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ARREST AND SEARCH

The saga of drinking and driving continues. In *Butterworth v Police*, HC Wellington, 30 June 2000, AP 21/00, Heron J held illegal and unreasonable the search of a person detained for breath and blood testing.

The detainee said that he wanted to go to the lavatory. Rather than accompany him to the lavatory the officer asked him to turn his pockets out. After he had done so there was a lump left in one pocket and so the officer put his hand in and removed the object which turned out to be cannabis. The Judge ruled the evidence inadmissible. Heron J actually went so far as to suggest that some sort of opaque container should be available for such people to put objects into.

The precise reasoning may be open to question. In particular it seems bizarre that someone can insist on putting an object in an opaque container of that sort and then object to being searched on leaving the police station. But it is a criticism of the law, rather than of Heron J to point out that this is the kind of decision which brings the law into public contempt in the US and leads to police demoralisation and corruption.

There is no argument for the exclusion of such evidence. This statement can be firmly made on the basis of the Law Commission report on police questioning. This is a pusillanimous and weak document. What it does is to reject all the arguments which we all know perfectly well the proposers of exclusion of such evidence make. It then goes on to give examples of evidence which ought to be excluded which are all irrelevant because they are all confessions and everyone is agreed that confessions have to be considered separately. Hence the Law Commission paper makes no argument to support its own recommendation.

But the root of the problem is the failure to get to grips with the law of arrest and questioning overall. The law of search after arrest will be the subject of a three page article in next month's issue of this *Journal*. In order to render the Bill of Rights guarantees meaningful, the Court of Appeal has had to invent a new category of de facto detention. In order to square drink-drive procedures with the antiquated general law on arrest, a specific statutory power of detention has had to be invented, the incidents of which are unclear, as is shown by the steady stream of cases.

The political problem is that the responsible politicians do not want to take on the criminal defence lobby. The intellectual problem is that the criminal defence lobby profess to be unable to understand that it is impossible to regulate police questioning and detention properly until and unless police are given the power to arrest for the purpose of questioning.

This can then be accompanied by a general rule that only by arrest can police compel someone to attend or remain at a police station.

The procedure for dealing with persons suspected of drinking and driving can then be assimilated into the general procedure. A person suspected of driving after drinking too much can be arrested and will remain under arrest under the general rules until the procedure is complete.

In practical terms such persons must be dealt with in exactly the same way as other prisoners. They have, ex hypothesi, been drinking. For many this may mean loss of livelihood for a period. They may become despondent and a danger to themselves and the officers. The more outwardly "respectable" the truer this may be; and this is not even to consider the ones who may be unknown to the officers and who may be wanted and dangerous criminals.

The blood testing procedures in particular may lead to delay and there is no reason why an officer should have to remain with such people. They should be treated like any other prisoner, which means that they must be locked up while waiting for the doctor to arrive or to have their identity established. That in turn means that they must be searched to ensure that they do not have anything which can threaten their own or the officers' safety.

PRISONS

The latest scandal in which a number of violent criminals have received greater compensation for crimes committed against them by prison staff than their original victims have received illustrates a number of things.

One is that the accident compensation scheme has now been rendered a complete joke by exemplary damages and Bill of Rights compensation.

The other is that there are still deep-seated problems of violence and corruption in the prison system. Several other recent incidents have demonstrated the staff to be incompetent also.

The fault of this lies with those in the Corrections system who long ago forgot that people go to prison as a punishment and amongst other things decided that prison staff should be recruited from the local community. The disadvantages of this policy hardly need to be pointed out, it is so self-evidently idiotic.

Something radical has to be done to improve the competence, integrity and conduct of prison staff. It seems highly unlikely that any such radical improvement will occur while the prisons remain a state monopoly run by unionised local talent. ❑

LETTER

From The Hon David Caygill

I write belatedly in response to your challenge back in May. While reviewing of "The Euro: Law and Banking" you wrote: "... (in) *the first six months of 2002 ... the current national coins and notes are to disappear and the Euro notes and coins take over. I am still willing to bet that it will not happen and I can't find anyone to take me on*".

Because of my delay in responding I won't hold you to your wager. But I was surprised at your prediction. For the reasons which follow I hold a contrary point of view.

I have long been fascinated by the system which is now generally known as the European Union. Both the scale and the nature of this "Union" intrigue me. Even from the other side of the world the breadth of vision and nobility of purpose involved seem impressive.

New Zealanders' information about the European Union has been influenced by two factors. The first is the damage that has been done to New Zealand by the Union's policy of protecting its agricultural sector. According to at least one study New Zealand may have been harmed more than any other single country by this policy. The second source of bias in the understanding of New Zealanders about the European Union arises because the majority of our information comes from United Kingdom sources. It is therefore infected by British scepticism and division about the European Union. Continental attitudes, while still mixed, have on the whole been more positive.

Given these limitations, as I understand the case for a common European currency, it has been motivated partly by a straight-forward desire to reduce the costs involved in dealing in multiple currencies, ie the transaction costs of shifting from one currency to another, the risks of adverse exchange rate movements and the complexities of accounting in different currencies. The removal of such costs will provide a minor but useful boost to member economies. More significantly a common currency constitutes a further step towards economic integration. A common currency won't just boost trade; it will ease investment between member states. In turn, introduction of a common currency reinforces "European" as against "national" attitudes and will mark a further success on the part of would-be integrators.

As you recorded in your review, the financial Euro has already been introduced. With the significant exception of Britain, almost all other members of the European Union have pegged their separate currencies under a common monetary management regime and adopted the Euro as a single measure of account. Although this was not achieved without much debate, the economic adjustments required proved on the whole beneficial, especially in those countries where fiscal discipline had been difficult to achieve in the past.

It seems implausible now that these difficult steps have been taken that the final step of phasing in a common physical currency would be postponed. Such a failure at this stage would represent a considerable political setback for which there does not appear to be any significant popular demand. Accordingly, I am prepared on my part to wager (perhaps a dozen bottles of my good friend Philip Woollaston's Wai-iti River Pinot Noir) that Euro notes and coins will come in on schedule in 2002.

Incidentally, it does not follow that because the common currency has commended itself to continental Europe, it must be in the interests of Australia and New Zealand to follow suit. Indeed, I think the very opposite is the case. What is surely in the interests of both Australia and New Zealand is to wait and observe the European experience, since they are kind enough to afford us this opportunity. It is true that traders across the Tasman also face transaction costs in moving from one currency to another, but this does not appear to inhibit significantly our strong economic relationship. On the other hand, we lack any of the common institutional apparatus which has grown up in Europe. Nor do we need to erect common institutions in order to remove threats of mutual hostility. Fortunately these seem largely confined to the sporting field. Let us explore the possibility of a Tasman dollar by all means, but let us do so calmly and carefully, as time undoubtedly allows.

David Caygill

ADOPTION REFORM

Helen Colebrook and Megan Noyce, the Law Commission

summarise the main points of the Commission's Report

Despite four official reviews of adoption law and practice in the last 20 years, the Adoption Act 1955 has been neglected and ignored by legislative reformers over the past 45 years. The Adoption Act is an anachronism that freezes the values and mores of 1950s society, reflecting a society which condemned single parenthood and branded children of unwed mothers with the stigma of illegitimacy. Nor was there any recognition that a child might have autonomous rights. The legislation has lagged behind changes in and improvements to adoption practice, such as increasing openness in adoption arrangements.

The Law Commission has undertaken a comprehensive review of adoption law and its place in contemporary society, and has recently published its final report *Adoption and its Alternatives: A different approach and a new framework* (NZLC R65, September 2000).

GUIDING PRINCIPLES

The Commission adopts as its central recommendation the principle that the interests of the child must be the paramount consideration throughout the entire adoption process. This principle underlies every other recommendation.

In keeping with this emphasis upon the best interests of the child, we recommend that the new Act define the purpose of adoption as being to provide a child, whose own parents cannot provide care, with a permanent family life. In constrast to the current legislation which preserves the fiction that the adopted child becomes the child of the adoptive parents as if born to them in lawful wedlock, the proposed adoption chapter of the Care of Children Act states simply that adoption involves the transfer of parental responsibility and rights. Adopted children have two sets of parents, birth parents and adoptive parents, with differing (legal and social) roles to play.

The principle that the child's welfare and interests are paramount does not preclude consideration of other interests, in particular those of the birth parents and adoptive parents. The interests of the child are best promoted if the adults who are making decisions about the child do so in an informed and considered manner, and if they are supported in the decisions they have made. To this end, the Commission has developed an interlocking set of recommendations regarding the process preceding the granting of an adoption order, including mandatory counselling for birth parents and independent legal advice. A birth parent's consent to an adoption must not be taken until at least 28 days after the birth of the child. The Commission recommends that prospective adoptive parents also receive counselling, preparation and education about adoption, and that all prospective adoptive parents be assessed and approved by the Department of Child, Youth and Family Services ("CYFS") before they are eligible to apply to adopt a child. Many submitters felt "cut adrift" after the adoption order had been made. The current Act does not fund CYFS to provide post-adoption support services. The Commission considers this short-sighted – once an adoption order is made, it is in the interests of the community that the adoption works. Otherwise a social cost is simply shifted from one area of the state to another. The Commission therefore recommends that state funded post-adoption counselling and mediation services be available for birth parents, adoptive parents and adopted persons.

OPENNESS IN ADOPTION

A particularly challenging issue is the status that the law should confer upon open adoption arrangements. Many submitters considered that the success of open adoption arrangements can be attributed to their informal nature, and that making such arrangements justiciable would undermine their success. While unanimous in its support of the concept of open adoption, the Commission does not recommend that open adoption arrangements be enforceable by legal process.

Any system of enforceable orders must provide an ultimate sanction in order to encourage compliance. If open adoption were to be legally enforceable, the ultimate sanction for breaching an agreement must logically be the discharge of the adoption order. We did not consider that refusal to comply with an open adoption arrangement should lead to such a result. Absent any serious deficiencies on the part of the adopters, it is unlikely that such upheaval would be in the best interests of the child.

The Commission has considered expressed concerns that open adoption might be used to induce birth parents to agree to an adoption ("you will still be able to see him whenever you want – nothing will really change"). It must be clear that by consenting to adoption a birth parent has permanently given up the parental responsibility for that child. If a birth parent has doubts about that consequence then a measure short of adoption should be employed.

The Commission does, however, see value in requiring birth parents and adoptive parents to create a parenting plan, which would be attached to the adoption order. A parenting plan encourages parties to address issues such as continuing contact and access, and allows them to express their intentions at the outset. If difficulties later arise, parties will have access to mediation services, but the plan itself will not be enforceable by Court order.

The importance of openness (honesty) in adoption can be emphasised by liberalising rules governing access to adoption information. It is a fundamental right to have access to sufficient information to form a sense of one's own identity. The Commission recommends that birth certificates, adoption information and records be made available to the adopted person (at any age), birth parents and adoptive parents as of right. A new "long-form" version of a birth

certificate, which lists the person's given name at birth, adoptive name, the birth parents, the adoptive parents, and the date and reference number of the adoption order should also be made available. This would be in addition to the original birth certificate and the amended birth certificate currently available. An emphasis upon openness, however, must be balanced against an adopted person's right to privacy. For this reason the Commission recommends that persons other than those referred to above be permitted to obtain adoption information or records, or the long form birth certificate, only with the permission of the adopted person or the Family Court.

