/00, 18 July 2000 in a decision delivered by Blanchard J.

Article 5 provides for the right to obtain leave from the High Court to appeal an award on questions of law. The article applies to all domestic arbitrations unless excluded by the parties. Article 5(2) states that the Court "shall not grant leave unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties".

The debate in the cases has centred on what, if any, principles govern the exercise of the discretion once the threshold requirements are met. In particular, the question has been whether the New Zealand Courts should apply the guidelines developed in English case law under the then equivalent provision.

The crux of the guidelines, derived from *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 ("the *Nema* guidelines") is that leave will rarely be granted where there is a "one-off" issue that is unlikely to occur again and has no precedent value. This is contrasted with cases where either the parties on another occasion, or other parties in future arbitrations/litigation, may have an interest in having a decision on the point of law. The strength of the case that an error has been made will need to be greatest where the dispute is the one-off type, and least in the latter type of case.

In *Gold Resources*, the appellant (seeking to set aside the award) argued that a broad discretionary approach should be taken and that any fettering of the discretion should be through legislative intervention not by judicial law making. It was argued that it should suffice if the applicant could show that there was a "real possibility of error" in the award.

The Court of Appeal rejected the appellant's argument and held that the *Nema* guidelines should be applied here. The Court stressed that the discretion under art 5 should be exercised in a disciplined way having regard to a list of factors which it proceeded to set out. These were stated as not exhaustive and only guidelines, rather than as governing the exercise of the discretion.

The first of the factors, described as the most important, was the strength of the argument that there had been an error of law and the nature of the point raised, being the thrust of the *Nema* guidelines set out above. The rationale for the raised importance of this factor is that the policy in favour of finality in arbitration gives way to the benefits to clarity and certainty to the law in resolving issues of wider importance.

The other factors (of equal importance) were:

(a) how the question arose – if the legal issue was the very point of the arbitration and the parties have therefore specifically referred it to the arbitrator, it will be harder to obtain leave than if it only emerged during the hearing;
(b) the qualifications of the arbitrator – it will be harder to appeal where the arbitrator is legally qualified;
(c) the importance of the dispute to the parties (in monetary and non-monetary terms);
(d) the amount of money involved;
(e) the amount of delay involved in going through the Courts and the urgency to obtain a final determination;
(f) whether the submission declares the award to be final and binding – this will not be determinative but will indicate that the parties did not contemplate subsequent litigation;
(g) whether the dispute before the arbitrators is international or domestic – art 5 must be expressly included in an international submission, indicating that the parties did intend the possibility of appeal.

The Court of Appeal went on to set out the procedure to be followed in applications for leave. In particular, the hearing of the application should be brief, merely giving the Judge the opportunity to grasp the arguments and ascertain whether a sufficiently strong case to justify leave has been made. Reasons should not ordinarily be given if the Judge decides to grant leave, thus avoiding the Judge hearing the substantive argument from being embarrassed or influenced by the written reasons. The Court further directed that if leave is not granted a short judgment only is appropriate, simply indicating why the case did not meet the required standard.

The Court's clear directions on the process of appeal were much needed, given the time and expense that was being wasted on the exercise. For example, in the decision appealed from, the application for leave was heard over a period of three days and a forty-one page judgment delivered.

The approach to the discretion contended for by the appellant was indeed too light. It positioned an arbitration award as little more than a first instance decision not to mention that the Court might be clogged with arbitration appeals.

The reasoning behind the adoption of *Nema* guidelines by the Court has its

difficulties however. First, the Court adopted the guidelines having determined that Parliament intended to strictly limit involvement of the Courts in arbitration. Reliance was largely placed on two of the purposes of the Act set out in s 5 – "to encourage the use of arbitration as an agreed method of resolving ... disputes", and "to redefine and clarify the limits of judicial review" of the arbitral process and awards.

However, it is arguable whether the intent to restrict Court involvement can properly be derived from the Act's purposes, which seem equivocal on the issue. It is only by emphasising the word "resolution" as the Court did, that the first of the purposes supports the conclusion. As to the second, it does not follow from the aims of "redefining" and "clarifying" the limits of review that a further limitation on the Courts' involvement was intended. It is well known that Parliament was seeking to simplify the pre-existing technical law on "errors of law on the face of the record".

Second, the premise behind the decision is that the prospect of finality encourages parties to arbitrate. This is questionable given the wide range of factors influencing the decision to arbitrate. Take a party seeking advice on whether to incorporate an arbitration clause in a contract in a custom-made contract. If properly advised, that party will be told that the chances of appealing from an award on a dispute arising as to interpretation of such a "one-off" contract are low in the absence of a blatant error, or unless agreement can be obtained to appeal or to modify art 5. The potential for injustice might tip a party towards preferring to leave disputes to the Courts.

Nor is arbitration encouraged where participants become disenchanted with the process. A number of arbitration clauses drafted under the 1908 Act are still in operation. Article 5 will apply to disputes referred to arbitration under those clauses in the absence of contrary agreement, notwithstanding that the parties could not have anticipated the change in law. Still worse is the position of a party who is dissatisfied with an award but who was embarked on the arbitration process in ignorance of the consequences of art 5.

Third, the absence of any guidance in art 5, could be said to indicate that Parliament did not intend the discretion to be circumscribed in the manner suggested by the Court. It would have been easy for Parliament to have itself set out factors to which the Court "may have regard" in exercising the discretion including "such other matters as the Court thinks fit". Such a formulation is commonly used.

Their Honours answered the accusation of judicial lawmaking by reference to the fact that Parliament enacted the legislation based upon the Law Commission's report. This report favoured leaving the discretion unfettered on the ground that it expected that the Courts would follow the *Nema* guidelines. Use of the Commission report in this way is unsettling. The appearance is of a prospective nod from the Law Commission to the Courts as to how to approach proposed legislation.

The Court also relied on the practice of the Courts providing principles through case law which guide the way in that a statutory discretion is exercised. However, principles develop in the common law tradition on a case by case basis from which a set of relevant factors are deduced. The Court of Appeal's statement of factors to be applied did not develop in this way, and is saved from the appearance of legislation only by the rider that the factors are only guidelines.

For practitioners involved in drafting agreements to arbitrate, the *Gold Resources* decision reinforces the importance of explaining the relevance and consequences of art 5 at the outset. Indeed, if the Act is to succeed in encouraging arbitration, legal advisers play an important role in ensuring that clients are not left disenchanted with a process they embarked on willingly but which they look back on as having had unforeseen and unjust consequences for them.

UNWORKABLE SOLUTIONS FOR MINORITIES

Brian Keene

Natural Gas Corporations Holdings Ltd v Infratil 1998 Ltd HC Wellington, CP 100/00, 10 July 2000, Doogue J

Sections 110 to 115 of the Companies Act 1993 are new sections intended to empower minorities who have voted against the alteration of a company's constitution, a major transaction or an amalgamation. Under the sections the shareholder may give notice within ten days of the resolution being passed requiring the purchase of its shares. Within 20 working days of receiving the notice the company must itself purchase the shares, arrange a third party to do so or alternatively rescind or refrain from taking the action referred to in the resolution or otherwise apply to the Court for directions. If the company purchases the shares it must within five working days of its notice nominate a fair and reasonable price for the shares. Unless the shareholder objects within ten working days that price will be taken as the agreed value. However, if there is an objection, the question of the fair and reasonable price must be referred to an arbitrator. In any event, within five working days the company must pay its proposed reasonable price to the shareholder. Once the arbitrator's award is given, a price adjustment will follow (either way). The arbitrator's powers extend to awarding interest but to no other elements of the transaction.

This regime of notices, cross-notices and strict timeframes was obviously intended by the legislature to set rules so that the company and its shareholder will be forced into a fair compromise. But the regime now appears from the *Natural Gas Corporations Holdings Ltd* (NGC) case to be severely wanting.

In the *NGC* case Doogue J called for ss 110-115 to be urgently reconsidered by the legislature:

> It is common ground that the minority buy-out rights sections are defective. Although they provide for the company to nominate a fair and reasonable price for the shares to be acquired, they do not state at what date that price is to be ascertained. Nor do the sections make any provision for the company, in nominating the fair and reasonable price, to give any information to the minority shareholder of the basis of the valuation. Nor do the sections provide any mechanism for the completion of transactions falling within them. As already noted, s 112(4) is silent as to the basis upon which the shares at issue are to be dealt with at the time when the company is required to pay the provisional price. Nor has the arbitrator power to make orders in respect of the completion of the transaction following the arbitration. Having created minority buy-out rights, the Act fails to provide for important features of the transactions that can arise under them.

At issue was Infratil's objection to NGC purchasing, as a major transaction

under s 106, a minority shareholding in another company thus triggering s 110 rights in favour of Infratil. The relevant notices were sent. NGC nominated a fair and reasonable price at $35.5 m. Infratil's response was that this price was "*grievously low*". It referred the issue to arbitration.

In the meantime the statutory timetable required NGC to pay Infratil its suggested fair price. It tendered the $35.5 m on the basis it would receive the share scrip. Infratil objected and declined to deliver a transfer. In turn NGC refused to make the payment until it had received the scrip. Thus arose the impasse before the Court.

The Court needed only to decide the simple question of whether Infratil must hand over the scrip or whether it could accept the provisional price payment without doing so. Doogue J first went to the wording of the sections and concluded that:

> the language of these sections is perfectly neutral in relation to the issue to be determined.

Doogue J, in finding for NGC, characterised the legislation as wanting compared to how parties may themselves structure such a commercial transaction. He rejected the proposition that a purchaser should be forced to pay out a provisionally nominated fair price and yet not get the scrip. He held that no commercial transactions would be structured on this basis. With respect, it is not clear that this is the right test. It is less clear that his findings in favour of NGC self-evidently flow from the application of that test.

First, the shareholder is entitled to say that the legislature has provided the scheme under which it is to get a fair and reasonable value for its shares should the company, despite its dissident vote, substantially change its constitution, the nature of its business or restructure. It is probably best both for the company and the shareholder that the separation is made as quickly and efficiently as possible. In that sense one cannot apportion responsibility between them. The company has set off in some new direction and the shareholder wants none of it. The shareholder has exercised a right (which it is not obliged to do) and so provoked an unwanted turn of events. So neither party is singularly responsible for the triggering of ss 110-115 rights. There should therefore be no inherent preference of one interest over the other in completing the statutory sale process.

Having triggered the Act's mechanisms there arises a natural conflict between buyer and seller. Neither is likely to pay too much attention to the interests of the other. Why would the company wish to be generous in stating the price it must pay for its own shares? Why would it supply information justifying or supporting its decision? Its best interests, and those of its remaining shareholders, is to rid itself of the dissident minority at the lowest possible cost. Therefore a "grievously low" price is only to be expected. On Doogue J's analysis the company, on payment of its lowly offer, receives the scrip and the shareholder loses control of it. To take extreme figures were the company's offer price $1.60 per share and the fair value $5.00, still the scrip would pass and the only remedy available to the shareholder is arbitration and debt recovery. Its rights in rem are lost.

Adopting Doogue J's test it could equally be said of the shareholder's marginalised position that no vendor would construct a commercial transaction on that basis. Therefore, with respect, the test proposed may not be helpful in determining the right course, and indeed may simply beg the question. In fairness, Doogue J had to visit an injustice upon one or other of the parties. The statutory scheme of ss 110-115 does not give him a discretion to order a compromise.

Other aspects of this judgment throw into relief important policy issues on the statutory transaction intended to empower a dissident minority. These require clear analysis in any legislative change.

First the date as at which the shares are to be valued. Prima facie one might think that to be either the date of the special resolution or the date of the shareholder's notice. However, further reflection may cast doubt on that. If the purpose of the provisions is to protect the minority against the effects of substantial change in the company, surely the valuation date should be prior to those changes affecting the share price, perhaps before public announcements of intent by the company and/or the notice of shareholder meeting. For the shares to be valued taking account of the presumed disadvantage (in the minority's view) of the disputed substantive change would be to shut the stable door after the horse has bolted. By this time the shareholder arguably will have suffered the loss in share value which formed the basis of its original objection. Sweet reason would therefore take the share value back to a time before the proposed change would have affected the share price. Unfortunately sweet reason is not supported by statutory indicia.

The second material issue is the disparity of information between the directors of the company and the minority shareholders. This disparity may well flow over to the arbitration process unless all price-sensitive information of the company is available to the arbitrator in fixing the price.

Therein lies the rub. Under the Securities Amendment Act, and the New Zealand Stock Exchange Listing Rules there are strict regimes which govern persons dealing with shares in a company based upon "inside information". Two consequences flow from this. First, the company must be aware that it is itself an insider in the purchase transaction. It should therefore take care not to profit from this so opening the prospect of a Securities Amendment Act or Stock Exchange Listing Rule case. Second, as the "inside" information becomes available to the shareholder it must regulate any other share dealing in the company by carefully complying with the insider code. Where the company is listed on the New Zealand Stock Exchange and it would need also to comply with the Listing Rules.