A NEW FRAMEWORK

One of the major criticisms of current adoption law is that it is fundamentally out of step with other family-related legislation (such as the Guardianship Act 1968 and the Children, Young Persons, and Their Families Act 1989 ("CYPFA")), and there are many occasions when such legislation needs to work in tandem. Spreading basic guidelines for the regulation of family relationships across three pieces of legislation, enacted in different eras and with different guiding principles, produces unnecessary inconsistency in our law. For this reason the Commission recommends the enactment of a Care of Children Act, which will define the responsibilities and rights of parenthood, and will incorporate provisions from the Guardianship Act and the CYP&F Act that define who is, who can apply to be, and who may be removed as, a guardian. Adoption can then be viewed as one of a number of options for the permanent care of a child. The Commission recommends that the new Act place an emphasis on exploring all options (including placement within the family) before adoption of the child is contemplated.

OTHER RECOMMENDATIONS

The issues discussed above go to the heart of the Commission's recommendations, but are merely a few amongst many others made in the paper. We now summarise the balance of the Commission's recommendations:

Cultural adoption practices

A number of submissions criticised the euro-centric approach of the Adoption Act and its emphasis on the nuclear family, as opposed to wider family (whanau, hapu, iwi). Several Maori submitters spoke of being adopted by a Pakeha family and feeling caught between two cultures. Many commented on the damaging effect that the Act's emphasis on secrecy has had upon Maori adoptees. The Commission recommends as a general principle that a child should, where practicable, be placed within a family of the same culture. Cultural considerations should be taken into account as part of a consideration of the welfare and best interests of the child.

The Commission does not recommend that customary adoption practices (including Maori customary adoption or "whangai") should be specifically recognised by law. There is little agreement about whether customary adoption practices should be given legal effect, and if so, what that effect should be. The Commission considers that the changes recommended in the report will resolve many of the concerns raised by Maori and other cultural groups.

Intercountry adoption

Adoptions by persons habitually resident in New Zealand of children habitually resident in an overseas country should be made in accordance with the principles of the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention)* even where the overseas country is not a party to the *Hague Convention*. This is to ensure that the interests of the child are protected at every stage of the intercountry adoption process.

Who may be adopted?

The Commission recommends that children may only be eligible to be adopted up to the age of 16. The Court should have a discretion to make an adoption order in respect of a person aged between 16 and 20 where the young person wishes it and it is clear that the welfare and interests of the young person require an adoption order to be made. This distinction recognises the growing autonomy and declining vulnerability of a young person reaching adulthood.

Who may adopt?

The Commission has adopted a two-step criteria of "eligibility" and "suitability" regarding persons wishing to adopt. People should not be excluded from being eligible to adopt a child on the grounds of their marital status or sexual orientation, rather they should be assessed for suitability to adopt a particular child on a case-by-case basis. The two exceptions to this principle occur in relation to step-parent and intra-family adoptions. In such cases, because of the resulting genealogical distortions that may occur as a result of adoption, the Commission recommends that a Court must consider any genealogical distortion that will occur, the degree of contact the child currently has with his or her birth parents, and whether guardianship or the proposed concept of enduring guardianship would be preferable to adoption.

Consent to an adoption application

The Commission makes a number of important recommendations regarding the methods of obtaining consent to an adoption and the protections that should be built into the process. In particular, the Commission recommends that a birth father's consent should always be obtained to an adoption, regardless of whether he is a guardian of the child. The present provisions for dispensing with consent are sufficient to deal with a clearly inadequate or absent father. The Commission considers it is a child's right for the father to be involved in this fundamental decision. The Commission also recommends that the child's views relating to the adoption must be ascertained and given due weight, in accordance with the child's age and maturity.

Adoption orders

The Commission recommends a provision allowing the adoption order to be discharged in special cases where the adoptive relationship has irretrievably broken down.

Surrogacy

The Commission has concluded that surrogacy needs to be considered as a discrete issue, and has asked the Minister for a reference to enable the Commission to conduct a review of surrogacy and associated issues.

Copies of the paper can be obtained from the Law Commission website (www.lawcom.govt.nz) or from Colleen Gurney, phone 473 3453. For any other queries, please contact Helen Colebrook, 914 4830 (DDI) or e-mail:

adoption@lawcom.govt.nz . ❑

TAX UPDATE

Jan James and Raymond Yee, Simpson Grierson, Auckland

discuss the updated attribution rule

At [2000] NZLJ 143 we discussed the government's proposed "attribution rule". This has since been before the Finance and Expenditure Select Committee in the form of the Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill.

The Committee has now reported back on the Bill and recommended a number of changes. These have to some extent clarified problem areas but they also highlight the cumbersome nature of the new legislation.

THE ATTRIBUTION RULE

The requirements of the attribution rule have not changed substantially since it was first announced. The rule will apply to attribute income of an interposed entity to a service provider, subject to exceptions, if:

- 80 per cent or more of the interposed entity's gross personal services income during the income year is derived from the sale of services to one purchaser or a person associated with the purchaser; and
- 80 per cent or more of the interposed entity's gross personal services income during the income year is derived through services personally performed by a service provider or a relative of the service provider; and
- the service provider's net income for the year in which an attribution would be made is over $60,000 (so losses from other activities will be relevant); and
- substantial business assets are not a necessary part of the business structure that is used to derive the interposed entity's gross income.

EXCEPTIONS

The rule will not apply in three important cases:

- the interposed entity and the service provider are both non-resident throughout the entity's income year; or
- to the extent that the services personally performed by the service provider are essential support for a product supplied by the interposed entity; or
- the amount to be attributed is less than $5000.

GROSS INCOME/DEDUCTIONS

Where the attribution rule applies, the amount attributed is gross income to the service provider. The interposed entity will still also derive gross income from the service purchaser, but to prevent double taxation, the interposed entity will be able to deduct from its gross income the amount attributed to the service provider.

AMOUNT TO ATTRIBUTE

The amount the interposed entity must attribute to the service provider is the lesser of the following amounts:

- the interposed entity's net income for the income year, calculated as if its only gross income were derived from personal services; and
- the interposed entity's net income for the year; and
- if the interposed entity is a company or trust that has a net loss available for carry forward that arises only from personal services, the interposed entity's net income for the income year, offset by any net loss carried forward from a previous income year.

Net income

"Net income" is the figure obtained after deducting allowable expenses from gross income. If an interposed entity only derives personal services income such deductions would generally include "head office" expenses incurred in running a personal services company. Where the interposed entity derives other income, indirect expenses (such as head office expenses) will need to be apportioned – apportionment guidelines are to be addressed in a future TIB.

Because under the attribution rule deductions are taken before attribution, thereby effectively passing those deductions on to the service provider, there may still be some benefit in an employee providing services through an interposed entity rather than entering into employment.

Current year losses from other revenue activities can be taken into account in determining net income, although any income derived from those other activities is ignored. Furthermore, losses from previous income years can also be taken into account but only to the extent they arise from personal service income. If an interposed entity which supplies personal services is in a start up phase and generates losses, those losses can be used in future income years.

Where the interposed entity is a trust, any distributions of current year income to any beneficiary are ignored in calculating the trust's net income for this purpose. The rationale for this is that allowing distributions to be subtracted from attributed income could frustrate the anti-income splitting objective of the rule.

However, after the net income is calculated, it is reduced by any beneficiary income derived by the service provider from the trust in the income year. This means that any beneficiary income that has been derived by the service provider is not attributed, to prevent the same amount being included twice in the service provider's gross income. (There are also similar provisions for companies in respect of dividends paid to the service provider and profits of a partnership that are allocated to the service provider.)

By way of example, assume trust A:

- receives $100,000 of personal services income (from the services of a single service provider); no other income;
- has head office expenses of $10,000;
- pays $50,000 salary to the service provider; and
- distributes $10,000 to the service provider as beneficiary income for that income year.

Trust A's gross income

Trustee income	$90,000
Add back beneficiary income distributed	$10,000
Total	**$100,000**

Deductions	
Head office expenses	-$10,000
Salary	-$50,000
Net income	**$40,000**
Deduct beneficiary income received by service provider	-$10,000
Amount attributed to service provider as gross income	**$30,000**

Trust A's tax return would show after the attribution:

Trust A's gross income	
Trustee income	$90,000
Deductions	
Head office expenses	-$10,000
Salary	-$50,000
Amount attributed to service provider	-$30,000
Net income	**$0**

DOUBLE TAXATION

Generally, double taxation should not arise from the attribution rule because the amount attributed is expressly allowed as a deductible expense of the interposed entity, thus offsetting the gross income derived by the interposed entity from the sale of the personal services. If the accounting treatment of the amount attributed follows the tax treatment, there will be no surplus income to distribute which could result in double taxation.

Any salary paid by an interposed entity to the service provider will be gross income of the service provider as monetary remuneration, but will be deducted from the income attributed to the service provider.

Double tax has not, however, been entirely removed.

Companies

Double taxation can arise where the entity is a company and income is distributed as a dividend – eg where:

- income is distributed by way of a dividend prior to it being realised that the attribution rule applies. Attributing all the income of an interposed entity to a service provider means that the interposed entity will not derive any imputation credits. The recipient of the dividend would therefore derive gross income without any imputation credits to shelter the resulting tax liability; or
- for whatever reason, the accounting treatment of the amount attributed does not follow the taxation treatment (for example the whole attributed amount is not treated as an accounting expense for the interposed company, thereby leaving surplus accounting income in the company to distribute as a dividend, which again would not be sheltered by imputation credits).

The legislation allows a credit to the interposed company's imputation credit account equal to 33 per cent of the attributed income. If the interposed company's financial statements are adjusted to reflect the attributed income an adjusting debit must be made to the interposed company's imputation credit account to offset the initial credit.

This remedy only counters double tax, however, up to 33 per cent tax on dividend income. If the shareholder is a 39 per cent taxpayer, the dividend income will be taxed at six per cent in the hands of the shareholder, and again in the hands of the service provider at the latter's marginal tax rate. This remedy also fails to address in full the difficulties in the first bullet point above where the attribution is not recognised in the interposed company's financial statements.

Trusts

A similar problem arises if the interposed entity is a trust and the attribution rule causes the trust to be in a net loss position. This could happen if income is distributed to a beneficiary (so that it is no longer trustee income for tax purposes). As discussed above, these distributions are not subtracted when determining the amount of income to be attributed (assuming the beneficiary is not the service provider). Because of this, a trustee could end up with a deduction for the attributed income in excess of its actual trustee income, giving rise to a loss, and the amount distributed would be taxed twice – once in the hands of the beneficiary and once in the hands of the service provider.

As a way around this difficulty, to the extent of that net loss, beneficiary income must be reduced according to proportions determined by the trustees so that the trust's taxable income is zero. Failing determination by the trustees, the reduction should be pro rata over all beneficiary income.

- Trust A receives $100,000 of personal services income;
- trust A distributes the $100,000 as beneficiary income to beneficiary B (not the service provider); and
- trust A has no expenses.

Trust A's net income	**$100,000**
Amount attributable to the service provider as gross income	$100,000

Trust A's tax accounts would show:

Trust A's gross income (because it has been distributed as beneficiary income)	**$0**
Deductions (amount attributed to service provider)	-$100,000
Net loss to trust A	**-$100,000**

However, without the specific provision, beneficiary B will be taxed on the $100,000 of beneficiary income and the service provider will be taxed on the $100,000 of attributed income (being the same income). To remove the double taxation, the trustees must reduce the beneficiary income distributed to beneficiary B from $100,000 to zero.

PROVISIONAL TAX

Provisional tax paid by an interposed entity during an income year will be able to be transferred to the service provider who has the attributed income.

PARTNERSHIPS

Special provision is made for partnerships where a person provides administrative services but is not paid for those services (other than a share of the partnership profits).

Assume a husband and wife form a partnership with the wife performing the personal services and the husband providing book keeping services. The husband does not receive a salary. The partnership profits are allocated 75 per cent to the wife and 25 per cent to the husband.

Under the attribution rule, the total partnership income will be attributed to the wife as the service provider even though the husband is entitled to a 25 per cent share. The 25 per cent share is not deductible in the partnership's net income calculation because it represents a distribution of profit. This could give rise to "reverse" income splitting – over-correcting the perceived mischief.

To solve this, the amount attributed to the service provider must be reduced by the market value of the services provided by the non-salaried person. ❑

WORLD TRADE BULLETIN

Gavin McFarlane, of Dechert, London

reviews an eventful month in international trade

THE PETROLEUM DILEMMA

Not just in the United Kingdom but throughout much of the developed world, governments have been shocked by the strength of feeling demonstrated recently by public anger over the cost of vehicle fuel. A combination of high rates of excise duty and the limitation on production by the OPEC members has combined to make the price of petroleum products almost beyond the pocket of individuals on national average earnings, yet as the shortages bit ever deeper, it has become clear that western populations have come to depend ever more heavily on their cars for access to their places of employment and their sources of essential foods as public transport has been cut back, particularly outside the city centres.

Petrol and diesel are bulk products, as the current difficulties of moving them from the refineries to the points of retail sale demonstrates. As such it is a simple matter to apply a high rate of excise duty based on the amount of fluid taken into the tank of a vehicle. If say electricity were to be developed as a viable alternative source of vehicle power, it is hard to see how an excise duty which would raise anything like similar amounts could be applied to the taking in of electrical power to the batteries on which vehicles would run. On the assumption that batteries could be recharged simply by plugging into the same source of electrical energy as powers houses all over the country, it would be well nigh impossible to differentiate between electricity used to heat a kettle or drive a washing machine, and electricity applied to the recharging of a vehicle's batteries.

The recent emergencies have also shown how much more the populations of the advanced economies have come to depend on their own private road transport since the fuel crises of the seventies. Successive governments have repeatedly invoked the mantra of a return to widespread public transport, in the hope of reducing congestion on the roads, but it took no more than forty eight hours of disruption to show that without access to private motor transport, a large number of people could not get to work, so that emergency services would in many cases shut down simply because their staff could not get to work. And with the decline of the traditional shopping centres on high streets, forcing people to buy their basic foodstuffs and other necessities at out of town supermarkets, the emergency quickly showed that in many cases the public transport did not exist to get consumers to the points of sale. All these factors present a growing challenge to the ability of governments to control events within their own economies, when factors on the global stage such as the price of oil are in the hands of supranational forces beyond their control

NAFTA AND THE s 11 PROCEDURE

There has been renewed interest generated in the idea of developing links between member states of the EU and NAFTA. Since the inception of the free trade arrangements between the US, Mexico and Canada at the start of the nineties, there has been recurring discussion of whether some kind of association agreement might be the first step on the road to a closer economic relationship between the two economic giants. But there is one important feature of the NAFTA relationship which does not appear in the EU, and on present sentiment is unlikely ever to be included. This is the "s 11 provision", under which private corporations can bring an action against any of the governments of the three NAFTA member states if they consider that the company's assets have been expropriated by some form of government action. Litigation of this kind is already developing in North America, and a recent case involving Mexico illustrates the point. A company registered in California under the name of Metalclad Inc had erected a site in Mexico for the treatment of hazardous waste material, having received approval to do so from both the national government in Mexico City, and the government of the Mexican state in which the operation was situated. But a local regulation prohibited the factory from operating, and the locality in which the facility had been built was declared to be an area of ecological interest, and was duly made subject to protective orders. Three years ago an arbitration panel was set up under s 11, and its decision has just been made public. It held that the American company had not received the national treatment which it was entitled to expect under NAFTA regulations, and the action of the Mexican authorities had been a denial of the minimum standard of treatment which investors were entitled to expect under international law. It has ordered Mexico to compensate Metalclad for the actual expenditure it had incurred in setting up the plant, although the company had claimed a larger amount which it said it would cost to dispose of the unit.

The Mexican government is now left with the option of asking the arbitration panel to look at the matter again, although it is hardly likely to admit that it was wrong, and to reverse a decision which it has deliberated over for so long. Alternatively, it can challenge the panel's decision in the domestic Courts, on the basis that the prescribed procedures were not properly applied. Meanwhile under NAFTA rules, Metalclad Inc can take steps to enforce the judgment it has obtained from the panel in the Courts of the United States. A number of similar cases are building up in the three NAFTA member states, and the government authorities in Ottawa, Washington and Mexico City are bracing themselves for further actions of the kind taken by Metalclad. Many of these actions will be brought by corporations

against central government legislation on protection of the environment. This factor makes it less likely that the member states of the EU would be inclined to go for anything similar the s 11 provision, and would certainly be a brake on any movement towards closer relationship between the two economic blocks. For there is already a precedent two years ago in the shape of the draft Multilateral Agreement for Investment (MIA). This had been promoted by the OECD, and contained a proposed provision similar to the s 11 procedure which would have allowed private corporations to sue national governments in certain circumstances where it was alleged that government action had damaged the interests of that company. But the refusal of some of the states which were being asked to sign up to the draft convention balked at this, and declined to put their signatures to the document. In particular Lionel Jospin the French prime minister objected that a formula of this kind would usurp the power of national governments to govern. It does seem a basic point of principle around which professional politicians of most parties are likely to rally; is government of the future to be conducted by the political class of professional elected representatives, or is it to be controlled by corporations? This may become the most crucial constitutional debate of the new century.

CAROUSEL RETALIATION AND THE WTO

The history of the dispute resolution procedure of the World Trade Organisation since it was established at the end of 1994 on the back of the Uruguay Round of GATT has come more and more to centre on the increasingly bitter disputes between Brussels and Washington. These seem to have taken off shortly after the ability of WTO members to obtain enforceable judgments against other members came into operation, with the capacity on the part of the successful state to obtain WTO endorsement of sanctions against the offender until it agrees to comply with the WTO rules which it has infringed. The first leading case was the banana dispute, and although the WTO has ruled against the EU member states on a number of occasions, Brussels has not yet come up with a proposal for a new regime for importation of the fruit which would be acceptable to the United States and its Latin American allies. Similarly the saga of EU refusal to admit beef which has been treated with growth hormones rolls on, and in respect of both cases the United States has obtained the approval of the WTO authorities for the application of sanctions against certain categories of goods which are exported from Europe to the United States. The American authorities have decided to operate these sanctions on a rotating carousel basis, in order to cause – as they believe it will – greater harm to the industries which are affected. This is certainly a more effective approach from the Americans' point of view, but it is not much fun for the industries in Europe which are on the receiving end. At the present time a rather bizarre mixture of handbags, perfumes and food products is in the firing line. Delicatessen foods feature very strongly, particularly specialist cheeses, preserved fruit and sweet biscuits. Prominent in the luxury biscuit category is shortbread made in Scotland. As the carousel turns, so new goods are due to enter the list of those to suffer sanctions, and in November another Scottish product, cashmere knitwear, is due to join the hit list. This could well be a terminal disaster for the Scottish borders, where the knitwear industry is a staple, and where a good deal of the finished products are destined for the American market.

But as the situation deteriorates, fuel is likely to be added to the flames by escalation of the recent major case in which the EU has obtained judgment against the United States. This is the matter of the foreign sales corporations (FSCs), where the exemptions obtained by American corporations using this medium from domestic business taxes has been held by the WTO to be an illegal export subsidy. It is the case that under WTO rules, sanctions can be applied by the EU against American exports until the United States complies with the WTO ruling, and the size of the numbers involved here is so great that it will make the sanctions currently being applied by Washington seem a drop in the ocean. Feelings in Congress on trade matters runs high, and there is a strong protectionist element – just as there is in some EU circles! But the dangers are that escalation could lead to an assault by the United States authorities on the European tax structures which relate to the export of goods, and the current situation about VAT on exports could be high on the target of American complaints to the WTO.

A full blown trade war across the Atlantic is the last thing that the developed world wants, for this has the potential to bring to an end the long run of increasing prosperity which has taken place since World War 2. But circumstances seem to conspire to make the situation still worse. Yet another complaint is being lodged by the European Union with the World Trade Organisation over alleged malpractice by the United States. In 1998 the United States Congress passed s 211 of the US Omnibus Appropriations Act. This provision places an obligation on Cuban companies which wish to register a trademark in the United States previously owned by a business which was expropriated by the Cuban government when it came to power in the 1960s, to obtain the agreement of the original owner prior to such registration. This legislation includes the situation where the original owner abandoned its trademark registration in the United States, thus making the trademark in question available to anybody. This section also prohibits a Court in the United States from recognising or enforcing any assertion of such rights unless the original owner has given its consent. Clearly any former owner who has emigrated to the United States is in the nature of things going to refuse consent to registration by the Cuban company. A case on the point came before the Courts recently, and in the United States Appeal Court an attempt by a Cuban-French company to defend in American jurisdiction its trade name and trademark for "Havana Club", a Cuban white rum, against the American Bacardi corporation was thrown out, largely on the basis of s 211 of the 1998 Act.

The Commission of the EU has taken strong exception to this ruling, and has claimed that the terms and conditions required by the Omnibus Appropriations Act infringe a number of the obligations which the United States assumed when it adhered to the Trade Related Aspects of Intellectual Property Rights Agreement. This is the TRIPs agreement which is now a corner-stone of the GATT system, moving international trade law firmly into the field of intellectual property. America, alleges Brussels, is attempting to deal with foreign right holders with Cuban assets less favourably than it deals with domestic American right holders. Brussels also contends the rules of international trademark law is being broken, as the registration of a trademark and its enforcement in the Courts cannot be made conditional on the consent of a previous trademark proprietor who has abandoned his rights. ❑

AID FOR WHOM?

Patricia Schnauer, Schnauer and Co, Milford

asks who legal aid is meant to benefit

Recent figures released by the Legal Services Board (LSB) under the Official Information Act highlight a widening distinction between privately funded and taxpayer funded Court cases. The figures suggest that whereas private individuals who bring Court cases are guided by practical economic expediency, this common-sense approach does not restrain those on legal aid.

Claims for exemplary damages are a good example, the figures show that lawyers, not the litigants, are the real winners in this new growth industry.

Over the past 2 – 3 years the LSB has received increased numbers of legal aid applications for exemplary damages. The number now stands at 208, although many are in their infancy.

Big money has been spent so far to fund the top five legal aid grants for exemplary damages, namely $192,937; $139,078; $101,127; $50,169; $20,173. While the LSB has ongoing commitments at present of over a $1 million for exemplary damages cases, undoubtedly, both the number of cases and the money needed to fund them will increase. Many, such as the top fee earner at $192,937, have yet to be concluded.

The LSB says that based on past Court awards for exemplary damages, it expects that future damages awards will not exceed $50,000, with average payments probably between $15,000 and $20,000.

Clearly everybody has the right to sue, irrespective of what is at stake. But many people do not sue because it is just not worth while. If a private person, left to their own devices and resources, knew they had to pay $200,000 plus in legal fees to recover a maximum of $50,000, they simply wouldn't start. Yet that is exactly what occurs when people qualify for a taxpayer funded legal aid system, to pay for their Court case.

The LSB quite rightly has the power to take a charge over any damages awarded. The High Court has held in one case that notwithstanding damages and costs awarded totalled only $50,000, legal aid costs of approximately $39,000 could be recovered. This meant the litigation spent $39,000 to recover a net $11,000. Would the plaintiff have spent their own money for the far from guaranteed chance of such an outcome?