The solution to these dilemmas lies in ameliorating legislation. The particular issue of who holds the scrip and what price is paid for it could readily be placed within the purview of the arbitrator's powers. The date of valuation of the shares is a more principled matter and ought to be fixed in the legislation. The information requirement issue is a little more thorny. Given the statutory confidentiality of the arbitration process perhaps the appropriate public policy balance would be to permit that information to be presented to the arbitrator leaving it to the company to decide what (if any) price sensitive information it wishes to simultaneously release to the market.

It appears the genesis of these problems was the legislative adoption of the Law Commission's view that the Act should not include a detailed statutory regime such as was provided for in North America. These complex rules have themselves come in for trenchant criticism overseas. However the absence of any arbitral or judicial discretion to deal with the statutory purchase regime and interregnum issues (such as

who votes the shares meantime) until final payment cannot be the right balance. One trusts that the next attempt sets out a more commercially appropriate solution to the management of rights between a company and its dissident minorities without requiring the continual intervention of the Courts.

TORT AND CONTRACT

In *RM Turton & Co Ltd (In Liq) v Kerslake & Partners* (CA 169/99, 6 July 2000) the issue was whether an engineer who had prepared a mechanical services specification for incorporation into a contract to construct a building, owed a duty to the builder who undertook those mechanical services as part of the overall construction.

The claim related to heat pumps, which once installed, did not perform to the standard stated in the specification, as they were unable to produce the 185 kw output required. The trial Judge found that this problem was due to the fact that the evaporators specified for could not perform adequately. The builder paid for remedial work to be performed and claimed this cost from the engineer based on negligent misstatement in failing to draw up the specification with reasonable care.

As is always the case in development projects, the litigants were just two of several parties that were associated with the project, related tangentially or directly through inter-related contracts. Thus, as relevant, the architect contracted with the client to design the building and prepare the necessary documents for that purpose. The engineer contracted with the architect to provide the mechanical service specification, which included specification for heat pumps for the project. The builder contracted with the client to undertake the whole of the contract works, and to construct the building in accordance with, inter alia, the mechanical specification for the heat pumps. The builder had in turn subcontracted out the mechanical services section to a specialist mechanical subcontractor. This subcontractor had contracted to obtain the heat pump packages specified in the main contract from two equipment suppliers. All the parties involved were aware of this contractual chain.

The focal issue in the case was the effect on the duty issue of the terms of the tender documents and the above contractual arrangements. A majority of the Court of Appeal (Thomas J dissenting) held that the engineer owed no duty to the builder. In summary, the decision was founded upon the assumption of risk in each of the contracts referred to above, particularly the existence of a comprehensive exclusion clause and an arbitration clause in the engineer's contract with the architect, and the knowledge that the defendant had of the contractual structure.

Additionally, the Court pointed to the extent of possible liability if a duty was imposed, given that the mechanical specification was found in all the tender documents issued to prospective tenderers, and that the client itself would be under no duty of care even though it issued the tenders.

In reaching its conclusion, the majority embraced the raft of English decisions that confirm the relevance of the contractual setting to the duty issue and that the contract terms may militate against the existence of a separate duty of care. The most recent case referred to is *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* [1999] 2 All ER 241 (HL), where, however, the contractual terms supported, rather than negated a duty. The Court distinguished *Edgeworth Construction Ltd v ND Lea & Associates Ltd* (1994) 107 DLR (4th) 169 (Supreme Court of Canada), a decision appearing factually similar, by reference to the particular contractual setting there.

The majority also referred to the Court of Appeal's decision in *Price Waterhouse v Kwan* (CA 80/99, 16 December 1999) to explain that the doctrine of concurrency of duties in tort and contract does not conflict with the principle in the English cases. The rationale is that the contractual chain/matrix may show or support intentions regarding the assumption or allocation of risk/responsibility inconsistent with the alleged tortious duty alleged, and in forming an assessment of the relationship between the parties. Thus the contractual setting is effectively relevant as one of the factual circumstances against which the existence of a duty is assessed. In the context of the concurrency doctrine, the issue is instead whether there can be concurrency of remedies, that is, whether contract trumps tort.

Thomas J, in dissent, held that a duty was owed. He proceeded by considering whether the elements of the *Hedley Byrne* rule were made out, then considering policy factors and the contractual matrix to assess whether anything negatived the duty. Thomas J concluded that the engineer made a representation in the specifications, in particular representing the performance ability of the heat pumps (as opposed to setting the performance standard for the pumps). He considered that there was clear reliance by both contractor and subcontractor on the specification and together with knowledge of reliance by the engineer, the duty of care was established. Nothing in the contractual matrix, including the exclusion clause between engineer and architect, negatived the duty to the contractor.

The true difference between Thomas J and that of the majority is a different assessment of the assumption and reliance issues. Thomas J assessed the elements of *Hedley Byrne* in isolation from the contractual matrix. In contrast, the majority found that the elements of *Hedley Byrne* were not met because:

- the engineer had a comprehensive exclusion clause in its contract with the architect, showing that it did not in fact regard itself as assuming responsibility for the correctness of statements made in the specification;
- under the builder's contract with its subcontractor, the latter was obliged to ensure that the pump specification was met. The builder was therefore in fact relying on its subcontractor, not on the engineer, the former having assumed the risk in that regard;

The engineer knew that the builder would be relying on the subcontractor – the contract documents required the builder to engage a specialist subcontractor to carry out its work.

The majority decision sends a message to the construction industry that the scout around for other parties to sue in negligence upon insolvency of a direct contracting partner will often prove a futile effort. Much will depend upon the terms of the particular contractual terms and the tender documents from which relative assumption of risk and responsibility between the relevant parties will be derived. The challenge for commercial lawyers seeking to exclude any liability to third parties will be to ensure that the sought for protection is achieved.

The broad reach of the Fair Trading Act 1986 may yet allow a claim, depending on the extent to which the factual circumstances (including the contractual and tender documents) negate reliance. ❑

"GOOD FAITH"

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examines the concept at the heart of the ERA

Legislation regulating the labour market is commonly an instrument of social policy for the government which enacts it. Often it reflects a particular philosophical perspective and is designed to achieve certain social objectives. The Industrial Conciliation and Arbitration Act 1894, which set the framework of industrial relations in New Zealand for almost a century, reflected an abhorrence of the economic disruption caused by strikes and other industrial activity and set about to eliminate strikes and lockouts by providing a state administered mechanism (compulsory arbitration) which fixed terms of employment when the parties couldn't agree. The Employment Contracts Act embraced the philosophy of contractualism and sought to distance the state from involvement in the employment relationship. The Employment Relations Act ("ERA") also has a philosophical underpinning and that is that there is an inherent inequality of bargaining power in employment relationships and that the employment relationship involves more than just a contractual exchange. The device used to give effect to these theories is the concept of "good faith". Just as the enactment of the Employment Contract Act ("ECA") in 1991 represented a radical change to industrial relations with its new focus on contractualism and rejection of the previous model of collective bargaining between unions and employers, so too, the new Employment Relations Act due to come into force on 2 October represents the second major change to the system of industrial relations in New Zealand in a decade. The Act has generated much comment. Those on the right of the political spectrum have been outspokenly critical of the Act and its objectives and have made dire predictions of workplace disruption and ruin for employers. Those on the left of the political spectrum have hailed the Act as a document which redresses the imbalance of power and removes a number of the inequities in the ECA. It is important to keep the new legislation in perspective. Perceptions fuel expectations and we have already seen the destructive effect on business confidence caused by uninformed comment from both sides. While the new Act does make changes, it is unlikely that these will have the extreme consequences predicted by both sides of the political spectrum. It is important not to expect too much from the Act or to overestimate potential adverse consequences.

THE CONCEPT OF GOOD FAITH

The concept of "good faith" in the ERA is the counterpart to the concept of economic efficiency which pervaded the ECA. In the explanatory note which accompanied the Act when it was introduced to Parliament the government described the framework of the Act in the following terms:

> That framework is based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual economic exchange.

That concept finds expression in the Act as the obligation to act in "good faith".

What does "good faith" mean?

In the abstract, good faith is a little like motherhood and apple pie. It is almost impossible to say that you are against it. However, in the context of industrial relations the ERA defines what "good faith" means. It is therefore important for both employers and employees to look in detail at the proposed changes in the law and to consider their implications.

Good faith is essentially a philosophical idea which underpins the Act both specifically and generally. It is defined non-exhaustively in the ERA and applies at all times, across a broad scope of employment relationships. This paper discusses both the parameters of the duty to act in good faith and the practical consequences of this duty in the new employment framework, and refers to overseas experiences as examples.

Keeping a balanced perspective

Notwithstanding the changes in the ERA, managerial prerogative can still be balanced against the new legal requirements about to be imposed on those in, or entering into, an employment relationship. The changes will not be widespread and drastic in nature and, as many commentators have said, good employers have very little to fear in relation to the obligation to act in good faith. In many cases "good faith" frameworks are already operating and it will be only a small matter to adapt them to the new specific requirements.

In order to understand the challenges and opportunities provided by the ERA, it is important to understand the concept of good faith, its interpretation under the Act and the areas where changes are likely to impact on the way in which businesses operate.

CONDUCT OF THE PARTIES

The explanatory statement to the Act claims that, under the ERA, emphasis will be placed on developing "employment relationships" rather than employment contracts. There will also be more emphasis placed on collectivism and collective bargaining. The preamble to the Act also tells us that employment relationships are "complex human relationships" with "economic and social dimensions". All participants in the employment environment are included under this umbrella, not just employers and employees. The Act

seeks to provide basic recognition of a relationship which is more than just a contract.

The scope of these relationships brings into play a whole new range of parties who would not normally be thought of as enjoying employment relationships. All sorts of people who interact in business, including competitors, could be obliged to deal with each other in good faith. The general obligation is set out in s 4(1) of the ERA, and (without limiting the good faith duty) includes a prohibition on conduct likely to mislead or deceive the other party.

Section 4(2) of the Act indicates that what it describes as "employment relationships" subject to an obligation to deal with each other in good faith include:

(a) an employer and an employee employed by the employer;
(b) a union and an employer;
(c) a union and a member of the union;
(d) a union and another union that are parties bargaining for the same collective agreement;
(e) a union and another union that are parties to the same collective agreement;
(f) a union and a member of another union where both unions are bargaining for the same collective agreement;
(g) a union and a member of another union where both unions are parties to the same collective agreement;
(h) an employer and other employer where both employers are bargaining for the same collective agreement.

The obligation imposed by s 4 is not just confined to periods of bargaining, but extends across all dealings related to employment. For example, under s 4(4), the duty of good faith applies to such things as any matter arising under or in relation to a collective agreement while the agreement is in force, consultation between an employer and its employees about the employees' collective employment interests including the effect of changes to the employer's business, proposals to contract out, redundancy, and union access to the work place.

It should be noted that the obligation of good faith in relation to an employment relationship is not something new. It has existed in New Zealand law prior to the ERA. However, what is new is the scope of that relationship. In addition to the specific good faith obligations that apply to collective bargaining, the ERA also provides far more general good faith obligations to apply across the board in various relationships.

Good faith has different meanings

Having widely defined the range of relationships that are "employment relationships" and subject to an obligation of good faith, it is important to note that the good faith obligation means different things in relation to different parts of the Act. Therefore, parties will be expected to conduct themselves in specific ways depending on the circumstances. For example, the ERA makes a clear distinction between collective bargaining, which is prescriptive and governed by s 32, and individual bargaining which is governed more generally.

Good faith and collective bargaining

Much of the focus of the Act relates to encouraging employment relationships to be ordered by collective contracts which are obtained as a result of collective bargaining between employers and unions. The ERA expressly states that one of its objects is the promotion of collective bargaining in the interests of addressing the "inherent inequality" in employment relationships. Included in the Act are specific references to the ILO conventions on Freedom of Association and the Right to Organise and Bargain Collectively. Several aspects of the system of bargaining we know under the ECA will change significantly, not the least of which will be in relation to the "take it or leave it" approach currently perceived to be available to employers.

The definition of "bargaining" in the collective context is set out in s 5.5 and:

> means all the interactions between the parties to the bargaining that relate to the bargaining.

The section is designed to extend the good faith duty to both before and after the formal discussion process and to communications and correspondence that relate to the bargaining.

Given the Act's preference for collective contracts it is not surprising that the good faith obligations in relation to the negotiation of such contracts are spelt out with a far greater degree of particularity than the obligations in relation to the formation of individual contracts. It is the good faith obligations in relation to collective bargaining that are novel in the New Zealand context and which have attracted a good deal of public comment. These provisions are found in Part 5 of the Act which starts at s 31. Section 32 sets out a number of specific components of the obligation of good faith. It is not exhaustive, and other conduct or a combination of activities could also potentially amount to breach of the good faith obligations, but if a party to collective bargaining breaches one of the specific obligations listed in s 32 this is likely to be regarded by the Courts as what the North Americans would call a "per se" breach of good faith. This means that this breach alone, regardless of total conduct, is evidence of bad faith.

A summary of the express obligations set out in s 32 is that:

(a) the union and employer must endeavour to agree on a process for conducting bargaining in an effective and efficient manner;
(b) the union and employer must meet each other for the purposes of bargaining;
(c) the union and employer must consider and respond to proposals made by each other;
(d) the union and employer must recognise the role and authority of any representative and must not bargain about matters relating to terms and conditions of employment with people for whom a representative acts, or undermine the other's bargaining authority;
(e) the union and employer must provide to each other on request, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of bargaining;

Section 32(3) further sets out matters which are relevant to whether the union and employer are dealing with each other in good faith. These (in summary) include:

(a) provisions of a code of good faith relevant to the circumstances;
(b) provisions of any good faith agreement entered into by the parties;
(c) the proportion of employees who belong to the union and to whom the bargaining relates; and
(d) any other matter considered relevant under current or background circumstances.

With some minor exceptions, all of these requirements represent significant changes to the existing legal obligations on parties to collective bargaining. Before looking at what the obligations might mean in practice it is important to note that there is still a line beyond which parties are not obliged to go. Section 33 expressly states that the duty of good faith does not require a concluded collective agreement. There is no obligation on parties to make particular concessions or to actually reach any agreement. Neither does there appear to be an obligation to continue to meet and bargain indefinitely provided the specific requirements have been complied with. To this extent the new regime does not represent a return to the form of industrial relations that existed in New Zealand for most of the last 100 years. Under the system set up in 1894, if parties couldn't agree on the contents of a collective agreement (then called awards) an independent third party neutral would impose an outcome on them. Despite ill-informed comment to the contrary, such a scenario is not possible under the proposed legislation.

only 20 per cent of New Zealand's workforce are governed by collective contracts. Even if that figure were to double, the majority of employees are still going to be governed by individual agreements

Practical matters

There are some elements of the new good faith obligations in relation to collective bargaining that, while different to the situation under the ECA, are unlikely to cause any difficulties for the parties. These are the obligations to use best endeavours to, as soon as possible after initiating bargaining, agree on a process for bargaining and the obligation to meet, from time to time for the purposes of the bargaining. Also, the obligation to consider and respond to proposals made by each other should not be difficult in practice to comply with. The recognition of the role and authority of representatives, the implications of a prohibition on communication and the duty to provide information are considered in more detail under different headings in this paper.

It should be noted that ss 35 to 39 make provision for developing codes of good faith which will form guidelines to sit alongside the legislation. The purpose of these codes is to provide guidance regarding the application of the general duty of good faith in collective bargaining, or other specified situations. Similarly to codes of practice in other regulated areas, a code will not be solely determinative of good or bad faith, but will act as a reference point for the ERA or the Court if it is relevant to the case in issue.

Good faith and individual employment relationships

The explanatory note to the Bill suggested that for individual employment relationships:

> good faith will reflect the common law concept of mutual trust and confidence, supplemented by specific provisions in the Bill dealing with unfair bargaining.

This means that the Act is less prescriptive regarding individual agreements, except in certain contexts. For example, in Part 6 of the Act, dealing with individual employees' terms and conditions of employment, s 60 defines the good faith obligation relatively narrowly. Section 60(c) states that the objective of this part of the Act is:

> to recognise that, in relation to individual employees and their employers, good faith behaviour is:
>
> (i) promoted by providing protection against unfair bargaining; and
>
> (ii) consistent with the implied term of mutual trust and confidence in the relationship between the employee and the employer.

The second of these obligations adds nothing to long-standing common law rights that the Courts recognised and enforced for many years. To understand the substance of the obligation in relation to individual employment relationships it is therefore necessary to examine what the Act might proscribe as "unfair bargaining" in the context of individual employment contracts.

Section 68 of the Act categorises as unfair a number of types of activity which are little different to the sort of behaviour caught by the ECA. These include:

- diminished capacity in relation to understanding;
- reasonable reliance on skill, care or advice of a person acting on behalf of another party;
- an inducement to enter an agreement by oppressive means, undue influence or duress.

However, there is one new obligation which extends beyond anything in the present law. Section 62 of the ERA obliges employers, prior to the entry into an individual contract of employment, to provide the employee with a copy of the intended individual employment agreement and advise the employee that the employee is entitled to seek independent advice about the intended individual employment agreement and to give the employee a reasonable opportunity to seek that advice. Breach of this obligation will give the employee the opportunity to challenge the individual employment contract on the basis that it is unfair and was not obtained in good faith. If there is an applicable collective agreement s 62 requires that for the first 30 days a new employees' terms must not be inconsistent with it.

DOES IT MATTER?

It is important to remember that, at the moment, only approximately 20 per cent of New Zealand's workforce are governed by collective contracts obtained by collective bargaining. Even if that figure were to double (and this is beyond most commentators' predictions) the majority of employees in New Zealand are still going to be governed by individual agreements. Therefore, for most New Zealand workers, the good faith obligations in relation to bargaining are not significantly different from what already exists.

DISCLOSURE OF BUSINESS INFORMATION

In relation to collective bargaining, the most far-reaching of the new obligations under the Employment Relations Act is in s 32(1)(e), the obligation on both unions and employers to provide to each other information:

> that is reasonably necessary to support or substantiate claims or responses to claims.

The scope of this obligation on either side is currently as broadly defined as the whole concept of good faith bargaining itself. The key issue under the new legislation will be relevance – information that is seen to be a relevant part of the good faith bargaining process, information that is "reasonably necessary". We can look to North American law for guidance on the likely parameters of relevant information.

It is important to note that in all aspects of good faith bargaining and despite the significant changes in the existing legal obligations, there is still no obligation on parties to make particular concessions or to actually reach any agreement.

The meaning of s 32(1)(e)

Sensitive information must only be divulged if it can be shown to be "reasonably" necessary to support or respond to claims. If information is not regarded as sensitive then it is in all parties' interests to be as open as possible during the bargaining process. The wording of s 32(1)(e) suggests information must be provided on request.

At commencement of bargaining

The obligation to provide all relevant information does not arise immediately at the commencement of bargaining. This is probably the time where parties can be at their most guarded, because it is not likely to be apparent exactly what will be relevant to each party's participation in the bargaining. In other words, it seems that parties can wait until it is obvious that certain information is likely to be necessary to advance the process. However, an employer or union would have to be wary of the overriding obligation of good faith in light of what "might reasonably be expected to be relevant".

On request

The request can be made at any time during the bargaining process. However, there is still no obligation to supply non-relevant information, even if it is requested. Following United States law, it is likely that a party would have to prove the relevancy of the information when requesting it or its "necessity" to support or respond to the claim.

North American experience

The obligation to provide financial information in support of a bargaining position is well-established in North American employment law jurisprudence. It has been interpreted by the Courts to be a fundamental aspect of the obligation to bargain in good faith. While the detail of the United States and Canadian labour legislation differs from the ERA, it is almost certain that the New Zealand Courts seeking to interpret s 32(1)(e) of the ERA will look to the North American case law to answer a number of the questions that will arise. For example the United States Courts have clarified issues such as:

- what information is relevant and necessary for collective bargaining;
- the manner and form in which the information must be made available;
- the time in which it must be made available;
- legitimate employer refusals to supply it; and
- the types of information that must be furnished.

The sorts of information that have been held to be relevant include:

- financial data;
- wage and salary schedules;
- hours;
- insurance and pension plan information;
- seniority lists; and
- employees' biographical information.

This type of information has been presumed to be relevant and required to be handed over. In the United States more sensitive information, usually financial, is not presumed to be relevant but requires a union to justify its request. Whether a union can justify such a request may often depend on the particular stance taken by the employer. If the employer has put in issue its ability to pay then it may well have to justify that by producing significant financial information. The Supreme Court of the United States said in the case of *NLRB v Truitt Manufacturing Co* 351 US 149 (1956):

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy ... we agree with the [NLRB] that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of failure to bargain in good faith.

The Supreme Court pointed out that it does not automatically follow that claims of an inability to pay must be substantiated. "The sole test is on the circumstances, and whether the obligation of good faith has been met." The same case also made it clear that good faith means more than merely "going through the motions".

In another similar case, *NLRB v Jacobs MFG Co* 2d, 196 F 680, it was said that one "cannot fashion a decision out of one thread drawn from the whole fabric of evidence". This hints at what is known in the United States as the "totality test", which involves a weighing of all the evidence in the circumstances. When applied to obligations to disclose information, it implies that if all of the other evidence shows a willingness to reach agreement, the decision by the Court may not hinge on a refusal to provide information. Such a refusal may well be risky however and under the totality test, would seem to lead to a rebuttable presumption of bad faith.

In *International Union of Electrical Workers v NLRB* 648F 2d18(D) (1980) an order was upheld requiring information of racial and sexual composition of employees, broken down into wage rates, seniority, hiring and promotions statistics, in order for the union to bargain effectively to correct discrimination. It was held no defence that the information might be used for bringing civil actions for discrimination. Employers' claims that information is confidential are rejected more often than not in the United States. Where the information is deemed relevant, it is very difficult for the employers to resist providing it. (*Press Democrat Publishing Co v NLRB* 629F 2d1320 (1980), *General Electric Co v NLRB* 466F 2d1177 (1972).)

It is important to note that the good faith obligations under the ERA rest both on unions and employers. This has been overlooked by many commentators. It is therefore entirely plausible that, if a union presents a demand for a wage increase that is significantly in excess of either the rate of inflation or an increase in the cost of living index, that an employer would be entitled to insist, as part of the obligation of bargaining in good faith, that the union provide financial

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RESPONSIVE REGULATION IN THE ELECTRICITY INDUSTRY

Barry Barton, the University of Waikato

continues his review of the Ministerial Inquiry into the electricity industry

Last month ([2000] NZLJ 300) I outlined the legal framework of the electricity sector and discussed the inquiry's recommendations on the governance of market institutions and distribution companies. This one discusses price control and retail terms of service, including the proposal for an Electricity Ombudsman, and turns to some questions about regulation generally. We encounter novel issues here because we have little recent experience of regulation of a sector like electricity.

PRICE CONTROL

Price control attracted more public comment than any other part of the inquiry's report. Most of it was adverse and expressed surprise that the inquiry did not go further. Consumer and user submissions to the inquiry had criticised lines companies (that is, the local distribution companies) for still increasing consumer line charges even though their business has changed considerably with the separation of lines and retail; they now have a lower exposure to price changes, volume reductions and bad debts. To the consumers and users there was a strong case for immediate and robust price control to bring prices down as earlier reforms had promised.

The inquiry was cautious in two respects. First, it made no recommendation for retail price control, focusing instead the pressure that competition for retail customers was bringing to bear. (We come back to retail shortly.) Second, in relation to the lines companies and Transpower, it recommended targeted price control, not general sectoral price control. Price control would be imposed on individual companies, for a period up to five years. It recommended that controls not be immediate. Rather, the Commerce Commission should be empowered, by amendments to the Commerce Act 1986, to determine criteria, thresholds and procedures under which controls may be imposed on individual companies. One suspects that no such action will be taken until a period after the recommended once-only recalibration of optimised deprival value (ODV) valuations of lines assets is completed to provide better comparative data (paras 183, 191-199).

The inquiry agreed that distribution and transmission are areas of effective monopoly, but its recommendations still imply that monopolistic behaviour in distribution will be an exception, an occasional aberration, and so needing targeted regulation only. In favour of targeting, certainly, is the fact that it minimises the intrusion. Additionally, lines companies are not all the same. Some build and maintain networks in sparsely-occupied hill country, some in the cities. Some have numbers of large industrial users, others have none. The comparative information is still in poor shape. Against targeted regulation is the inquiry's view that, as a credible threat of future regulatory action, it is itself a solution (para 193). The experience in this sector in the last few years casts doubt over this notion. The possibility of rulemaking affecting future periods is probably a weaker determinant of management behaviour than the possibility of increasing profits in the current period. Another problem with targeting the price control may be that it will emphasise procedure, and the justification for singling out one company but not another. It may have some appearance of being a penalty measure.

On the other hand, one can readily see the reasons for recommending the Commerce Commission be the regulator, rather than the minister or some new agency. It will raise a new set of issues about regulation generally that we can consider below. (Statutory amendments should include the price control powers in the Electricity Industry Reform Act 1998, put there to ensure equitable treatment of domestic and rural customers.)

The recommendation of the CPI-X method of price control is equally supportable in view of experience internationally. CPI-X regulation requires a company to keep its price increases below a figure set by taking the Consumer Price Index and subtracting from it a figure as an efficiency target. (Consumer and user groups suggested an X figure between 15 and 20 per cent, to reflect the efficiencies that government forecasts had predicted from the lines-retail split and as an incentive to find new efficiencies.) If the company can improve its efficiency more than that then it has the incentive of the extra revenue. The main alternative method, rate of return or cost of service regulation, fixes prices so as to allow a company a "reasonable" return on its allowed asset base. It has a record in the United States and Canada of intrusiveness and complexity, and of sending unintended signals to companies, for example to over-invest in capital works. (See S Breyer, *Regulation and its Reform*, Cambridge, Mass: Harvard Univ Press, 1982.) Unfortunately the record with CPI-X regulation in the United Kingdom is not free from difficulty either. In particular, setting the appropriate X factor can often require a detailed analysis of a

company's cost structure and capital needs, just like rate of return regulation. (See J Surrey (ed) *The British Electricity Experiment*, London: Earthscan Press 1997. Prof S Littlechild, who advised the inquiry and was formerly director-general of Electricity Supply in Britain, was one of the inventors and then implementers of the RPI-X or CPI-X system: Surrey p 101.)