Consequently lawyers, who without legal aid would not have had a case, end up with $39,000 paid for by the taxpayer, while the litigant ended up with $11,000. It is a classic case of "producer capture". The scheme was designed and implemented to benefit litigants. Instead, it seems to benefit lawyers.

It is not only claims for exemplary damages, where people lose sight of the financial implications when they stop paying for something personally. Details released under the Official Information Act noted a long running civil case had cost $76,581 in legal aid to date and still not reached trial. The case involves a claim for misrepresentation. It was funded by the plaintiff personally from 1992 to 1996 when legal aid took over. In 1996 legal aid was estimated to cost $15,000. Today it stands at $76,581 and is still ongoing. The legal aid committee describes the case as "straightforward". "Double handling" perhaps contributing to increased costs.

All litigation involves a risk assessment, as the plaintiff spends money against an uncertain outcome. Provided there are reasonable grounds for bringing the claim, there is nothing wrong with legal aid committees on occasions approving legal aid fees, unsure of whether a positive return is guaranteed. What is wrong, is a legal aid system which allows legal expenditure to continue where ordinary litigants, spending their own money, would have called a halt to the proceedings because the expenditure was out of proportion to the likely return and outcome.

The argument does not depend on any individual case. It depends on building into the system controls which prevent litigants proceeding with cases where there is a high probability the gains are insufficient to warrant the risk. Not only do such cases affect the legal aid budget, they also clog up the Courts. Worse, they can cost a non-legally aided litigant huge costs they would not otherwise have to face.

How can the legal aid system be improved?

- the Legal Services Board urgently needs the proper legislative authority to control the grants of legal aid;
- the LSB should have power to employ lawyers to handle special cases. Claims for exemplary damages, particularly in class actions, are a good example. Legal aid should not deliver an open cheque book for lawyers bringing such cases;
- the LSB should be able to negotiate legal aid fees either for a contingency fee or, alternatively, to tender cases to selected firms for a fixed fee; and
- the Court hearing the case should have the power to comment in its judgment to the LSB, when it considers legal aid moneys have not been wisely spent and to reverse or amend any grants as the Court thinks fit. This seems particularly appropriate in light of Penlington J's recently reported comments on a claim for exemplary damages against a hospital. Describing that case His Honour said the claim for exemplary damages was hopeless and "doomed from the start". In ordering costs against the plaintiff His Honour limited these to $10,000 as she was on legal aid.

Government should speed up the Legal Services Bill, at present before a Select Committee, so as to give the Legal Services Board more power to ensure the proper expenditure of taxpayers' money. ❑

A CLEVER CURVED BALL

Derek S Firth, Barrister, Auckland and past President of AMINZ

considers appeals from arbitral awards

In *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* CA 57/00 18 July 2000, the Court of Appeal has taken the opportunity to lay down sensible guidelines to apply to applications under cl 5 of the Second Schedule to the Arbitration Act 1996 for leave to appeal on questions of law from a decision of an arbitral tribunal. More erudite commentators will analyse this decision but I would like to add my own simplistic thoughts at this stage.

The judgment of the Court (Richardson P, Henry, Thomas, Keith and Blanchard JJ) delivered by Blanchard J, should make mandatory reading. A knowledge of this area of arbitration is an essential element of legal practice touching as it does almost every area except criminal law. Further, any unanimous decision from this strong Bench is to be both respected and treasured.

Of the many options stemming from the previous judicial quagmire I have favoured the approach of Baragwanath J in *Weatherhead v Deka New Zealand Ltd* [1999] 1 NZLR 492. He had to consider the position in *Pioneer Shipping Co v PTP Tioxide (The Nema)* [1982] AC 724 which was not only a leading judgment in the UK on the topic but it had been adverted to by the Law Commission when recommending the new Arbitration Act for New Zealand. The Law Commission had assumed that our Courts would follow the principles in *The Nema*.

In brief summary, *The Nema* involved an application for leave to appeal an award in an international arbitration heard in London. Lord Diplock, who delivered the leading judgment of the House of Lords, referred to the fact there was a need to deal with these applications in summary manner, and some guidelines were formulated, the principal one being that leave should be granted more readily where a standard form contract was involved.

In the setting of a country such as the UK, with a population of over sixty million people, and a backlog of, apparently, thousands of applications (in domestic and international arbitrations) for leave to be determined, the rather superficial demarcation adopted in *The Nema* may have some justification.

But New Zealand is different. We are a little under four million people and perhaps an interesting comparison of size is that New Zealand's total electricity demand is similar to that of greater Birmingham. We also have a more egalitarian society than the one with which Lord Diplock is familiar. New Zealand Courts would want to be just as concerned with parties who chose not to use standard forms as those who do.

Of much greater relevance in New Zealand are such factors as the amount at stake, and the experience of the arbitrator, which do not feature in *The Nema*.

In *Weatherhead* Baragwanath J was more diplomatic when he said (favouring a more flexible approach):

> But *The Nema* guidelines are not a statute. ... Ours is a smaller society in which it is not yet necessary to control a flood of international arbitrations.

In *Doug Hood*, the Court of Appeal initially gives the appearance of distancing itself from that view but it then does two excellent things.

First, in the initial and most important guideline it resolves a range of conflicting thresholds which had emerged from High Court judgments and said that

- if it is a one-off point unlikely to recur and is without precedent value, then "... unless there are very strong indications of error [of law] leave should rarely be given";
- in other cases a "strongly arguable case would normally be required".

In this way, the Court has opted for a high threshold and adopted a test similar to that in England ("obviously wrong" pursuant to s 69(3) of the Arbitration Act 1996 (UK)) and in Australia ("strong evidence that the arbitrator ... made an error of law" (the Commercial Arbitration Acts in Australia)).

Second, and of equal importance, the Court has nicely sidestepped the pompous part of *The Nema* and set out a schedule of eight guidelines which, in my respectful view, are far more suited to New Zealand. These are: most importantly:

- the strength of the challenge (strongly arguable case required);

and not in any order of importance:

- whether the question of law arose unexpectedly (greater readiness to grant leave) or was the very point originally put to the arbitrators (less readiness);
- the qualification(s) of the arbitrator(s);
- the importance of the dispute to the parties;
- the amount of money involved;
- the amount of delay involved in going through the Courts;
- whether the contract provides for the arbitral award to be final and binding; and
- whether the dispute before the arbitrators is international or domestic.

The primary high threshold has been tempered with a set of secondary guidelines appropriate to this country.

I am sure *Weatherhead* fans can live with that.

It will be interesting to hear what other commentators have to say regarding the weight to be applied to the words "final and binding" where they appear in an arbitration clause in relation to an award. It has certainly been thought by many drafters of commercial contracts that those words meant "final and binding subject to any legal rights of review". This has certainly been the law in England and

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QUEEN'S COUNSEL

Noel Cox, Auckland University of Technology and Professor Peter Spiller, University of Waikato

background the government's review

The Attorney-General, the Hon Margaret Wilson, has called for a review of the office of Queen's Counsel. This paper outlines the history of the office in England and its extension to New Zealand; then to comment on its current role and the current appointment criteria and process. In so doing, we intend to submit that the office as presently constituted is effective and serves a useful purpose, and that no significant reform is needed.

HISTORY OF THE OFFICE

England

Queen's Counsel are barristers appointed by patent to be one of Her Majesty's counsel learned in the law. They do not constitute a separate order or degree of lawyers. But whilst utter barristers were called to the Bar by their inn of Court, the Queen's Counsel were called by the Court within the Bar, a distinction which is, of course, inapplicable in New Zealand, where barristers are called to the Bar by the Judges of the High Court. They were thus more than merely a professional rank, as their status was conferred by the Crown and recognised by the Courts.

The Attorney-General, Solicitor-General, and King's Serjeants were King's Counsel in Ordinary. The first Queen's Counsel "Extraordinary" was Sir Francis Bacon, who was given a patent giving him precedence at the Bar in 1597, and formally styled King's Counsel in 1603 (WS Holdsworth, *History of English Law* (1938) vi 473-4).

The obsolete rank of Serjeant-at-Law was formerly more senior, though it was overtaken formally in the 1670s, and professionally in the course of the late eighteenth century by the newer rank. The Attorney-General and Solicitor-General, had similarly succeeded the King's Serjeants as leaders of the Bar in Tudor times, though not technically senior until 1623 (except for the two senior King's Serjeants) and 1813 respectively (JH Baker, "The English Legal Profession 1450-1550" in Wilfred Prest (ed), *Lawyers in Early Modern Europe and America* (1981) 20). But the Queen's Counsel only emerged into eminence and integrity in the early 1830s, prior to when they were relatively few in number. It became the standard means of recognising that a barrister was a senior member of the profession, and the numbers multiplied accordingly (Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (1983) 35. It became of greater professional importance to become a QC, and the serjeants gradually declined. The QCs inherited not merely the prestige of the serjeants, but enjoyed priority before the Courts.

Queen's Counsel and serjeants were prohibited, at least from the mid-nineteenth century, from doing chamber work. They were briefed together with a junior barrister, and they had to have chambers in London (Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (1983) 98-99). In Scotland, a separate roll of Queen's Counsel was created only in 1897, with the first appointed 1898. Formerly, the only QC appointed from the Scots Bar were the Law Officers, and the Dean of the Faculty of Advocates. Till 1920 in England and Wales they had to have a licence to appear in criminal cases for the defence. On appointment, QCs renounced the preparation of written pleadings and other chamber practices.

Queen's Counsel were traditionally selected from barristers, rather than from lawyers in general. This was because they were counsel appointed to conduct Court work on behalf of the Crown. Although the limitations upon private employment was gradually relaxed, they continued to be selected from barristers, who had the sole right of audience to the higher Courts. However, in 1994 solicitors of England and Wales were entitled to be admitted to the upper Courts. Some 275 were so practising in 1995. In 1995 these solicitors alone became entitled to apply for appointment as Queen's Counsel. The first such was appointed March 1997.

New Zealand

First appointed June 1907, Queen's Counsel occupy in New Zealand a position in the nature of an office under the Crown, although the formal authority for the appointment of Queen's Counsel is reg 3 of the Queen's Counsel Regulations 1987. Appointments are made by the Governor-General by Order in Council, on the recommendation of the Attorney-General with the concurrence of the Chief Justice. A fee is payable on appointment (Queen's Counsel Regulations 1987 cl 4, $100, now $270 by 1992/128). Till 1956 appointments were made under the general authority of the Letters Patent Constituting the Office of Governor-General, by letters patent. Since then they have been under the authority of the Law Practitioners Act 1955, and now 1982 (1955 s 15 (and later enactments)). Queen's Counsel receive a patent on appointment.

As soon as possible after the appointment, a new Queen's Counsel is called to the inner Bar, and reads the declaration of a Queen's Counsel. The following is the text of the declaration taken by Queen's Counsel:

> I do hereby declare that well and truly I will serve the Queen as one of Her Counsel learned in the Law, and truly counsel the Queen in Her matters when I shall be called and duly and truly minister the Queen's matters and sue the Queen's process after the course of the law and after my cunning. I will duly in convenient time speed such matters as any person shall have to do in the law against the Queen as I may lawfully do without long delay, tracting, or tarrying the party of his lawful process in that to me belongeth. I will be attendant to the Queen's matters when I shall be called thereto.

This declaration preserves the identity of these senior counsel as "Her Majesty's Counsel learned in the law".