As a country we are feeling our way here. We have no recent experience in price control at all. We do not want to go back to a time where ministers set prices, often with an eye to the electoral cycle, nor do we want to set up an elaborate Public Utilities Commission with lengthy annual rate-of-return hearings.

The recommendations are politically awkward for Labour, because they are no stronger than the Commerce (Controlled Goods or Services) Amendment Bill that the National government proposed in May 1999. They are weaker, in fact, in relation to targeting and duration. In opposition, Labour refused to support the Bill, arguing that it was unworkable, unsupported by data, and aimed at the wrong target in picking on lines companies. The government could find a way out by amending the law to include retail, but making lines companies the priority for the Commerce Commission.

DISTRIBUTION

The inquiry recommended a number of measures to improve the Electricity (Information Disclosure) Regulations 1999 under the Electricity Act 1992. The initial purpose of the regulations was to provide transparency, as an element of light-handed regulation, to disclose whether the owner of a monopoly network is acting in an anti-competitive manner (Barton, "From Public Service to Market Commodity: Electricity and Gas Law in New Zealand" (1998) 16 JERL 351, 361). Even though the 1999 regulations were an upgrade, there has been disillusionment about the lengths that some companies have been prepared to go to defeat their purpose. Wide variations in interpretation have occurred and the quality of the comparative information is low. Measurement of companies' asset base under the Optimised Deprival Value system is especially confused. Perhaps the best improvement will be the recommendation to turn the data collection, data analysis, enforcement and amendment of the regulations over to the Commerce Commission, and for the Commission to carry out a one-off recalculation of asset values. These functions would tie in with the Commission's ordinary monopoly regulation, its new price regulation powers, and its enforcement capacity. This should bring the more creative accounting into line. The inquiry also recommended that the focus of the regulations be moved away from business inputs towards outcomes and performance indicators. Eventually, information disclosure may become more integrated with price regulation.

The inquiry recommended a relaxation of the lines/generation-retail split imposed by the Electricity Industry Reform Act 1998 to permit a lines company to own generation up to five per cent of its network's maximum demand. This is intended it encourage distributed generation, discussed below. While five per cent does not sound high, the amount that the generation could be contributing to the company's revenue could be a good deal more, and so therefore could be the cross-subsidy that the split sought to do away with.

RETAIL

Industry Ombudsman

In relation to the retailing of electricity, we have already noted the inquiry's decision not to recommend price control. The inquiry was generally satisfied with the rate at which retail competition has emerged, and hopes that the numerous stories that it heard about unwarranted disconnections, delays and obstruction of consumers wishing to switch retailers are transitional problems. It may be right. Retail operations have been in upheaval, first in being separated from lines functions and sold to comply with the 1998 Act, then having to implement the new MARIA Retail Competition protocol, having to meet the Y2K compliance deadline, and beginning to integrate the newly-acquired systems and customer databases. Customer switching should also improve under the revised MARIA protocol. The inquiry envisages the protocol coming under the control of the proposed Market Board.

The inquiry recommends that an Electricity Industry Ombudsman be established to apply to retail and distribution companies in order to resolve consumer complaints. The ombudsman would be established by industry agreement and funded by the industry, not established or funded by the state. In this it would be like the Banking Ombudsman and the Insurance and Savings Ombudsman. An Energy Industry Ombudsman operates in Victoria (http:// www.eiov.com.au), and an Energy and Water Ombudsman in New South Wales (http://www.eionsw.com.au).

Ombudsman schemes are generally well regarded, and this proposal may be better than the status quo, but there are several questions to ask about it. Above all, who gets to set the contractual terms that the Electricity Ombudsman would be applying? If the terms are defective, then no amount of fair procedure in dispute resolution will produce a good outcome. The ombudsman may receive power to make orders based on the fairness and justice of the case and not only on terms of the contract, and could therefore be argued to need no power to set the terms of the contract. But the terms of the contract will certainly be applied by the company before the ombudsman becomes involved; and some industry ombudsmen adhere closely to contractual terms with little departure from them on fairness and justice grounds. Other questions come to mind. Presumably the scheme will not be written into contracts in a way that seeks prevent a customer from going to District Court or the Disputes Tribunal. Will customers be made to keep the ombudsman's decision confidential? Finally, should the ombudsman not have some formal relationship with the proposed Market Board, which will have authority over customer switching, security and pricing methodologies that will affect consumers?

Consumer Guarantees Act

The inquiry's recommendation that electricity be covered by the Consumer Guarantees Act 1993 will go some way to impose general rules that retailers cannot contract out of. It comes in the wake of *Electricity Supply Association of NZ Ltd v Commerce Commission* (1998) 6 NZBLC 102,555 (HC) which held that electricity and lines provision were neither goods nor services within the meaning of the Act. In 1999 the government agreed to reverse the effect of the decision by an amendment to cover electricity as a good, and network line services as a service, but it did not proceed. If the amendment proceeds, retailers will be obliged to supply electricity that is of acceptable quality, and lines

companies will be obliged to provide their services using reasonable care and skill, in the sense that those standards are used in the Consumer Guarantees Act. Reasonably foreseeable consequential losses, for example damage to sensitive equipment, would have to be made good. (Retailers will need to negotiate the consequent liability that they expect lines companies to carry.) However only consumers within the restricted meaning of the Act would be protected. Large customers and small are concerned about voltage spikes, brownouts and the like. They are also concerned about any repetition of the Auckland central business district power failure of 1998. Consumer contracts at that time capped retailer liability, and imposed a significant asymmetry between the loss suffered by consumers and the loss suffered by the company.

Industry Code

The standards of acceptable quality and reasonable care and skill in the Consumer Guarantees Act 1993 are of a general character, and will not lead to specific security standards. There are many other elements of the relationship that the Act will not address except in the most general way; disconnections, billing procedures, meter standards, meter inspections, and faults response times, for example. Nor will the needs of business users be addressed. In most other countries the terms and conditions of consumer supply are approved by regulators. Without intervention of some kind, there is a real risk that companies that are newly subject to price control will be tempted to reduce standards.

It is therefore very noticeable that the inquiry did not say anything about standards and terms of consumer supply. It did not pick up on proposals, made from within the industry as well as without, for a stakeholders' charter or a standard industry code prescribing the key minima for a contract although not the entire contract. It would be possible for an industry ombudsman to have a real say in the contents of an industry code for retail contracts.

ENERGY EFFICIENCY

The inquiry had the benefit of a recent report by the Parliamentary Commissioner for the Environment, *Getting More for Less: A Review of Progress on Energy Efficiency and Renewable Energy Initiatives in New Zealand* (Wellington, 2000). One issue before the inquiry was the fixed charges component in energy prices, in contrast to the variable charges for energy consumed. It is a deterrent to energy conservation, even though it is necessary to secure a return on capital works. The inquiry suggests that the Energy Efficiency and Conservation Authority, with its new statutory mandate, monitor fixed charges, and, where they exceed 25 per cent of a typical household power bill, refer to the issue to the Commerce Commission. This proposal needs more work. It would seem easier to build this into the information disclosure and analysis that is proposed for the Commerce Commission itself. The Commission would need statutory power to control fixed charges. The matter is different from the ordinary price regulation that is a response to imperfect competition. It would certainly not be caught by CPI-X price control.

Small-scale distributed generation is located within a distribution network, reducing transmission demand and line losses. The inquiry recommended that the proposed Market's procedures control the terms and conditions offered by the local lines company. The recommendation that lines companies be allowed to increase the amount of generation they own beyond five MW up to five per cent of their maximum demand will also facilitate distributed generation. The inquiry also made recommendations to ease Transpower's pricing practices for co-generation. In both cases, technical developments are opening up new ways to improve energy efficiency.

Demand-side management consists of the steps that consumers of electricity can take to avoid using electricity in response to price signals, for example in peak periods. It promotes energy efficiency and reduces environmental impacts. The inquiry considered that its recommendations for the wholesale market to produce real-time prices rather than ex-post prices would encourage demand-side management. Electricity purchasers would know the actual price they are paying in time to make load management decisions that would in turn affect price.

HOW TO REGULATE?

Until now, we have used structural reform as a policy instrument, but we have taken it as far as possible for the time being. We have relied on the emergence of competitive pressure; it has emerged, to much advantage, in some sectors, but in transmission and distribution we have been slow to accept that monopoly is a permanent fact of life, especially in a small country with difficult geography. We have relied on a light-handed regulatory regime of information disclosure, the Commerce Act, and the threat of further regulation (Barton supra p 382); but it has not been effective. We have had the benefit of self-regulation in the central industry organisations, but their role has always been a confined one. The inquiry showed an awareness of the limitations of these policy tools when it spoke of the need for a robust regulatory framework in the sense of providing a strong assurance that the government's objectives will be met. In its Issues Paper, it also considered the relationship between public law rules (statute and regulation) and private ones (contracts and self-regulation); and the relationship between general policies and detailed prescriptive rules.

The electricity sector needs regulation that is overt, principled, responsive and enforced. It is needed partly because of monopoly, and partly because of the special position of energy in society and the economy which makes it important for life, safety, amenity and productivity in ways not always measured by market price. Regulation needs to be overt in being express, public and constitutional. The means of determining and expressing government objectives in energy should be placed in legislation. The relationship between the government and the self-regulatory market mechanisms of the industry should be clarified, and so should the means by which the objectives or guiding principles of the market are set.

Regulation should be principled in the sense that its purposes are made clear, in order to restrict the regulator's discretion and clarify the general intent of the legislature. Regulatory action should meet tests of necessity in achieving those purposes, evaluation of reasons for and against the action, and efficiency and effectiveness of the action in comparison with alternative policy instruments such as increasing competitive pressure. (Cf s 32 of the Resource Management Act 1991.)

Regulation needs to be responsive and to be enforced. These two characteristics go together in concerning the continuing relationship between the regulator and the regulated parties. Enforcement gives the regulator and the process credibility. There should be a range of sanctions that include prosecution but also less extreme options, to

enable the regulator to send signals appropriate to the situation. Prosecution is often an unsuitable reaction to a problem.

One aspect of responsiveness is in time; circumstances change, and rules need to evolve. Rulemaking can be iterative, and sometimes it can require prompt action. For example, the Information Disclosure Regulations could have produced more usable data if an annual cycle of improvements had occurred; the need for certainty was perhaps given too much prominence. A robust means of rulemaking or contract change is sometimes identified as an important feature of a self-governing entity, but it is equally important for public regulation. The problem of regulatory creep, where new layers of regulation are added to control the side effects of the previous ones, can be contained by a careful statement of principle that is explicit about the keeping regulation to the minimum necessary to meet government objectives. In *Telecom NZ Ltd v Commerce Commission* (1994) 5 NZBLC 103, 431 (CA) it was said that the Commission has no jurisdiction to conduct a general inquiry into an industry on its own motion, or to monitor or keep under review practices of market participants; it is not an "ongoing and omniscient watchdog". Omniscience may be asking too much, but in a sector like electricity an ongoing function is essential.

Another aspect of responsiveness is that regulation should be attuned to the structure, needs and motivation of a particular industry, and in particular in accommodating self-regulation. (See I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: OUP 1992.) Self-regulation or self-governance can pursue social objectives effectively with minimal interference with the private sector and with few of the limitations of classical regulatory institutions. It can be well tuned to the quickly-changing circumstances of the particular group or industry, and it can be expertly administered with high levels of acceptance by people who see it as their own rather than an imposition by outsiders. On the other hand, it can conceal group self-interest, it can exclude external scrutiny, and it can evade active administration and enforcement. A regulatory framework that combines that merits of public regulation with self-regulation in cooperation would be a constructive and responsive one. A procedure for the explicit setting of Market objectives by the government has already be suggested. A two-tier governance structure with public involvement in the upper tier would also bring the two aspects of regulation together.

Regulation will only get more complicated. Price control is an example; the CPI-X system, it has already been mentioned, is well regarded internationally, and better than the status quo, but it will not be problem-free and it will require adaptation. Other "sleeper" issues exist. One is the balancing of tariffs between big and small customers and customers of different kinds involves judgment and is not susceptible to mechanical economic analysis. Corporate activity will change in unforeseeable ways, as companies seek to diversify or add new value. Security of supply, energy efficiency and environmental issues will take new turns, particularly as the world's response to climate change gathers momentum. A form of regulation is required that can accommodate such complexities without needing a new inquiry or new legislation every year or two, and without forfeiting the benefits of competitive market pressure. ❑

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information in support of the claim. A failure by a union to provide such information may very well see it lose the right to strike.

In New Zealand it would be illegal under the ERA for an employer or a union to withhold relevant information from the other party, provided the necessity for disclosure could be proven.