There is little evidence of why Queen's Counsel were only introduced in 1907, fifty years after Australia, and thirty years after the last Australian colony received them (Jeremy Finn, "A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915" [1995] NZLJ 95). However, it has been suggested that it was to improve the appointment of Judges. Since Hoskings and Stringer in 1914, nearly half of the Bench have been King's or Queen's Counsel, including six of seven Chief Justices from Skerrett to the present. Not all welcomed the new office however, with opposition from both within and without the legal profession (Finn, Jeremy, "A Novel Institution: The First Years of King's Counsel in New Zealand 1907-1915" [1995] NZLJ 95, 96). This was motivated largely, it would seem, by suspicions that the new office would be monopolised by the larger centres.

Till the passage of s 3 of the Law Practitioners Amendment Act 1915, QCs could practice as solicitors also. The forced abandonment in 1915 of joint practice is the only instance where Parliament has intervened in an institution already operating as part of the prerogative, and it affected counsel already appointed (Finn [1995] NZLJ 95, 97). In 1935 s 44 of the Law Practitioners Act Amendment Act made the prohibition on joint practice clearer. This development was designed to bring the status of Queen's Counsel into conformity with contemporary British practice.

No practitioners from the independent Bar applied for silk until 1924 (although two Solicitors-General took silk), apparently because successful barristers and solicitors believed the risk of abandoning practice as a solicitor to be too great. The term silk of course refers to the traditional use by senior counsel of silk gowns, in contrast to the gowns of junior barristers, which should be stuff, or woollen cloth. Today, both will be likely to be made of a synthetic material, though differences in cut and fabric are still apparent. From 1924 the English tradition, conspicuously not present at the inception of the appointment, of appointing those in practice as barristers sole, was adopted (J Finn [1995] NZLJ 95, 98). Since then the number of QCs have gradually increased, as has the number of members of the independent Bar.

CURRENT POSITION

Role

Although originally the QC was an extraordinary Crown officer – and their declaration retains this flavour – they have since the time of King William IV been largely seen as a mark of recognition for the leading counsel of the day. This was never purely an honorific distinction, however, as it imposed certain obligations, some of which were at times onerous. It is best seen as a professional distinction.

The government of New South Wales has ceased to recommend the appointment of Queen's Counsel since 1993 ([1993] NZLJ 1. Legal Profession Reform Act 1993 (NSW) §380). The motive for such a move may have been the republicanism of the then state government. The high level of fees paid to QC was also given as a factor, although there was little hard evidence that the incomes of QCs were higher than would be expected for counsel of their seniority. Certainly, there is no evidence that senior counsel has declined.

However, the need for some means of identifying senior counsel was felt to be necessary. As a consequence, the New South Wales Bar has invented the grade of Senior Counsel ("SC") to fill the gap left by the abandonment of the status of silk (*Sydney Morning Herald*, 14 October 1993, p 4). Such a need is also seen in other professions, where it is usually met by the use of grades of membership in professional bodies. (Thus the seniority and experience of a professional arbitrator will be seen by their use of the style FArbINZ, less experienced by the style AArbINZ.)

The appointment of Queen's Counsel has also been ended in Queensland, which now uses the style State Counsel (SC). Thus, the need for a style for senior counsel was recognised. Senior Counsel are also found in Belize.

In Commonwealth republics, the office of Queen's Counsel has generally been retained, though with a new style. Thus they became Senior Counsel in Guyana and in Trinidad and Tobago, Senior Advocate in India, State Counsel in South Africa, President's Counsel in Sri Lanka.

It is clear that there are marked advantages to having a means by which senior members of the independent Bar may be identified. As a distinction conferred by the Crown, members of the general public, lawyers, and other interested parties can be confident that the recipient is a senior, experienced, and respected member of the Bar.

Appointment criteria

By 1963 there were only nine practising silks in New Zealand, and thirteen in 1968. They were to later increase in numbers as the independent Bar grew. In 1978 there were 23 QC and another 84 barristers sole. Thus 21 per cent of counsel were of the senior rank.

By 1992 there were 48 QC and another 219 barristers sole. The seniors now numbered 18 per cent. In 1996 the numbers were 53 QC and another 396 barristers sole (12 per cent senior). Discussion of the partial fusion of the legal profession between barristers and solicitors is beyond the scope of this paper. But, although generally anyone may practise as both barrister and solicitor in New Zealand, practice as a barrister sole is by no means uncommon. Indeed, the independent Bar continues to grow as the legal profession becomes more specialised.

The degree of fusion between counsel and solicitors varies throughout the Commonwealth, and indeed between jurisdictions within one country. But it is appropriate for QC to be selected solely from amongst counsel practising in the Courts, for any alternative would render the style meaningless. The English option of allowing solicitors with admission to the upper Courts to become QCs is unnecessary in this country, since all lawyers are now admitted as both barrister and solicitor.

Those lawyers who choose the path of barristerial practice alone should receive recognition. Although in the early years of the office in New Zealand QCs practiced as solicitors also, that was at a time when the independent Bar was small, and few could afford to abandon practice as solicitors. The independent Bar is now significantly stronger, and the division between barristers sole and those barristers and solicitors who choose to practice as solicitors also is more marked. Senior solicitors may be identified by becoming partners of firms. There is only the office of QC to distinguish a senior barrister. Given the existence of a separate Bar, were the office to be extended to those practising as solicitors, the nature of the office would be radically changed. If there is envy amongst solicitors of the bestowal of the office upon barristers alone, let the solicitors be appeased by the creation of a new office. This could be confined to solicitors, and might be styled Queen's Solicitor.

Appointment process

The criteria for appointment of QC were never drawn together in a comprehensive way. Appointment is made only of the select few regarded as worthy of the prize awarded to the specially diligent, learned, upright and capable members of the Bar (Memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476). In more recent years there have also been several one-off appointments of non-practising barristers, the first being Sir Kenneth Keith. (See Sir Thomas Eichelbaum, "Appointment of Queen's Counsel" [1995] NZLJ 8, where Sir Kenneth Keith was appointed. Similar honoris causa appointments have also been made in the United Kingdom.) More recently, the Clerk of the House of Representatives, David McGee, was appointed QC.

The general requirements for appointment include eminent practice at the Bar, reasonably frequent engagement in important litigation, professional success dependent on scholarship, Court experience and sound judgment, reputable private life, principal interest in the practice of law, and the spread of counsel at the Bars of the main centres. Application is made to the Solicitor-General, giving a history of experience at the Bar, and the particular reason for seeking to take silk.

Applications are sent to the Attorney-General and the Chief Justice. The latter seeks the views of the High Court and Court of Appeal Judges, and indicates to the Attorney-General whether he or she supports the application. The Attorney-General consults as he or she thinks appropriate. Applicants are notified by the Solicitor-General, and the Attorney-General publishes a list of appointments ([1995] NZLJ 95; memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476).

This is not an open process, in that selection is largely along lines similar to the selection of Judges. Selection of QC's is however more transparent. The Memorandum of 1980 makes the criteria of selection quite clear (Memorandum of November 1980 from the Chief Justice and Minister of Justice [1980] NZLJ 476). It is also unclear what alternative process could be adopted. Certainly, were the matter left entirely in the hands of the profession, as has happened in New South Wales, there could be public concern that the selection of new senior counsel was not made in an impartial manner. The selection process has also been criticised from time to time in England. On the 4th of April 1996 the appointment of 66 new QCs was announced. There had been 488 applicants, including 40 women and 14 from racial minorities. Of the new QCs, four were women, and one from a minority race. This was taken to imply discrimination of some kind, though the evidence for such a belief was inadequate (*Times* (London), 5 April 1996).

CONCLUSION

Appointment as a Queen's Counsel is not simply a matter of privilege, and Queen's Counsel are generally conscious that the conduct of their practice should reflect their responsibilities. The appointment of Queen's Counsel helps to provide incentives for those practising at the independent Bar, by providing an office to which Court practitioners can aspire. Most within the legal profession would agree that the standing and standards of the profession would be diminished if the rank of Queen's Counsel were to be abolished or seriously downgraded. (See Rt Hon Paul East, QC, "The Role of the Attorney-General" in Philip Joseph (ed), *Essays on the Constitution* (1995) 184-213.)

The title of Queen's Counsel (as opposed to Senior Counsel or the like) should be retained as reflecting New Zealand's constitutional structure, the history of the institution in New Zealand, and its established reputation in New Zealand and abroad. There appears to be no groundswell of opposing opinion or compelling reason to change. ❑

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Australia for some years: see the very good judgment of Giles CJ in *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312, pp 332 and 333. Presumably, the Court had in mind the obvious conundrum of the extent to which the public policy rule against ouster of the Court's jurisdiction continues to apply. The House of Lords clearly thought it did: *The Nema* (supra, 737 B-C and 741 C-E). But the argument for continuing with such a public policy rule is difficult to sustain when Parliament has barred an appeal for error of law in international arbitrations, unless the parties opt into such a regime, and permit the parties to a domestic arbitration to opt out of a right of appeal. The question did not fall for determination in *Doug Hood* because the necessary threshold to warrant leave was not reached for other reasons. It would be interesting to know what the Court would have done if the threshold had been reached because the words ... "shall be final and binding" appear in the New Zealand Standards NZSS 3910 1987 and NZSS 3910 1996. We will have to wait for a case where this point has to be fully argued.

Probably with these points in mind the Court has said that where there is such a clause, "... it will not be determinative, but it will be an important consideration". Just what that means in practice, remains to be seen.

I would imagine this decision will be warmly welcomed by everyone involved in arbitration (as well as the Courts which have to determine applications for leave).

As it happens, the work plan for the Law Commission for next year includes a review of the Arbitration Act. There are a number of good reasons for review (unrelated to issues relating to cl 5) but there is no doubt that the question of the appropriate threshold for applications for leave to appeal an award on questions of law would have attracted considerable attention from the Commission in view of the many varied approaches adopted in the High Court.

I would not be surprised if the Law Commission will now feel free to turn its mind to more pressing aspects of arbitral law reform. After all, the approach of Baragwanath J in *Weatherhead* appeared, at one point in the judgment, (p 19) to be kicked into touch; but I suspect that everything Baragwanath J could ever have wanted turned up later in the eight guidelines. His "ball" ended back in mid field without having touched the ground!

I have been honoured to serve a two year term as President of the Arbitrators' and Mediators' Institute Inc and in my final message to the 600 strong membership of that organisation, in June of this year, I said:

> many arbitrator members (myself included) will wish to lift our game to bring our skills more appropriately into line with the very high responsibilities reposed in arbitrators under the new Act, (all the powers of a High Court Judge) especially when coupled with the ever increasing reluctance of the Courts to interfere with awards.

That point is now even more apposite. ❑

CONTRACT INTERPRETATION

Don Holborow, Simpson Grierson, Wellington

ponders the factual approach to contract interpretation

The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations ... We must ... enquire beyond the language and see what the circumstances were with reference to which the words were used. (*Prenn v Simmonds* [1971] 3 All ER 237 at 240, per Lord Wilberforce.)

When Lord Wilberforce delivered the leading judgment in *Prenn v Simmonds*, he did not seem to realise he was starting a revolution in contract interpretation. It would appear from the judgment that His Lordship believed he was merely affirming and restating principles of long application.

Nonetheless, others have interpreted Lord Wilberforce's confirmation of the relevance of the background of a contract as elevating what is referred to as the "factual matrix" to the level of a touchstone of interpretation, overriding the language which the parties have used.

This development which, it is submitted with respect, is far more revolutionary, has been brought about by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98.

INVESTORS COMPENSATION

It is important to digest the following in full to appreciate the systematic way in which the ratio of *Investors Compensation* was presented (per Lord Hoffmann at pp 114-115):

> I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* and *Reardon Smith v Hansen-Tangen* [1976] 3 All ER 570 ... is sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life .... The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) ... Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, [the admissible background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes ... the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification ....
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax ....
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

The upshot was that a clause which read "any claim (whether sounding in rescission for undue influence or otherwise)" was interpreted as "any claim for rescission, whether for undue influence or otherwise" (at 114).