In practice it would be employers that primarily will be put to the new expense and trouble of providing necessary financial information. In addition to the things mentioned above such information could include details of individual earnings, job classifications, merit increases, pension data, time study data, incentive earnings, piece rates and other detailed information. The provisions requiring an employer to provide information such as balance sheets, a copy of its business plan and forecasts were deleted from the Act however, in some circumstances such information could still be "necessary".

Limitations on scope of duty

There is not an absolute obligation on an employer to provide all information requested by a union (or vice versa). It is important to note the provisions in s 34 of the Act, which clarifies s 32(1)(e). Section 32 sets out that a request for information must:

- be in writing;
- clearly identify the information sought;
- specify a reasonable time within which the information must be provided.

If a union or employer objects to providing information it is compulsory for that party to:

- advise the other of the objection;
- discuss the objection with a view to resolving the matter.

This requirement applies in the following cases:

1. if the information requested is not reasonably necessary for the purposes of bargaining; or
2. the request is too unclear to enable the information to be identified; or
3. an unreasonable time limit is set.

Section 34(7) indicates that information provided can only be used for the purposes of bargaining and must be treated as confidential.

CONCLUSION

Section 34(3) permits information to be disclosed to an independent reviewer. If American practice is followed it may become common for employers to impose such a condition. In other words sensitive financial information may be provided to, say, the union's accountant, for perusal by the accountant without necessarily being disclosed to the union. Undoubtedly, there are risks to employers that sensitive financial information could be disclosed by unions or their employees to other parties. This is perhaps particularly so in collective bargaining that the union has initiated involving more than one employer. Despite the obligation in s 34(7) that information only be used for the purposes of collective bargaining employers' best protection is probably to insist upon strict conditions in relation to the disclosure of the most sensitive type of information. Just how far s 34(3) can be stretched is likely to be the subject of the early litigation in this area. ❑

CIVIL DEFENDANT NAME SUPPRESSION

Cedric Hunt, The Open Polytechnic

finds it often done but seldom argued

Court orders prohibiting the publication of defendant's names continue to attract public controversy. Unlike the situation in criminal jurisdiction, there are no statutory provisions that allow defendant name suppression in general civil jurisdiction. The power to order suppression arises in the High Court from inherent jurisdiction. If a similar power exists in District Courts the only source for this power would seem to be implied jurisdiction. In either case, is there a clear test that Courts should apply? The paucity of direct authority is illustrated by the comment in *G v G* (HC Auckland, M536/95, 5 March 1997, Cartwright J) that counsel was unable to point to any decisions "in which the topic was discussed". This paper discusses the test for name suppression in civil cases, particularly in relation to defendants, and examines two recent High Court decisions.

This paucity of authorities has meant Courts have had to draw on precedents where the power to hold hearings in camera, rather than defendant name suppression, has been the issue, and from decisions in criminal jurisdictions.

Caution is needed when using cases dealing with one aspect of open justice, such as the requirement for public Court hearings, as authority for the application of another aspect, the unfettered right to publish proceedings. Also: "It does not follow ... that what is necessary to secure justice is done is the same in both civil and criminal cases". (*R v Hughes* [1986] 2 NZLR 129 (CA) at 135 per Cooke P.)

The pre-eminent authority on the power to conduct in camera hearings in the absence of statutory provisions is still *Scott v Scott* [1913] AC 417, where the House of Lords ruled the exercise of the power to order in camera hearings was not at the Judge's whim but depended upon justice in a case necessitating such action. The speeches stressed that circumstances must be exceptional, the "broad principle" being that justice would normally best be served by a public hearing. Because *Scott* dealt with the publication to third parties of in camera proceedings, and because the comments of some of the Law Lords clearly referred to the publication as well as to the in camera issue, there are grounds for arguing *Scott* is authority that the same test exists for deciding to exercise the power to suppress publication as for ordering a hearing in camera. This apparent equal ranking and inclusion of both these aspects within the concept of open justice seems to get support from a later House of Lords decision, *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450. Lord Diplock included as aspects of the principle of open justice both that Court hearings be held in public and that nothing be done to discourage "fair and accurate reports of proceedings".

THE HIGH COURT

McDowell in "*The principle of Open Justice in a civil context*" [1995] NZ Law Rev 214 at p 229 pointed to the judgment of Richmond J in *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) for the proposition that within the context of civil hearings:

> in determining the inherent jurisdiction for the suppression of names, a less strict test was applicable compared with the right to order an in camera hearing.

Although *Taylor* was decided some time ago it is submitted this conclusion deserves re-examination because it is crucial to the issue of civil defendant name suppression. *Taylor* was an unsuccessful appeal against conviction for publishing the name of a witness ordered suppressed by the trial Court.

Although this was a criminal case, the provisions of the Criminal Justice Act 1954 then in force did not include specific provisions allowing for the suppression of witnesses' names and did not expressly exclude inherent jurisdiction, as does now s 138(5) Criminal Justice Act 1985. Because of this it is submitted that the discussion of inherent jurisdiction in *Taylor* is relevant to general civil proceedings where similarly there are no general statutory provisions.

The majority in *Taylor*, Wild CJ and Richmond J, applying *R v Socialist Worker Printers and Publishers Ltd, ex p Attorney- General* [1975] 1 All ER 142, found that the trial Judge had inherent jurisdiction to make:

> "an order which did no more than prohibit publication of anything that might lead to the identification of those witnesses at an otherwise entirely public trial" (because it) "was necessary in the interests of justice to protect a service whose duty, ...", (included) "bringing to justice alleged offences against the Official Secrets Act 1951" (p 680 per Wild CJ).

Richmond J found the "interests of justice required the effectiveness of the [SIS] to be preserved" and that suppression of witness names could be ordered on this basis. He seemed to imply at 684 that it would be unjust for persons under a duty to give evidence not have protection as to do otherwise could affect "their actual safety".

Perhaps surprisingly in the light of this finding, Richmond J had earlier commented at 683 that the Court in *Socialist Worker* had applied a lesser standard of test for suppression of name than set out in *Scott* for a departure from open justice. "But in the lesser situation" (lesser than ordering a hearing in camera) "a somewhat less strict test is applicable in determining the inherent jurisdiction of the Court". Richmond J did not elucidate upon, nor formulate, this "less strict test".

As with *Taylor*, in *Socialist Worker* witness name suppression was itself argued on the ground that it was necessary in the interests of justice. A blackmail trial Judge had ordered that the victims' names not be used in Court and be referred to only as Mr X and Mr Y. The defendants published the names of the victims, allegedly in contempt of Court.

Counsel for the defendant publisher submitted (at 149) that the trial Judge "had no authority in law to give the direction he gave" in respect to the witnesses' names. The argument of counsel does not become clear until pp 150 to 151 where Lord Widgery CJ states:

> Indeed in the end I think that must be [counsel's] submission: one must either satisfy the rules for an in camera hearing or one must go to the other extreme and have every word of evidence said aloud.

Counsel's argument then was that the only alternative to a hearing that was entirely open, was a hearing in camera. As that did not occur, the Judge had no jurisdiction to make an order preventing full disclosure of all that occurred in Court.

Lord Widgery CJ at 151 rejected this "all or nothing" approach. Without the name suppression the witnesses would not have given evidence and the blackmailers not brought to justice. Victims in future cases would be deterred from making complaints to the police by the expectation of courtroom publicity, and blackmailers would escape justice:

> to destroy the confidence of witnesses in potential future blackmail proceedings in the protection which they would get [would be] an act calculated ... to interfere with the due course of justice.

Consistently with *Scott*, achieving justice required the departure from the broad principle that justice should be administered in public. Lord Widgery at 150 compares blackmail to an example used in *Scott* by Earl Loreburn:

> A man who has a [trade] secret with the defendant ... would not seek proceedings on the terms that the secret was to be communicated to the world ... this ... type of case is much closer to the *Scott v Scott* principle than one might think at first blush.

The view that *Socialist Worker* is authority that there is a lesser test for name suppression of a witness than for holding a hearing in camera, it is submitted, not supported by a careful analysis of that judgment. For either step superior Courts have it within their inherent jurisdiction to order some restriction on open justice, if this is what justice requires. To achieve justice in one case may require a hearing in camera, but in another a lesser step such as the suppression of the name of a witness, a defendant, or part of the evidence.

Woodhouse J in *Taylor* refers to *Scott* and *Socialist Worker* and comes at p 69 to a different conclusion from Richmond J:

> [*Scott*] makes it plain ... that the particular power to exclude the public is one to be exercised not for the sake of individual litigants or witnesses but in the interests of the administration of justice itself. Here the issue concerns the protection of names of persons associated with a trial held in open Court – but the same principles apply as was emphasised in *R v Socialist Worker*.

The dissent by Woodhouse J was based on his finding of fact that the publishing of the witnesses' names would merely inconvenience the Security Intelligence Service and that name suppression was not required in the "long-term interests of justice itself". Also supporting his dissent was his finding that s 46 CJA 1954 replaced the Court's inherent jurisdiction with a statutory one. As there was no longer, in his view, inherent jurisdiction, and no specific statutory power, the Court had no power to order suppression of witness names. Inherent jurisdiction was not specifically excluded by s 46 as is now the case with s 138(5) CJA 1985.

It is submitted that in *Taylor* it was unnecessary for Richmond J to find there was a "less strict test" than the "necessary in the interests of justice" test of *Scott*. He appears to apply the *Scott* test. His "lesser test" comment it is suggested is obiter. All three Judges appear to have used the *Scott* test. The differing decisions of the majority and Woodhouse J appear to be about their respective conclusions after the application of the same test.

Skope Enterprises Ltd v Consumer Council [1973] 2 NZLR 399 followed *Scott*. This was an application for an injunction to restrain publication of material considered prejudicial to a fair trial. Cooke J granted the application and noted in accordance with *Scott* that the onus of showing the order was required was on the applicant. Justice could not be done without the order being made, as a hearing in public would incur the publicity that it was the object of the application to argue should be avoided in the interests of a fair trial of the substantive matter. (Other cases to follow *Scott* have been *R v Hughes* [1986] 2 NZLR 129 (CA) per Cooke P at p 135 and *R v Accused* (CA 32/91) [1992] 1 NZLR 257 per Cooke P at p 262.)

Although this debate has been in the criminal jurisdiction, it is submitted it is equally applicable in the civil context where there are similar absences of statutory guidelines. This view received recent support from Wild J in *Angus v H* (HC Wellington, CP 129/99, 17 June 1999) at 5: "I am not in doubt that, inherent in this Court's jurisdiction, is a power to suppress the name of a party to civil litigation before the Court, if the due administration of justice requires it".

DISTRICT COURTS

There would seem doubt as to whether District Courts have any general power to suppress the names of parties in civil cases. (*R v L* (s 91/94) (1994) 12 CRNZ 1, 3.)

The predicament of a Court without inherent jurisdiction was highlighted in *Guy v Medical Council of New Zealand* [1985] NZAR 67 where the High Court as appellate body to the Medical Council under the Medical Practitioners' Act 1968 was found not to have inherent jurisdiction and consequently no power to suppress the defendant's name. That District Courts, appellate bodies under the Medical Practitioner's Act 1995, have such power on disciplinary appeals is settled by s 120 of that Act.

The District Court although not having inherent jurisdiction is said to have "an implied power such as the power to prevent abuse of process which is necessary for the due administration of justice under powers already conferred". (Kovacevich "*The inherent power of the District Court*" [1989] NZLJ 184.) Such a power has been said in the High Court to be: "a necessary implication into a statutory jurisdiction to ensure that the administration of justice itself is not oppressive or prejudicial to those who come before it". (*Watson v Clarke* [1988] BCL 1890 per Robertson J at p 10.)

There seems to be an absence of authority as to whether this implied jurisdiction gives power to suppress publication of a defendant's name in civil proceedings. If there is such power under the District Court's implied jurisdiction, is the test the same as under the inherent jurisdiction of the High Court? Or is suppression available only where "necessary

to ensure that the administration of justice ... is not oppressive or prejudicial"? Although "prejudicial" may not be too different to the test in *Scott*, "not oppressive" has the sound of being a considerably more rigorous test.

A District Court civil case where the names of the parties were suppressed was *W v L* [1997] DCR 558. The report indicates a suppression order was made, but there is no discussion in the reported judgment of this order, nor the authority under which it was made.

A v B AND *G v G*

To avoid confusion with similarly intituled but separate judgments we will refer to:

- *A v B No 1* (HC Auckland, CP 310/96, 19 March 1999, Young J), a claim for exemplary damages in tort in respect to the misreading by a pathologist of the plaintiff's cervical smear slides;
- *A v B No 2* (11 May 1999, Young J), the successful application of Wilson and Horton Ltd, a newspaper publisher, for the discharge of the order for suppression of the defendant's name;
- *G v G No 1* (1996) 1 BACR 286, a claim by a wife for exemplary damages in tort against a husband for repeated incidents of domestic violence;
- *G v G No 2* (HC Auckland, M 535/95, 5 March 1997, Cartwright J) the unsuccessful application of Wilson and Horton Ltd for the discharge of the order for suppression of the defendant's name.