There was a robust minority judgment from Lord Lloyd of Berwick. He reached a number of conclusions, with which any commercial lawyer would be sympathetic:

> I know of no principle of construction (whether by reference to what Lord Wilberforce said in *Prenn v Simmonds* ... or otherwise) which would enable the court to take words from within the brackets, where they are clearly intended to underline the width of "any claim" and place them outside the brackets where they have the exact opposite effect. (105-106)

It is not proposed to undertake a detailed analysis of the majority's reasoning in this article. Suffice it to say that Lord

Hoffmann's description of the clause in question was as follows:

> It was rather like providing in a lease of a flat that the tenant should not keep "any pets (whether neutered Persian cats or otherwise)". Something seemed to have gone wrong. (at 113.)

The more important point is that the principles applied in *Investors Compensation* do not sit comfortably with the approach New Zealand Courts have historically taken to contract interpretation. It is submitted that the application of the *Investors Compensation* principles by New Zealand Courts has brought about a departure from established principle, albeit one justified by high authority.

NZ LAW PRE *INVESTORS COMPENSATION*

Prior to *Investors Compensation*, the law relating to the influence of factual material on contract interpretation, at least in New Zealand, was tolerably clear. In cases such as *Benjamin Developments Ltd v Robert Jones (Pacific) Ltd* [1994] 3 NZLR 189 (CA), *National Provident Fund v Shortland Securities Ltd* [1996] 1 NZLR 45 (CA) and *Melanesian Mission Trust Board v AMP* [1997] 1 NZLR 391 (PC) the Courts applied a consistent approach.

First, the words used in a document are to be taken as expressing the intention of the parties. The surrounding factual matrix will be considered in construing the words used only if there is some uncertainty or ambiguity. The authority cited for this proposition in *Benjamin Developements*, at 196, and *NPF v Shortland*, at 50, was *Masport Ltd v Morrison Industries Ltd* (CA 362/92, 31 August 1993, at p 18, per Robertson J):

> When parties contract their obligations, rights and responsibilities are to be determined from a reading of the contract. If there is uncertainty or ambiguity then the surrounding factual matrix will be taken into account.

It is noteworthy also that Hardie Boys J in *Benjamin Developments*, at 203, in a passage cited with approval in *NPF v Shortland*, at 50-51, warned against allowing:

> the background to create the uncertainty of meaning and then [using] it again to resolve the uncertainty in a manner ... contrary to the plain meaning of the words.

The above principles are well captured in the following passage from the Privy Council's advice in *Melanesian*:

> the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail. (at 395)

So there it is. The background is relevant, but clear words will always prevail.

Second, if application of the ordinary natural meaning of words produces an inconsistency, absurdity or inconvenience the Court may adopt a meaning other than the ordinary natural meaning, provided it is a meaning that the words are capable of bearing, in the sense that the meaning must be grammatically available. As Lord Blackburn said in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 764-765, in language which may have been in Lord Wilberforce's contemplation when he decided *Prenn v Simmonds*, words should be given their ordinary signification:

> unless when so applied they produce an inconsistency, or an absurdity, or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification which, though less proper, is one which the Court thinks the words will bear.

This passage was cited with approval in *Benjamin Developments*, per Casey J at 196.

The above principles are unobjectionable, and clearly designed to save time and money not only in the conduct of commercial litigation, but also to reduce the "transaction costs" in the formation of a contract.

Key distinctions

It is helpful to identify the key distinctions between the above principles and those applied in *Investors Compensation*.

First, the factual matrix is now always relevant to the task of interpretation, even if there is no ambiguity in the language in question. It is no longer permissible to rely upon clear and unambiguous language to determine the parties' intention. It is necessary to delve deeper, into the realms of "absolutely anything which would have affected the way the language of the document would be understood". Perhaps a god-like omniscience is called for.

Secondly, the Court is no longer restricted to the meaning which words may bear. If there is no available meaning which is satisfactory to the Court, it may substitute its own words. This deprives the business person of even the minimum protection from vexatious action – the rules of grammar. We are now not limited to available meanings, but may seek to establish entirely different meanings by reference to the factual matrix.

The potential for increased costs in transacting, let alone litigating, is significant. If, in the face of clear language, the background facts may be used to undermine the natural meaning of, or even change, the words used then much time and effort will be spent in recording a factual background for the purposes of possible future litigation. Sir Christopher Staughton in his article "How do the Courts interpret Commercial Contracts?" [1999] *Camb LJ* 303 at 307, after citing the second principle from *Investors Compensation* put it this way:

> It is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation. In the first of the *Mirror Group Newspapers* cases I said that, as it then appeared to me, the proliferation of inadmissible material with the label "matrix" was a huge waste of money, and of time as well. Evidently Lord Hoffmann does not agree.

Some of us, indeed, have found ourselves struggling to recreate (or perhaps "establish by research" is a better phrase) the factual background to historical documents, given its sudden potential importance in the interpretation of words which are otherwise quite clear.

One colleague went so far as to say that every commercial contract may, in future, have attached to it an agreed factual matrix which may be used in assisting questions of interpretation. The parties may then agree that the scheduled facts are the only facts to be taken into account in interpretation. I ventured to discourage my colleague from this approach, given the possibility that a Court may consider

the scheduled factual matrix part of the contract itself, and subject to the same rules of interpretation.

To obtain the certainty which clear language has, up to now, been relied upon to provide would appear to require the unfailing and tenacious recording of all facts leading up to a contract. A draftsperson may no longer rely upon clarity of language – he or she must ask the client to outline the full background, lest it override the clauses the draftsperson uses in an attempt to capture the intention.

NZ CASES SINCE *INVESTORS COMPENSATION*

The *Investors Compensation* principles have been adopted by our Court of Appeal. Starting with *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 numerous cases have cited the principles and embarked upon a study of the factual matrix giving rise to the provisions subject to interpretation (*J W Cudden v G A Rodley* (CA 67/99, 31 March 1999), *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* (CA 28/99, 16 November 1999), *NDA Engineering Ltd v Oxford Group Ltd* (CA 148/99, 22 November 1999), *Valentines Properties Ltd v Huntco Corporation Ltd* [2000] 3 NZLR 16, to mention just the Court of Appeal cases which have come to this author's attention).

In some cases this exercise has been embarked upon with reluctance: McGechan J, in *Pyne Gould Guinness*:

> In our view the Court in the end gains no worthwhile assistance from the surrounding circumstances. There are pointers both ways, without clear guidance. Such a situation is not uncommon, and wasted effort of this variety is one string to the (presently unfashionable) literalist's bow. The Court in the end returns to the point from which it started: the document, in itself, read as a contextual whole.

It is interesting that, in interpreting a contractual provision relating to assumption of responsibility for a subcontractor, McGechan J summarised the Court's finding as follows:

> Quite simply, it is the natural meaning. Complete control and oversight are strong words. Whether the authors objectively meant to go so far is not important in the eye of the law. It is what he has said, interpreted objectively, which counts.

This commentator would go much further. It is not the business of Courts to interfere with plain language, on the basis of background facts. Such an exercise has traditionally been restricted to actions for rectification, in which proof of a common intention – a meeting of the minds – which is inconsistent with the words used is required (or at least knowledge by one party of another party's misapprehension), and the law relating to implied terms.

It is hoped, at least by this unfashionable literalist, that clear words will be given clear effects, despite the persuasive authorities which require otherwise. There is some evidence that this will be the approach of the New Zealand Courts, in *Pyne Gould Guinness*, and others (see *Cudden v Rodley* at 3, *NDA Engineering v Oxford Group* at 6).

Indeed, two recent High Court cases show that Judges may be prepared to read down the *Investors Compensation* principles, when confronted with clear language.

In *WEL Energy Group Ltd v Electricity Corporation of New Zealand* (HC, Wellington, CL18/99, 26 June 2000), McGechan J stated the principles he applied:

> It may seem old fashioned, but the first step in interpreting words in a document is to read the words concerned. They are the central focus, and the point of departure. *Boat Park* principles do not require anything different. The question is the meaning of the words used, in light of surrounding circumstances. Reference to surrounding circumstances is particularly appropriate where words used give rise to ambiguity or literal meaning gives rise to unreasonable outcomes. One does not start from the surrounding circumstances and on that basis invent wording which might have made more sense but which does not exist. The task is interpretation, not reconstruction. (at 12.)

With respect, it is difficult to reconcile this with the fourth and fifth *Investors Compensation* principles, which would appear to allow a Court to depart from clear wording and "invent wording which might have made more sense". This "invention" seems similar to reaching the conclusion "that the parties must, for whatever reason, have used the wrong words or syntax" (principle 4) or that "something must have gone wrong with the language" (principle 5).

The difficulty in reconciling the two positions is also apparent in Fisher J's judgment in *Amcor Packaging (New Zealand) Ltd v Forklift Rental Systems Ltd* (HC Auckland, AP 404/26/00, 13 June 2000). After citing both *Investors Compensation* and *Benjamin Developments* His Honour concluded:

> In short, if the meaning of the contract, read as a whole, is plain and it does not produce an absurdity, effect should be given to it.

If there is to be a departure from the *Investors Compensation* principles, it would be preferable if it occurred by direct authority, rather than attempting to read down the language Lord Hoffmann used or failing to recollect the decision His Lordship reached. *Investors Compensation* did involve the substitution of new words for the ones used in the document, as Lord Lloyd of Berwick pointed out.

One point may have been overlooked. *Investors Compensation*, although highly persuasive, is a decision of the House of Lords. *Stare decisis* requires our Courts to follow the Privy Council. Accordingly, until the principles in *Melanesian* are overruled by the Privy Council, they should be applied in preference to those of *Investors Compensation*. It remains to be seen whether or not such an argument will be found attractive by our Courts, given the currency of the *Investors Compensation* principles, and the risk of being over-turned by the Privy Council on appeal. The argument certainly supports the approach which our Courts are straining to adopt.

CONCLUSION

As it stands, it appears that we must live with the consequences of a factual approach to interpretation, until our highest Court can be persuaded to reach a different view from that which appears to hold sway, or lower Courts can be persuaded to follow decisions of the Privy Council in preference to later decisions of the House of Lords. It may be possible to confine *Investors Compensation* to its facts – an assignment of a chose in action in pursuance of a statutory compensation right – but this option is available only to the House of Lords, given the generality with which the ratio decidendi of the case was stated. In the meantime, much paper (or bandwidth) will be used in storing the factual matrix which may enable a party to depart from an obligation otherwise clearly undertaken. The impact of such an

LAST-MINUTE UPDATES

STUDENT COMPANION

edited by
Lynne Taylor

CONTRACT LAW

Maree Chetwin

Remedies

Attorney-General v Blake (HL 27 July 2000, Lords Nicholls, Goff, Browne-Wilkinson, Steyn and Hobhouse)

George Blake was a member of the security and intelligence services. From 1951-1960 he disclosed valuable secrets to foreign agents. In 1961 he was convicted on five charges under the Official Secrets Act 1911 and was sentenced to 42 years' imprisonment. In 1966 he fled to Moscow. In 1989 he wrote his autobiography and granted Jonathan Cape exclusive rights to publish the book in return for royalties. Under the publishing agreement £60,000 was paid and a further substantial sum in the vicinity of £90,000 remained payable. The proceedings related to the unpaid money. Blake had signed an Official Secrets Act declaration that included an undertaking not to divulge any official information gained as a result of his employment either in the press or in book form. He breached the undertaking by submitting his manuscript for publication. The House of Lords had to decide whether the profits of Blake's book that the publisher had not yet paid him were recoverable by the Attorney-General. This raised the question whether an account of profits can ever be given as a remedy for breach of contract.