In *A v B (No 1)* the suppression order was imposed in a cursory comment: "If Mrs A wants her name suppressed I will do so. If I suppress publication of Mrs A's name I will suppress publication of Dr B's. (Discussion with Counsel) I make a final order suppressing publication of the names of Mrs A and Dr B."

In *A v B (No 2)*, Young J found his original name suppression decision correct but discharged it, finding changed circumstances. The defendant was Dr Bottrill whose name has since received frequent media mention.

Young J began his reasoning in *A v B (No 2)* from the desirability of "open justice" as supported by *Scott* but, citing at p 5 the words of Lord Diplock in *Leveller*, only in so far as a "Court reasonably believes it to be necessary in order to serve the ends of justice". He then mentions statutory exceptions such as Family Court hearings, complainants in sexual abuse cases, and the existence of some English common law exceptions.

His Honour then states it is "not uncommon" that in claims for exemplary damages for suppression orders to be made "as to the names of the parties". No authorities were cited to support this contention. This statement would seem to include both plaintiffs and defendants although the issue before him clearly related only to the defendant's name.

The Lynx database was searched for cases that included claims for exemplary damages. This database, run by the Auckland, Wellington and Canterbury District Law Societies, carries notes of judgments reported and unreported in the District and High Courts and Court of Appeal from 1982. A total of 224 such cases were found, in 85 per cent of which the defendants' names were not suppressed.

Even if the figures supported Young J's contention it is submitted they would be irrelevant to support defendant name suppression in a particular case. The *Scott* principle is that justice is usually best served by open justice and only where justice would not be achieved because of the particular circumstances of a case do powers arise to curtail this. Trends are not decisive, the individual facts of each case are.

In *A v B (No 2)*, at p 6, Young J says that the benchmark for exemplary damages in almost all likely cases has been set by the Courts in the $20,000 to $30,000 range. A prospective plaintiff, he argues, may be able to extort a larger settlement from a defendant there was a high degree of probability of publication of the defendant's name if the matter proceeded to Court.

This argument, it is submitted, may well support interim suppression. If a defendant is exonerated, the claim found to be spurious, or not serious, then a final order may well be warranted. Otherwise possible publicity, it is submitted, along with the expense of litigation, are incidents of the process and inevitable factors in any settlement consideration.

However in *A v B (No 1)*, the pathologist, although not found grossly negligent, was found at p 28 to be negligent, seemingly at the higher end of the "ordinary" negligence scale. Arguably "justice" in terms of *Scott* would not require suppression here. The pathologist had retired so any argument about injustice resulting from being penalised financially by a reduction in income due to the publicity would not arise.

"Justice" perhaps required consumers to be informed of the lapse by Dr Bottrill in case they also may be affected, although Young J says there was no evidence presented of the problem with the plaintiff's diagnosis affecting others. Perhaps the information should have been given to consumers so they had the choice of having further tests done if in any doubt. The original suppression order could have hindered such inquiries on the basis that an answer would be in breach of the Court's order.

Although seemingly not in itself a component of the *Scott* test, public policy may be a factor in helping to determine the interests of justice in a particular case. Public policy may be best served by professionals not expecting their names be shielded if sued for negligence. Such an expectation would perhaps remove an incentive for some professional people to always perform at a high professional standard. Perhaps the dangers in anonymity or uncertainty as to those accountable are illustrated by Young J's comments at p 11 of his judgment about the apparent inaction of the "Disciplinary Committee", "Medical Council" and "Health Funding Authority" to take any steps in respect to cervical smear testing in Gisborne after the plaintiff's complaint.

At p 8 of *A v B (No 2)*, Young J sets out in a minute subsequent to the first judgment, his reasons for granting suppression of the pathologist's name. In summary:

1. the defendant's "obvious ill health";
2. the fact that the defendant had retired;
3. disciplinary proceedings had presumably investigated fully concerns relating to the defendant's "slide reading practices";
4. if the plaintiff's name was suppressed it would seem "oppressive" to release the name of the defendant;
5. there were no public interest grounds warranting publication.

With respect, none appear to be within the *Scott* principles. Grounds 1, 2 and 4 seem to indicate that the Judge suppressed the defendant's name because he felt sorry for him. This is something the speeches in *Scott* said a Judge could not consider. It is difficult to see the relevance of point 3.

Point 5 seems at odds with *Scott*. Public interest does not have to be established before a defendant's name is publish-

ed. "The burden of proof [of displacing] the general rule as to publicity [is] on those seeking to displace its application". (*Scott* at 437 to 438 per Viscount Haldane LC.)

Throughout the balance of the judgment there are comments which appear intended to support the original name suppression decision. In summary:

That pertinent matters could have been reported upon earlier before A brought her case to Court, perhaps indicating their lack of value as a public interest topic. With respect, it is submitted that this is irrelevant. If a matter should be in the public domain it should not be removed from that domain merely by a missed opportunity to report it.

That a publisher had been perhaps wrongly deterred from publishing the story earlier by a letter from the defendant's legal representatives. With respect, it is difficult to see any relevance to final name suppression.

That the defendant's failings may have been at the lower end of the scale of negligence. This would seem to be in conflict with Young J's comments at p 28 of the original judgment that the defendant's actions had fallen short of the standard of gross negligence necessary to trigger an award of exemplary damages, only "by a narrow margin". While the negligence may not have been to a sufficient level to trigger exemplary damages, negligence by a medical practitioner would be of public interest.

That the evidence showed initially no more than a mistake in this one case so there was no need for others to be made aware of it. This would seem to run contrary to s 14 New Zealand Bill of Rights Act 1990 that "[e]veryone has the right to freedom ... to seek, receive and impart information", to which Young J himself refers in *A v B (No 2)* to support discharging the suppression order.

That the programme itself was less effective than the public's perception of it. Again it is difficult to see the relevance of this point on the issue of suppression of the defendant's name. More publicity resulting in more accountability, with perhaps the allocation of more resources and the improvement of systems, is more likely to be in the public interest than suppressing the defendant's name which would impede public debate. This last point would appear to be made by Young J himself at p 16 of *A v B (No 2)*.

Weighing all the factors considered by the Court in *A v B (No 2)*, the decision to discharge the order suppressing the defendant's name was well justified and consistent with the principles in *Scott*. With respect, it is submitted it is also likely to have been the only justifiable decision if the issue had been looked at in more depth in *A v B (No 1)*.

The G v G decisions

In *G v G (No 1)* name suppression was extensively discussed at 298 – 299. The Judge notes the plaintiff "neither supports nor opposes the application made by the defendant", a medical practitioner, for suppression of his name. Her Honour moves on to the proposition that any woman who may be considering the choice of a medical specialist should be entitled to know the defendant's name, so she can take into account when making that decision, that this person is one who "has behaved in a violent and degrading way to another woman" and notes at p 298 that although violence in a "professional setting" would be likely to occur "only in the most exceptional circumstances" that such behaviour has been displayed is "an indication of the attitudes [the defendant] has towards women".

The Judge mentioned the right to freedom of expression set out in s 14 of the New Zealand Bill of Rights Act 1990 quoted Cooke P from *Liddell* at 546 in the context of the unfettered discretion for name suppression available in criminal proceeding by s 140 CJA 1985 that:

> the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report ... fairly and accurately as "surrogates of the public".

The defendant's arguments for suppression were:

1. the public stigma;
2. the "incalculable" financial harm if publicity precluded him from his career choice;
3. his natural disinclination to allow the publication "of intimate personal details".

The Judge found 1 and 3 unexceptional and 2 among the natural consequences of the defendant's behaviour. On balance, the considerations weighed in favour of publication. The defendant had not satisfied the onus that justice in the particular case required a departure from open justice.

An appeal against the decision was filed by the defendant. It was supported by the plaintiff, and an interim order was made to suppress both parties' names and details so the defendant's right to appeal would not be removed by publication before determination of the appeal. The order was stated to remain in force "pending termination of the appeal or further order of the Court".

Subsequently an application to discharge this order was made by Wilson and Horton Ltd. *G v G (No 2)* is the Court's decision on this application. This decision sets out at p 7 that since the substantive hearing, the plaintiff's view on the publication of the defendant's name had changed from neutrality to vehement opposition. The plaintiff had found the publicity about the case had:

- caused her "extreme emotional turmoil";
- "devastated" her family;
- adversely impacted upon her health; and
- been at a much higher level than she had anticipated.

She argued that these effects were likely to be considerably worsened if her name became known, which would be an inevitable consequence of publication of the defendant's name, even if her name was suppressed. During their marriage she had used the husband's surname.

At p 6 Cartwright J notes that as well as the general public interest in open justice, there is the public interest of the defendant's future patients in receiving adequate and courteous treatment. Also there was public interest in making it better known that domestic violence "is perpetuated by men of education and standing in the community".

As with public policy, public interest and justice may not always equate, but arguably public interest may often be a factor in deciding if justice is best served by a particular decision. Although as Her Honour stressed, the issue, because it involved public interest, was not one to be settled by negotiation between plaintiff and defendant, it now appeared clear that the adverse impact on the plaintiff of publicity would be likely a worse consequence for her than the consequence for future patients of the defendant selecting him and being subject to a possibly bad professional attitude. The interim order was allowed to stand. It is likely to do so indefinitely because of its terms and because of the parties' indication that no appeal would proceed.

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IMPLIED WAIVER OF PRIVILEGE

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defend legal professional privilege from attack

In "Generalised Rules of Fairness in Evidence Law" (2000) 63 MLR 104, Jonathan Auburn discusses the judgment of the English Court of Appeal in *Paragon Finance Plc v Freshfields* [1999] 1 WLR 1183. In criticising that decision he advocates the adoption of a generalised "fairness" rule of implied waiver of privilege. He argues that the English Courts should adopt the "putting in issue" waiver which applies in Australia and the United States. Putting in issue waiver occurs when the contents of a privileged communication become the subject of a legitimate and reasonable issue in litigation. Privilege is then lost.

This article will argue that such a waiver is too broad and would constitute a fundamental inroad into legal professional privilege. This privilege which should be upheld as a matter of public interest and not undermined by the kind of rule for which Auburn contends. The Court should be concerned with the conduct of the party asserting privilege rather than with the unavoidable "unfairness" which results from every assertion of privilege. The correct rule should be that privilege will be waived when a person asserting privilege attempts to rely on privileged communications to justify his or her position. Where this occurs, it is unfair to allow the privilege holder to assert two inconsistent positions as it has the potential to mislead the Court and the opponent as to the true contents of the privileged evidence.

We begin by tracing the development of the doctrine of implied waiver of privilege in the United Kingdom, Australia, the United States and New Zealand. The dangers of a broad putting in issue rule of implied waiver will then be examined and an alternative rule proposed.

ENGLAND

Until *Paragon Finance v Freshfields*, the English Courts were divided as to the extent of the implied waiver which exists when a plaintiff sues his or her former solicitor.

In *Lillicrap v Nalder* [1993] 1 WLR 94, the plaintiffs sued their former solicitors alleging negligence in their advice regarding a property transaction. The defendants admitted negligence but sought to adduce evidence of their advice to the plaintiffs concerning earlier property transactions which would show that the plaintiffs had ignored their advice on previous occasions. The Court of Appeal held that this evidence was relevant to the issue of causation and that the plaintiffs' implied waiver extended to those earlier transactions. Dillon LJ approved the statement of the Judge below that:

> A client who sues his solicitor invites the Court to adjudicate the dispute and thereby, in my judgment, waives privilege and confidence to the extent that it is necessary to enable the Court to do so fully and fairly in accordance with the law including the law of evidence. I suspect that at the fringes each case will depend on its own facts. Normally the waiver will extend to facts and documents material to the cause of action upon which the plaintiff sues and to the defendant's proper defence to that cause of action. The bringing of a claim for negligence in relation to a particular retainer will normally be a waiver of privilege and confidence for facts and documents relating to that retainer, but not without more for those relating to other discrete retainers.

Russell LJ held that once the Court was of the view that there is an implied waiver of privilege, there was no warrant for holding that it was confined to communications between solicitor and client within the specific retainer which was the subject of the proceedings. Accordingly:

> By bringing civil proceedings against his solicitor, a client impliedly waives privilege in respect of all matters which are relevant to the suit he pursues and, most particularly, where the disclosure of privileged matters is required to enable justice to be done.

Farquharson LJ held that as a matter of principle, the defendants should not be prevented from adducing evidence which was relevant to the issue of causation. A proper interpretation of the waiver in the present case was therefore one which embraced not only the documents in respect of the transaction which was the subject of the present action but also, "documents or information otherwise subject to privilege which are relevant to the issues between the parties and which it would be unfair to exclude".

Lillicrap therefore appeared to support a broad approach to implied waiver which would extend to all of the evidence needed to allow the Court properly to adjudicate on the dispute, including facts and material relevant to a plaintiff's cause of action and a defendant's defence which it would be unfair to exclude.