In the Court of Appeal it was suggested that the Crown might have a private law claim to "restitutionary damages for breach of contract" but the Attorney-General did not advance any argument. On this point the Court of Appeal suggested that the law would be seriously defective if the Court were unable to award restitutionary damages for breach of contract.

In the House of Lords, Lord Nicholls referred to the dearth of judicial decision but noted that there was no lack of academic writing. However, there was a noticeable absence of any consensus on the circumstances in which the remedy should be available. After discussing the question of financial recompense for interference with rights of property, referring briefly to breach of trust and breach of fiduciary obligations and damages under Lord Cairn's Act, His Lordship considered the remedies available for breach of contract.

The basic remedy is an award of damages which are compensatory. Equally well-established is that an award of damages assessed by reference to financial loss is not always adequate as a remedy for breach of contract. In some cases specific performance or an injunction may provide suitable protection for innocent parties when damages are not the adequate remedy, but these discretionary remedies are not always granted.

Lord Nicholls outlined cases that illustrate circumstances where "the just response to a breach of contract is the wrongdoer should not be permitted to retain any profit from the breach". He indicated that the desired result had been reached by straining existing concepts and concluded: "there seems to be no reason, in principle, why the Court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression 'restitutionary damages' ... the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract".

The main argument against an account of profits is that the circumstances where the remedy may be granted are uncertain. Such a remedy will only be appropriate in exceptional circumstances. Normally other remedies will provide an adequate response. "No fixed rules can be prescribed. The Court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit."

Lord Nicholls referred to the majority decision of the US Supreme Court *Snepp v US* (1980) 444 US 507 where a similar conclusion requiring the contract breaker to disgorge his profits was achieved when "the Court 'imposed' a constructive trust on Snepp's profits". "[A]ffording the plaintiff the remedy of an account of profits is a different means to the same end."

The appropriate form of the order was a declaration that the Attorney-General was entitled to be paid a sum equal to whatever amount was due and owing to Blake from Jonathan Cape under the publishing agreement of 4 May 1989.

Lords Goff, Brown-Wilkinson and Steyn agreed with Lord Nicholls. Lord Steyn outlined additional reasons. His Lordship was not willing to endorse the broad observations of the Court of Appeal as to when the remedy should be available. He said that "[e]xceptions to the general principle that there is no remedy for disgorgement of profits against a contract breaker are best hammered out on the anvil of concrete cases".

Lord Hobhouse dissented and in doing so outlined two primary difficulties. The conduct of Blake was criminal whereas the principles applied were only appropriate where commercial or proprietary interests were involved. Also the reasoning of his noble and learned friend depended upon the conclusion that there was some gap in the existing law which required filling by a new remedy. The reason why the term "restitutionary damages" was unsatisfactory was not fully examined. The remedy proposed was based on proprietary principles when rights are absent. Lord Hobhouse concluded sounding a note of warning that "if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far reaching and disruptive".

EMPLOYMENT LAW

Graham Rossiter

Contributory Fault

Tasman Pulp and Paper Co Ltd v Hei Hei (EC, AC 39/00, 23 May 2000, Judge Colgan)

The provisions of the Employment Contracts Act 1991 regarding personal grievance remedies (ss 40(2) and 41(3)) require the Employment Tribunal and the Employment Court, in any case where the employee's case is made out, to consider the fault or blame of the employee. The relevant statutory provisions are to substantially like effect although s 40(2) is confined to unjustified dismissal, personal grievances and s 41(3) to the remedy of reimbursement.

For some time, both the Tribunal and Court have applied the statutory provisions by discounting any remedies initially assessed by a fixed percentage where there is evidence of contributory fault. This decision casts doubt on the validity and appropriateness of that approach. The employee had been dismissed for contended misconduct relating to his arriving late for work on one occasion. In the Tribunal the employer's decision was found to be unjustified and remedies were awarded for reimbursement of lost wages, compensation for humiliation etc and redundancy compensation it was considered that the employee would have received but for his dismissal. This was on the basis of a finding that the applicant would have taken voluntary redundancy that was offered to other staff in a similar situation soon after the dismissal. The Tribunal reduced the reimbursement award by 25 per cent and also took into account the applicant's contributory fault when awarding compensation. No reduction was made in the award of redundancy compensation. Both parties opposed the Tribunal's decision. Judge Colgan had to consider (1) whether awards must by reduced by a percentage for contributory fault; and (2) whether all awards must be reduced by the same proportion. With regard to the second, the Court rejected the employer's argument that the ECA required a mandatory reduction of all remedies where there is contributory fault. It is possible to reduce an award of redundancy compensation for such a reason but the Tribunal's decision not to do so was open to it.

In so far as the Tribunal's percentage reduction of the reimbursement award was concerned, the Court said that in its "view it is wrong for the Tribunal to first determine a proportion or percentage by which it finds an employee's conduct to have contributed to the grievance and to apply this percentage to some or all of the remedies it would otherwise have awarded. Such percentages are imprecise and, in some cases, arbitrary. Rather, the Tribunal can fulfil the requirements to specify an initial notional remedial figure and a reduction to reflect contributory conduct or culpability giving a final specified amount".

Judge Colgan considered that a "fair and reasonable sanction for Mr Hei Hei's lateness would have been the loss of a fortnight's pay". The Court found that a proper application of the contributory fault principles would be to reduce the three months' wage reimbursement calculation by an amount equivalent to two weeks' wages. The award of $3000 by the Tribunal for humiliation stood. There was little evidence of distress on the applicant's part, meaning the award could not be increased but the Court also refused to decrease it.

LAND LAW

Julia Pedley

Mortgagee Sale

Bank of New Zealand v Adsett (CA 280/99, 10 July 2000)

The BNZ had granted a term housing loan of $140,000 to the Adsetts, and a business term loan of $250,000 to the Adsett's company, Bedrock. The personal loan was secured by a first registered mortgage over the Adsett's home. The security for the business loan included a guarantee from the Adsetts under which they covenanted to pay on demand whatever was owed by Bedrock to the bank.

When Bedrock defaulted in its payment of instalments of the business loan, the bank issued a notice requiring payment of the full amount due as opposed to the amount of the initial default of non-payment of missed instalments. In addition, the bank issued a demand to the Adsetts as guarantors. When the debt remained unpaid, the bank appointed receivers to the company and later issued to the Adsetts a notice under s 92(1) Property Law Act 1952 demanding payment of the accelerated debt owed by them as guarantors of Bedrock's loan. Subsequently, a mortgagee sale of the Adsett's house took place. Proceedings were brought against the bank by the Adsetts, who alleged that the s 92(1) notice was invalid. The bank applied to strike out the statement of claim on the ground that it failed to disclose a reasonable cause of action.

Before the High Court, (1999) 8 NZCLC 262,112, on the substantive issue of the validity of the s 92(1) notice, the Adsetts submitted that the bank had failed to serve a s 92(1) notice which required remedy of the initial default of the company, before or instead of serving a s 92(1) notice requiring them to pay the full amount owed by the company. It was submitted that s 9 of the Receiverships Act 1993 was not applicable on the facts, as it was the bank who sought to enforce rights against the Adsetts, and not the receivers appointed to the company by the bank. For the bank, it was argued that in the circumstances of the case, the meaning and effect of s 9 was clear, in that the receivers were not obliged to give a s 92(1) notice in respect of the initial default of the company prior to making a demand under the guarantors' mortgage for the full amount owed under the business loan.

The main question before the High Court was whether s 9 Receiverships Act 1993 relieves a bank with a debenture from the requirement to serve a notice under s 92(1) PLA requiring a default of a mortgagor to be rectified before being able to have recourse against the mortgaged property for the full outstanding amount. Following a detailed review of the relevant statutory provisions, the Court went on to find that s 92(1) PLA applied between the Adsetts and the bank unless displaced in the circumstances of the case by s 9(1) Receiverships Act. On this matter, the Court held that when read as a whole, s 9 on its proper interpretation is limited to actions taken under a debenture, namely demand for payment of money secured, and exercise by a receiver of a power of sale in relation to land. As a consequence of this finding, the bank's application to strike out the Adsetts claim was dismissed. Accordingly the bank applied to review the judgment and the review was removed to the Court of Appeal.

As stated above, prior to exercising its power of sale, the bank had given a s 92(1) notice to the Adsetts demanding payment of the accelerated debt. Before the Court of Appeal the issue was whether the bank was required to serve on the Adsetts a s 92(1) notice in respect of the earlier default by Bedrock which had given rise to acceleration of its debt. The crux of this issue was whether Bedrock's liability to the bank was secured by a mortgage of land.

The Court considered the mortgage document between the bank and the Adsetts, together with any other evidence properly associated with it and relevant to its meaning within the context of s 92(1). Here the Court considered the essence of the respondents' argument to be that the initial default by Bedrock constituted a default in payment of money secured under the mortgage. However the Court was unwilling to accept this contention, in that the demand made on the respondents was in relation to the accelerated debt due by Bedrock and not in relation to an acceleration of money payable under the mortgage.

Delivering judgment for the Court, Henry J stated, "We are quite unable to see how it can be said that liability for the accelerated debt has become payable by reason of any default in payment of money secured by the mortgage. The mortgagors have made no such default. The mortgage does not secure money payable by Bedrock; it secures and secures only money payable by the mortgagors." As a consequence, the Court went on to expressly disagree with the notion that the financial obligations of the company were secured by the mortgage between the bank and the respondents, and that the company debt could not be accelerated without the issue of a s 92(1) notice, not to it, but to a separate party. On this point the Court held, "Once it is accepted that the Bedrock debt was accelerated by its earlier default, any further or alternative argument that nevertheless the mortgagors' liability was for some other lesser debt requiring the issue of a notice, falls away."

For the respondents, *Commodore Pty Ltd v Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1984] 1 NZLR 324 was cited as authority for the contention that the company's liability to the bank was secured by a mortgage over the respondents' land. However the Court found *Commodore* to be distinguishable as being based on its particular contractual provisions, and held that the only principle the decision advanced is that s 92(1) is not confined in its operation to the rights and obligations between mortgagor and mortgagee, but may also include those of a guarantor.

Similarly in support of the contention, *BNZ Finance Ltd v Smith & Leuchars* [1991] 3 NZLR 659 was advanced to support the argument that if a guarantor of a loan provides a mortgage in support of the guarantee, then the loan is secured by a mortgage of land for the purposes of s 92(1) notwithstanding the guarantor's liability is accessory or secondary to the borrower's liability. This was also rejected by the Court which was unwilling to favour such a wide construction of s 92(1). Although the Court considered the words of s 92(1) to be relatively clear and free from ambiguity, the applicability of s 92(1) could not be determined in the absence of a proper consideration of the relevant documentation.

As the Court held that it was not the loan to the company which the mortgage had secured, the respondents had no tenable cause of action. Accordingly the bank's application to strike out was granted. As a consequence, it was not necessary for the Court to consider whether s 9(1)(c) Receiverships Act would operate here to render s 92(1) inapplicable. Significantly however, the Court did see considerable force in the bank's submission that, "where the payment of money is secured by a debenture, s 92(1) has no application even if that payment is also secured by a mortgage of land". The Court found *Elders Pastoral Holdings Ltd v Raptorial Holdings Ltd (in rec)* (2000) 8 NZCLC 262,196 persuasive.