In *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow* [1995] 1 All ER 976 the plaintiff, a Dutch corporation, had purchased the share capital of three insurance companies. In doing so, it had acted on advice from legal and non-legal advisers. It later sued its non-legal advisers, alleging that their advice had been negligent. One of the defendants, a firm of accountants, sought discovery of communications which had passed between the plaintiff and its Dutch and English legal advisers. They argued that if the documents were privileged, privilege had been waived. In the same way, they contended, a client who sued his solicitor

for negligence was taken to have waived privilege in respect of documents containing legal advice passing between his solicitor and him or herself. Colman J held that there could be no question of waiving privilege in an action to which legal advisers were not a party. In an important passage which, although obiter dictum, was later approved by the Court of Appeal in *Freshfields*, Colman J said that:

> The true analysis of what the Courts are doing in such cases of so-called implied waiver of privilege is, in my judgment, to prevent the unfairness which would arise if the plaintiff were entitled to exclude from the Court's consideration evidence relevant to a defence by relying upon the privilege arising from the solicitor's duty of confidence. The client is thus precluded from both asserting that the solicitor has acted in breach of duty and thereby caused the client loss and, to make good that claim, opening up the confidential relationship between them and at the same time seeking to enforce against the same solicitor a duty of confidence arising from their professional relationship in circumstances where such enforcement would deprive the solicitor of the means of defending the claim.

Colman J rejected the defendant's argument based on American authority that privilege is lost whenever the party asserting privilege puts the protected evidence in issue and it would be unfair to the other party to uphold the privilege. He noted that such reasoning "would involve a fundamental inroad into the scope of legal professional privilege".

In *Kershaw v Whelan* [1996] 1 WLR 356 Ebsworth J took a much broader view of the implied waiver doctrine, holding that it covered solicitors who had acted previously for a plaintiff but who were not party to the present litigation. The case concerned an action in negligence against the plaintiff's former solicitors in advising on the distribution of the estate of the plaintiff's intestate father. The plaintiff had previously issued proceedings concerning the estate using a different firm of solicitors. The current proceeding had been brought after expiry of the normal limitation period. The plaintiff contended that the limitation period should be postponed as the details of a letter from the defendant to the trustees of his father's estate had been deliberately concealed from him. This meant that he could not with due diligence have discovered the facts on which his claim was based. The defendant claimed that the plea of deliberate concealment implied a waiver of privilege and sought disclosure of documents relating to the plaintiff's previous legal actions concerning the estate, conducted by other solicitors.

Ebsworth J held that *Lillicrap* was authority for the proposition that once the issues between the parties have been identified then, "as a matter of fairness and justice waiver extends to documents and information, otherwise privileged, which are relevant to those issues which it would be unfair to exclude". She held that the advice given to the plaintiff by his solicitors in relation to the earlier litigation concerning his father's estate was relevant to the issue of when the plaintiff became aware of the contents of the defendant's letter. Accordingly, the plaintiff had impliedly waived privilege over all documents relevant to that issue.

The Court of Appeal returned to implied waiver in *Paragon Finance*. The defendant solicitors had acted for the plaintiffs in a series of mortgage securitisation transactions and in obtaining related insurance policies. The plaintiffs later sought to make claims under the policies which the insurers declined to meet. The defendants initially continued to advise the plaintiffs but were later replaced by new solicitors who pursued and settled the plaintiffs' claims against the insurers. The plaintiffs then began proceedings for negligence against the defendants claiming, *inter alia*, the costs of the proceedings and the negotiations relating to the claims, the shortfall suffered in recovery under the policies and the fees charged by the new solicitors in effecting recovery and in restructuring and re-financing the securitisation arrangements. The defendants denied negligence, and contested causation and quantum of the plaintiffs' alleged loss. They alleged contributory negligence by the plaintiffs and contended that they had failed to take reasonable steps to mitigate their loss. The plaintiffs appealed against a decision ordering disclosure of confidential communications between the plaintiffs and their new solicitors and counsel relating to the pursuit and settlement of the insurance claims.

When a person sues his or her former solicitor, alleging negligence in relation to a specific transaction, does he or she impliedly waive legal professional privilege not only in relation to communications between him or her and the solicitor sued, but also in relation to communications between him or her and any other solicitor whom he or she may have instructed in relation to the same transaction?

It was common ground that the communications were relevant to issues in the proceeding. Delivering the Court of Appeal's judgment, Lord Bingham of Cornhill CJ explained the rationale of the implied waiver of privilege which occurs when a person sues his or her former solicitor:

> When a client sues a solicitor who has formerly acted for him, complaining that the solicitor has acted negligently, he invites the Court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. Since Court proceedings are public, the client brings that formerly confidential relationship into the public domain. He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just determination of his claim; or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound.

The Court held that the rationale of the rule was that a party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality. A former client "cannot attack his former solicitor and deny the solicitor the use of materials relevant to his defence". But, the Court added:

> Since the implied waiver applies to communications between client and solicitor, it will cover no communication to which the solicitor was not privy and so will disclose to the solicitor nothing of which he is not already aware.

The Court held that the waiver in *Lillicrap* did not extend further than to the solicitors who were being sued. The broad language of Russell and Farquharson LJJ had to be read with some limitation, "otherwise, legal professional privilege would disappear altogether, even as between plaintiffs and solicitors advising them in their proceedings against former solicitors, where the interests of justice call for disclosure".

The Court overruled an earlier High Court decision (*Hayes v Dowding* [1996] PNLR 578) which had held that the plaintiffs had impliedly waived legal professional privilege by bringing proceedings even though they were not against a legal adviser. The Court noted that the Australian and United States authority on which that decision was based did not represent the law in England. By its decision,

the Court of Appeal also impliedly overruled *Kershaw v Whelan*. As to the suggestion that fairness is the overriding criterion when deciding whether privilege has been waived, the Court noted (at 1194) that:

> Fairness is an important part of the reason why a solicitor who is sued cannot be required to respect the confidentiality of his relationship with the client who is suing him; but, save as between the client and the solicitor he is suing, fairness is not the touchstone by which it is determined whether a client has or has not impliedly waived his privilege.

The Court of Appeal in England has therefore rejected the adoption of a broad putting in issue rule of implied waiver because such a rule would erode legal professional privilege too far. By firmly linking the waiver to the bringing into the public domain of the solicitor client relationship, the decision effectively limits the implied waiver to situations in which a plaintiff sues his former solicitor: Passmore, "Privilege Update" (1999) NLJ 803.

AUSTRALIA

The two leading decisions of the High Court of Australia on implied waiver of privilege, *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475; 69 ALR 31 and *Goldberg v Ng* (1995) 185 CLR 83; 132 ALR 57, have established that an implied waiver will occur when, "by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege" (*A-G NT v Maurice* 69 ALR 31, 39).

In *Goldberg v Ng* the Court held that where there are two or more distinct proceedings related in that they arose out of the same dispute, conduct in relation to one proceeding could found an implied waiver for the purposes of all proceedings. In that case, a solicitor had supplied privileged material to the Law Society of New South Wales in relation to a complaint made against him by the plaintiff who had also brought civil proceedings against him. The Court held that the solicitor's disclosure of privileged documents to the Law Society gave rise to a situation where ordinary notions of fairness required that he be precluded from asserting that those documents were protected from production and inspection in related civil proceedings.

Subsequently the Federal Court has held that legal professional privilege will be waived where a party puts into issue a matter which cannot fairly be assessed without examination of relevant legal advice received by that party. In *Telstra Corporation Ltd v BT Australasia*, 156 ALR 634, a claim inter alia for damages for misleading and deceptive conduct, Branson and Lehane JJ held that:

> Where, as in this case, a party pleads that he or she undertook certain action "in reliance on" a particular representation made by another, he or she opens up as an element of his or her cause of action, the issue of his or her state of mind at the time that he or she undertook such action. The Court will be required to determine what was the factor, or what were the factors, which influenced the mind of the party so as to induce him or her to act in that way. That is, the party puts in issue in the proceeding a matter which cannot fairly be assessed without examination of relevant legal advice, if any, received by that party. In such circumstances, the party, by putting in contest the issue of his or her reliance, is to be taken as having consented to the use of relevant privileged material, or to put it another way, to have waived reliance on the privilege which such material would otherwise attract:

They were, however, of the view that the principle enunciated "does not constitute a broad inroad into legal professional privilege as a 'substantive and fundamental common law principle'".

On this basis, privilege would be waived whenever the *party asserting privilege* puts in issue matters which cannot fairly be assessed without reference to the privileged material. However, the Queensland Supreme Court went further in *Wardrope v Dunne* [1996] 1 Qd R 224, and held that it does not matter whether the particular issue to which privileged material is relevant is raised by the plaintiff or the defendant. In *Wardrope*, the defendants alleged that they and their insurer were induced to compromise the plaintiff's action for damages for personal injuries by his fraudulent misrepresentations and claimed a declaration that the compromise was lawfully repudiated. The plaintiff denied that the compromise was induced by his representations and sought discovery and inspection of advice and recommendations relating to settlement of the action provided to the insurer by its solicitors. Granting the plaintiff's application, Derrington J was of the view that:

> Notwithstanding the high status of professional privilege and the careful protection which the law affords it, when the contents of a privileged communication become the subject of a legitimate and reasonable issue in the litigation, then the privilege is lost.

It does not matter whether the issue is raised by the party claiming privilege or by the party seeking to override it, providing that the issue fairly arises on the litigation.

Under *Wardrope*, if it is sound, there would be an implied waiver of privilege not only when the privilege-holder's conduct renders it unfair to maintain the privilege, or where the privilege-holder puts in issue matters which can not fairly be assessed without reference to the privileged material, but in any case where the privileged communication is relevant to a legitimate issue in the litigation.

UNITED STATES

The leading illustration of the American Courts' approach to the doctrine of implied waiver is *Hearn v Rhay* 68 FRD 574 (ED Wash 1975). In that case, the Court summarised the criteria for an implied waiver to operate as follows:

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party;
> (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
> (3) application of the privilege would have denied the opposing party access to information vital to his defense.

In *Hearn* two prison officials pleaded an affirmative defence of good faith to a prisoner's civil rights action. This defence protected officials from civil liability for acts committed without knowledge that they would violate the constitutional rights of others. The plaintiff could rebut the defence only by proving that the officials knew or should have known that their actions would violate the plaintiff's constitutional rights. The officials admitted that they had obtained legal advice prior to acting, but asserted that the advice was protected by privilege when questioned about its substance. The Court held that it was unfair for the officials to assert a defence and at the same time to deny the plaintiff access

to the very evidence that might refute that defence. Accordingly, it held that the officials had impliedly waived the privilege over the contents of the legal advice.

NEW ZEALAND

The High Court has adopted a more conservative approach to implied waiver of privilege than the Courts in Australia and America. It is likely that the *Paragon* approach will be followed here. Our High Court has held that the implied waiver which operates when a person sues his or her former solicitor does not extend beyond those two parties, and that a party asserting privilege will not be permitted to use the privileged evidence in such a way as to create a misleading impression of that evidence.

In *Equiticorp Industries Group v Hawkins*, [1990] 2 NZLR 175, the High Court held that extensive references in an affidavit to legal advice received by the deponent which was designed to add weight to that party's opposition to an application for security for costs led to an implied waiver of privilege. An element of unfairness had been introduced because what had been disclosed might have been selective and might not have constituted a fair representation of the whole of the contents of the advice.

On the other hand, a bare reference to having received legal advice, without referring to the contents of the advice, was not unfair and accordingly did not lead to an implied waiver of privilege. The deponent in *Cory-Wright & Salmon (in rec and liq) v Peat Marwick* 5 PRNZ 518 (see *Tau v Durie* [1996] 2 NZLR 190 for another recent example of the application of this rule), had not referred to the substance of the privileged communication, so there was no risk that either the Court or the defendant would be misled by his reference to it. The authorities are collected and synthesised by Williams J in *Registered Securities Ltd (in liq) v Windsor* (CP 593/97, HC Auckland, 24 May 1999).

In *Southland District Council v McLean*, HC Invercargill M 5/96, 20 October 1997, Master Venning held that the implied waiver of privilege which operates when a person sues his or her former solicitor does not extend to other parties to the litigation. The defendants had agreed to sell a forest to the plaintiff. It was subsequently damaged by wind and the plaintiff purported to cancel the contract and sued for its deposit. The defendants counterclaimed for specific performance and, in the same proceeding, claimed against the solicitors who had acted for them in the transaction alleging negligence in drafting the contract of sale and in advising them about possession and the passing of risk. The plaintiff then sought production for inspection of communications between the defendants and their solicitors relating to the advice tendered regarding those matters.

The defendants had waived privilege against their solicitors. Master Venning rejected the plaintiff's argument that privilege having been waived between the defendants and their former solicitors, it could not be re-asserted. The Master also rejected their argument that as a matter of fairness the defendants should not be able to advance a position (which the plaintiff would not be able to challenge) inconsistent with relevant contemporaneous documents in respect of which privilege was claimed against the plaintiff but impliedly waived against the solicitors.

Referring to *Lillicrap*, Master Venning held that:

> The justification for the waiver is to enable justice to be done between the Plaintiff and the solicitors. By suing his former solicitors the Plaintiff client puts in issue certain matters. It would be unjust and unfair to deny the solicitors the right to answer those allegations by reference to documents which, if there was no suit between the solicitor and the client, privilege would extend.

Master Venning held that this principle applied only between the defendants and their former solicitors, not between the plaintiff and the defendants. He noted that if the defendants had not sued their solicitors as second counterclaim defendants, the plaintiff would have been unable to pursue its current application.

Law Commission draft evidence code

Section 69(3) of the Law Commission's draft Evidence Code (NZLC R55 – Vol 2, 180) provides that:

> A person who has privilege waives the privilege if that person:
>
> (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
>
> (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.

The second ground under which privilege may be impliedly waived in s 69(3) covers the case of litigation against the plaintiff's former solicitor. The first ground could also cover this situation but appears to have a wider application. Prima facie it appears to import putting in issue waiver, although it is limited to where the privilege holder puts the privileged material in issue (ie *Telstra*) rather than where it is placed in issue by either party (ie *Wardrope*). In its discussion paper (NZLC PP 23), the Commission recommended the adoption of a provision similar to s 69(3). It noted that in New Zealand, implied waiver of privilege would operate in two circumstances: firstly, when it is unfair for the client to take the benefits of disclosure while also seeking to retain the benefits of privilege; and secondly, if what the client has done is inconsistent with a claim to keep the document confidential. It is submitted that an assessment of whether privilege has been waived should focus on whether the privilege-holder has used privileged material to advance the claim or defence in a way which is unfair rather than simply whether the privileged evidence has been put in issue.

CRITICISMS OF A BROAD RULE

Legal professional privilege has been described as a "substantive general principle which plays an important role in the effective and efficient administration of justice by the Courts" (*Goldberg v Ng* (1995) 132 ALR 57, 63 per Dean, Dawson and Gaudron JJ), and as a "practical guarantee of fundamental, constitutional or human rights" (*Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 129 ALR 593, 622 per McHugh J. In *R v Uljee* [1982] 1 NZLR 561, Cooke J explained that:

> There are several reasons why, on balance, it has been seen to be in the public interest to allow consultations with a legal adviser to be uninhibited by fear of disclosure in evidence. They include more efficient administration of justice; bringing to light and better presentation of defences; encouragement of lawful conduct; avoidance of litigation; possibilities of guilty pleas or cooperation with the police. In criminal matters there is also, notwithstanding Bentham's black-and-white argument

to the contrary, a strong sense that any person charged or in peril of a charge has a fundamental human right to professional advice – which may not be effectively given if facts are withheld.

Fundamental inroad

A broad putting in issue rule of implied waiver such as that in *Wardrope v Dunne* or *Hearn v Rhay* constitutes a fundamental inroad into legal professional privilege. Such an inroad should be resisted as a matter of public policy. The real danger that the Courts are trying to avoid in cases of implied waiver is to prevent the privilege-holder from creating a misleading impression of the privileged evidence by selective use of it to support his or her claim. Another way of expressing this danger is that, by selective use of privileged material, there is a risk that the privilege-holder may garble the truth (see Marcus, "The Perils of Privilege: Waiver and the Litigator" (1986) 84 Mich LR 1605, 1628). The decision in *Paragon* to decline to find a waiver can be explained on this basis. The defendants were not seeking to rely on communications between themselves and their present solicitors to advance their denial of negligence, causation and quantum or their claim of contributory negligence by the plaintiff or that it failed to mitigate its loss. The defendants had not attempted to use privileged material in a way which was unfair to the plaintiff or which had the potential to distort the contents of the privileged evidence. The only "unfairness" was simply the existence of the privilege itself. When viewed from this perspective, the cases which support a broad putting in issue waiver can be seen to have perverted the waiver doctrine and misconstrued the type of unfairness that it is designed to prevent.

Potentially limitless scope

Putting in issue waiver on the basis of *Wardrope* and *Hearn* has potentially enormous scope if used to its fullest extent, see Brown, "Deemed waiver of privilege – is nothing sacred?" (1999) 73(7) Law Inst Jnl 64, 65. An implied waiver would operate if it could be established that communications between a plaintiff and his or her former solicitor were likely to be evidentially relevant to an issue and it would be unfair if the defendant did not have access to them to aid his defence – see Coleman J in *Nederlandse Reassurantie* at 987. Brown lists several potential situations where legal advice received by a party could be held to be in issue, (65-66) including:

- where the plaintiff sues the defendant for breach of fiduciary duty. In seeking equitable relief, the party must demonstrate that it has acted with due diligence and has not allowed the matter to stand for an unreasonable period, *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Case 1218. If the defendant raises the issue of laches (unreasonable delay in issuing proceedings), the Court must have regard to a number of factors, and any advice received by the plaintiff prior to the issue of proceedings would be relevant to the issue of laches. Applying *Wardrope*, the fact that it is the defendant who raises the laches defence would not prevent the principle of waiver from applying;
- the plaintiff alleges that the defendant has engaged in misleading or deceptive conduct pursuant to s 9 of the Fair Trading Act 1986. The content of any legal advice would go to show the plaintiff's state of mind and whether in fact the plaintiff was misled or deceived by the defendant's conduct;
- if a plaintiff applies to amend a pleading to raise new issues in the proceeding, the question arises of why the party did not do so earlier. That in turn raises the question of the state of mind of the party and the party's legal advisers when the first pleading was filed and served and the changed state of mind leading to the amended pleading. The Australian decisions would appear to require, for the purposes of fairness, that the Brief and advice be disclosed even if there has not otherwise been a deemed waiver of privilege.

An examination of some American cases decided on the basis of *Hearn v Rhay* demonstrates that it is difficult to contain the logic of that case. In *United States v Exxon Corp* 94 FRD 246 (DDC 1981) when Exxon defended its pricing practices against claims of overcharges, it was held to have waived the privilege over legal advice received by asserting in defence that it had adopted those practices in reliance on Department of Energy interpretations of prevailing regulations. The plaintiff in *Russell v Curtin Matheson Scientific Inc* 493 F Supp 456, 458 (SD Tex 1980) sought to avoid the running of a statutory limitation period. He relied on an equitable doctrine that excuses delays induced by the prospective defendant's settlement overtures. He was held to have waived privilege over communications with his lawyer that might indicate that he had delayed his action for reasons other than the possibility of settlement. In *Pitney-Bowes Inc v Mestre* 86 FRD 444 (SD Fla 1980) which concerned a suit to rectify a contract on the grounds of mutual mistake, the Court used the implied waiver doctrine to require the party seeking rectification to disclose all contemporaneous communications with its legal advisers about the contract on the basis that the plaintiff had placed its intent in issue and had thereby waived its privilege in respect of legal advice which might reveal its true intent in negotiating the agreements.

Failure to target unfairness

Auburn criticises *Paragon* as having been decided on the basis of an unduly narrow interpretation of existing English authority and advocates the adoption of a broad fairness test such as that from *Wardrope* or *Hearn* when determining whether there has been an implied waiver of privilege. He argues that, "the relevant and guiding criterion should be unfairness to the defendant". His view is that fairness is the touchstone for most of the rules of implied waiver and that there is an important issue of fairness to be addressed in situations such as that which arose in *Paragon*.

This view, however, fails to distinguish between the type of unfairness caused by reliance upon the substance of privileged evidence to advance a claim while at the same time denying access to that evidence to the other side and the unavoidable "unfairness" caused by every assertion of privilege. (See Comment, "Developments in the Law – Privileged Communications" (1985) 98 Harvard LR 1450, 1642.) To use *Wardrope* as an example, even though evidence of the defendants' solicitor's advice might have disposed of the defendants' claim of inducement by fraudulent misrepresentation, permitting privilege to shield such evidence would create unfairness which is attributable merely to "incompleteness". The Court would have to decide the issue of inducement in the absence of some probative evidence. This type of incompleteness is caused whenever a party raises a privilege that requires the Court to decide a factual question without examining all relevant evidence.

Unfairness caused by "incompleteness" is distinguishable from that caused where a party seeks to inject the substance of privileged evidence into a proceeding to justify its position, but at the same time asserts privilege over that evidence. Applying the principle expressed in *Equiticorp*, this is unfair, not merely because the Court would be deprived of relevant evidence, but also because of the possibility that (a) a selective use of privileged evidence may create a misleading impression of that evidence; and (b) the opponent is denied a proper opportunity of answering evidence used against him or her.

Another criticism of putting in issue waiver based on the *Wardrope* and *Hearn* formulae is that it focuses on the opponent's need for information, rather than any unfairness caused by the conduct of the privilege-holder in attempting to use the privileged evidence. Such a rule would subject privilege to the hazards of fortune, as whether it had been impliedly waived would depend not on how the privilege-holder had used the privilege, but on who one's adversary happens to be. One adversary might have ample access to information while another might not.

Ultimately, the decision in *Wardrope* can be seen as the result of the trial Judge placing too much emphasis on the issue of fairness as between the parties in a particular case rather than properly taking into account the wider public interest in the maintenance of solicitor-client privilege.

CONCLUSION

Legal professional privilege is vital to ensure a candid exchange of information between solicitor and client and to ensure the proper functioning of the judicial system. It should be protected to the greatest extent possible. The New Zealand Courts should reject a broad putting in issue implied waiver as it would constitute a fundamental inroad into this important principle. Putting in issue waiver distorts the true purpose of the implied waiver doctrine which is designed to prevent the selective use of privileged evidence which creates a misleading impression of the material and thereby distorts the truth. Putting in issue waiver is concerned with the unavoidable unfairness that results from every assertion of privilege. Instead, implied waiver should focus on any unfairness caused by the conduct of a party attempting to use privileged evidence to advance its position but at the same time asserting privilege against the opponent. The formula that should be applied is that privilege will be waived whenever a person asserting privilege attempts to rely on the substance of privileged evidence in such a way that there is a danger that the Court or his or her opponent will be misled as to the true content of that evidence. ❑

continued from p 354

It is submitted that *G v G* illustrates an appropriate approach to civil name suppression giving weight to the public interest but weighing and balancing other relevant factors, to reach a decision that best serves the interests of justice in the particular circumstances. Publication of the defendant's name, which would have resulted in the plaintiff's name becoming known, would have been an injustice to the successful plaintiff because of the impact this would have had on her health and general wellbeing. These effects would at least erode, if not outweigh, the redress she had sought and achieved through bringing the proceedings for the wrongs she had suffered. If this case had been before the Family or criminal Courts suppression of both parties names would have been automatic. It would seem to have been unjust if merely the plaintiff's choice of proceedings were to have removed a protection that in the particular circumstances appeared necessary to ensure justice was achieved.

CONCLUSION

The test, at least in the High Court, to be applied to any decision as to whether a civil defendant's name should be prohibited from publication would still seem to remain that enunciated in *Scott*, that it is a decision to be made only where required in the interests of justice. This would appear to be the same test that is applied to the decision as to whether to hold a Court hearing in camera and views that a lesser standard applies, on consideration of the authorities, do not appear to have support.

It is not clear whether name suppression is available for parties litigating in the general civil jurisdiction of District Courts. If it is available, the test before it can be granted may be more rigorous than in the High Court.

The decision whether District Courts should be given such a power may be one for Parliament. It would seem likely that with the "benchmark" for the size of claims for exemplary damages now set well within the monetary limit of the jurisdiction of District Courts that this issue will arise.

A v B and *G v G* display contrasting approaches and conclusions on the issue of name suppression for the defendant in each case. On balance it could be argued that the facts in *A v B (No 1)* did not ever meet the criteria for suppression and that a number of irrelevant considerations held sway. In contrast the *G v G* cases are an illustration of a structured application of principle and weighing of relevant factors to reach a supportable decision not to suppress the defendant's name in *G v G (No 1)* and a different but equally supportable decision in *G v G (No 2)*, where the emergence and consideration of new factors tipped the balance of justice the other way.

It is submitted there is an unjustifiable absence of full discussion, or even more often, the absence of any discussion at all, of the issue of the granting of name suppression in many reported decisions. Understandably a Court will always be preoccupied with the substantive issues before it for resolution. However it is submitted that the issues arising that relate to open justice are not being given the open and recorded consideration that they deserve. Open justice has been acknowledged as one of the five key maxims of the rule of law for example by Mulholland *Introduction to the New Zealand Legal System* (9th ed, 1999 19).

The fundamental importance of the observance of its principles has been echoed in many cases since *Scott*, for example by the Court of Appeal in *Liddell*. The concept features prominently in statements of human rights for example *Art 14* International Covenant on Civil and Political Rights, ratified by New Zealand in 1978, The Constitution of the United States, and The Canadian Charter of Rights and Freedoms. Where a Court considers a departure from open justice it is submitted that the importance of the issue must require that Court to apply the correct principles and record the application of those principles to the particular facts of the case, in the decision.

The consequences of not at least giving general reasons for a name suppression order where imposed are to give credence to perceptions of unfairness and favouritism that can only serve to undermine the authority of and public regard for the Courts. This is a dangerous trend in any democratic society that prides itself on upholding the rule of law. ❑