TORTS

Rosemary Tobin

Psychiatric injury

Brickell v Attorney-General (HC Wellington, CP 267/97, 9 June 2000, McGechan J)

Since 1992 psychiatric injury has been outside the injuries covered by the accident compensation scheme. Brickell's injury was a psychiatric injury, post-traumatic stress syndrome (PTSD), suffered as a result of the horrific scenes viewed as part of his work as a member of the police video unit. Brickell alleged either a breach of a common law duty of care owed to him by his employer or, alternatively, a breach of statutory duty under the Health and Safety in Employment Act 1992. Specifically Brickell argued that the defendant employer not only failed to reduce his exposure to horrific material viewed as part of his job but also failed to provide him with the counselling that would have alleviated the stress he suffered as a result of viewing the material.

There was overseas precedent for Brickell's claim. Since *Walker v Northumberland County Council* [1995] 1 All ER 737, academic writers in New Zealand have warned that a similar claim could be successful here. As in *Walker* the defendant employer failed in its duty to ensure that Brickell was provided with a reasonably safe system of work. McGechan J found that the predominant cause of Brickell's PTSD was his work with horrific videos. It is important to note that Brickell was exposed to this material over a very long period, regularly, and often under emotionally demanding conditions. This was an intense exposure and not complete once filming was over, as the editing process that followed involved subsequent viewing and reviewing. Brickell could thus be distinguished from those who might view occasional horrific scenes but whose work would not normally, on a regular basis, involve viewing such scenes.

The question of whether the police should have perceived the risk of stress leading to PTSD had to be answered on the basis of psychological and general knowledge at the time concerned. Although Brickell's employment began in 1980, and his exposure to horrific scenes started from that date, in the light of circumstances and knowledge at the time the risk could then reasonably be regarded as low. However, a growing appreciation of the causes, symptoms, and dangers of stress, and of the resulting PTSD, meant that towards the end of the 1980s the risk to Brickell should have been appreciated. By then Brickell had already revealed the first signs of stress occasioned by work trauma. Given his history, and his regular and intense exposure to horrific scenes, the police should have appreciated the existence of a significant risk that the stress on him could lead to PTSD. Certainly by the middle of 1993 the police should have appreciated, and in some quarters did, that Brickell was at significant risk of PTSD. Acting reasonably they should have restricted or reduced his exposure to horrific work. McGechan J noted that it was not helpful that when Brickell was offered counselling, but instead pressed for more alternative, acceptable counselling, he was invited to jump off the balcony! The police should have more effectively followed up on Brickell's request for counselling, and also implemented more effectively a report by the Coordinator of the Police Psychological services on the same issue.

Brickell had to some extent contributed to the problem. He could have more effectively advised of his own concerns about the nature of the work, and repeated his request for regular ongoing counselling. He also undertook significantly more exposure than was strictly necessary. His failure to seek some rearrangement of his workload contributed to the situation that led to PTSD. McGechan J assessed Brickell's contributory negligence at 35 per cent.

As McGechan J observed, claims for pain and suffering, although once a familiar feature of personal injury litigation, were a comparative novelty in New Zealand. This meant he was driven back to first principles in determining the claim. The test was, he said, essentially one of fairness and community expectations. McGechan J considered Lord Devlin's words in *H West & Son Ltd v Shepherd* [1964] AC 326, 356-7 helpful, that is, "[w]hat would a fair-minded man, not a millionaire, but one with a sufficiency of means to discharge all his moral obligations, feel called upon to do for a plaintiff whom by his careless act he had reduced to so pitiable a condition?" This approach was flexible and "really distils to doing justice on the facts involved." McGechan J observed that Brickell's misfortune was nowhere near on a par with the loss of amenity associated with blindness or quadriplegia, but it was nevertheless real. He awarded a total of $75,000 subject to adjustment for contributory negligence. Loss of earnings was assessed on an actuarial approach. This was not a case where an award of exemplary damages was warranted.

Concurrent liability in contract and tort

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

This case involved a complex web of contracts between a number of parties. There were contracts between inter alia the engineer and the architect for the design, between the contractor and the owner for the construction of the building, and between the contractor and a subcontractor for the mechanical services work, but none between the engineer and the contractor. The issue the Court was faced with can be shortly stated; whether the engineer who prepared the mechanical services specification for incorporation into the contract to construct the building owed a duty of care in tort to the contractor who undertook those mechanical services. The majority (Henry and Keith JJ) considered no such duty arose. It is, however, the minority judgment of Thomas J which is the more persuasive.

The approach of the majority was to consider how the contractual intention could help enlighten the "difficult question of when the relationship between two parties is such as to warrant the intervention of the general law of tort". This involved an analysis of the contractual chain in order to determine whether the parties' intentions regarding the assumption or allocation of risk and responsibility were inconsistent with the claimed tort duty. The relationships were carefully spelt out in separate contracts, which defined the rights and obligations of the respective parties to them. Any duty in tort would, Their Honours thought, cut across and be inconsistent with the overall contractual structure. The separate contracts indicated that where the loss was to remedy a defect in the specifications then as between the owner and the engineer it rested with the engineer. As between the owner and the contractor it rested with the contractor and as between the contractor and the subcontractor it rested with the subcontractor. They could see no justification for holding that, in addition, the engineer should be regarded as having voluntarily assumed responsibility towards the contractor.

Thomas J's focus was on whether a *Hedley Byrne* representation had been made by the engineers in respect of the specification which had led to the remedial work. This, he considered, was present. The engineers had the requisite expertise. They had assumed responsibility for the specifications knowing that these would be relied upon by the contractors. The contractors had reasonably relied upon the representation to their detriment. Having decided this the next question was whether the fact of the contractual matrix made the imposition of a duty of care between the engineers and the contractors inappropriate. He said that, first, unless negated by contract the tortious duty could be sued upon. Second, and most important, in this case the contracts did not seek to regulate the relationship of the contractors to the architects or to the mechanical engineers. Indeed, it was not until the Court had decided that, because of the contractual matrix, at least one of the elements of *Hedley Byrne* had not been made out thereby precluding liability in tort that the contract could be said to be the sole means of regulating the parties' relationship. Third, any argument that the contract was the sole means of regulating the parties' relationships would not avail against a third party who reasonably relied upon the representation. It would be illogical to allow a third party an action in tort, but deny one to the contractor. Fourth, to argue that risk allocation is determined by the contractual matrix is to deny the ever present possibility of an insolvency, where losses may be borne by parties to whom the risk has not been allocated simply because one party in a contractual chain has become insolvent.

First, there are certain matters on which all of the Judges do agree. All accept that the modern doctrine of concurrent liability has clearly established that the mere fact that a contract is present does not, of itself, mean that no duty of care in tort can arise. Conversely all acknowledge that the fact of a contractual matrix can prevent a duty of care in tort arising. There was a marked difference of approach between the two judgments. The joint judgment of the majority focused on the contractual matrix and asked whether, having regard to that matrix, the consulting engineer owed a duty of care to the contractor. Thomas J, however, first considered whether the elements of *Hedley Byrne* were made out and then considered whether the contractual matrix precluded the engineer from being liable. Thomas J recognised the difference in approach, but considered the result should have been the same no matter which approach had been adopted. In fact it was inevitable that, given the differences in approach, and the primacy of contract accorded by one, the answer was never going to be the same.

INSOLVENCY LAW

Lynne Taylor

Equity of Exoneration

Milner v Official Assignee (HC Christchurch, M 377/99, 28 March 2000, Panckhurst J)

Milner was a self-employed builder who had been adjudicated bankrupt. There were two secured creditors with claims over Mr and Mrs Milner's matrimonial home. One was a building supplier with whom Milner had dealt with in the course of his building business. After both secured creditors realised their security over the matrimonial home there was equity remaining of $50,000. The general rule, pursuant to s 42 of the Insolvency Act 1967, was that Milner's interest in the equity in the home vested in the Official Assignee on adjudication. Mrs Milner sought to take advantage of the fact that the Official Assignee took Milner's interest subject to valid equities created by him prior to adjudication. Mrs Milner claimed that as between herself and her husband she was entitled to be exonerated (or indemnified) for the amount paid to the building supplier because that amount was a business debt incurred for Milner's benefit alone.

The dispute in this case was not as to the existence of the equity of exoneration but rather its availability to Mrs Milner. Panckhurst J made reference to an earlier Court of Appeal decision (*Re Berry (a bankrupt)* [1978] 2 NZLR 373) where it was said that the equity had its source as part of the relationship between a surety and principal debtor. Where the equity exists the individual charging his or her property is in the position of surety to the other and as such is entitled to be exonerated or indemnified by the other. In *Re Berry* the Court of Appeal also noted that, at least so far as the relationship between a husband and wife is concerned, that the equity had its origins at a time when social and legal conditions were markedly different from the present.

Panckhurst J emphasised that there is no presumption in favour of the equity but rather that the circumstances of the case must be examined to see if it can be inferred. He accepted that the facts showed that Mrs Milner had charged her interest in the house for the benefit of her husband's business but was not prepared to infer from this alone that Mrs Milner was in the position of surety to her husband. To do so, he said, would not sit comfortably with today's view of a marriage partnership. Panckhurst J considered that the facts of this case were distinguishable from other modern cases (*Re a Debtor (No 24 of 1971)* [1976] 1 WLR 952; *Re Pittortou (a bankrupt)* [1985] 1 WLR 58) where the equity was recognised. In those cases the individual held to have charged his or her property for the benefit of another obtained no advantage from the moneys raised by the charge. Mrs Milner and her family, on the other hand, were dependent on and shared in the income generated by Milner's business. ❑

LITIGATION

with

Andrew Beck

JARNDYCE LIVES ON

Hammond J was recently required to play the role of unwilling Lord Chancellor in a case of which he remarked:

> It would take Mr Charles Dickens to fully ventilate the utter absurdities to which the matter presently before me has descended.

The case was *Cameron v Prisk* unreported, Hammond J, 21 July 2000, HC Hamilton CP 59/98, CP 60/98.

A racy beginning

The sorry tale began in the early eighties when Mr Prisk was engaged as music teacher to Eileen Cameron. Eileen's parents were into racehorses, by all accounts with some success. In 1984, Mr Cameron invited Mr Prisk to go thirds in the racehorse "Spare Money" with himself and Mrs Cameron. Spare Money turned out to be as good as his name, and generated winnings of some $50,000. Mr Prisk claimed that he had paid his $5,000 share, and was entitled to his share of the winnings.

These never materialised, and he became somewhat suspicious, eventually complaining to the Racing Conference. The net result of that was that both he and Mr Cameron were fined for having an unregistered interest in Spare Money, and Mr Cameron was disqualified from racing horses for a period. Spare Money, for his part in the venture, was stripped of some of his winnings.

Three laps and they're still going

In 1988, Mr Prisk commenced proceedings in the District Court against Mr Cameron for breach of contract. Matters did not move especially quickly. Mr Cameron failed to file a defence, and default judgment was granted on 9 June 1989. This was set aside when his solicitor accepted the blame. A further judgment was entered on 16 July 1989 after a failure to appear. That generated a flurry of activity, including an appeal to the High Court. The judgment was eventually set aside in 1992. In 1993, Mrs Cameron was joined as a defendant.

A trial on the merits was finally fixed for 4 March 1996. As might perhaps have been expected, the Camerons did not appear. Mr Prisk gave his evidence, and judgment was granted by Judge Rea for the sum claimed together with interest and costs. He also made some strong statements as to what he saw as manipulation of the system by the Camerons. Once again, the Camerons applied to set the judgment aside. This application was heard by Judge Wolff in July 1997, and refused in a lengthy reserved decision in November 1997. Leave to appeal was refused by Judge Wolff in August 1998.

And they're off to the High Court

The Camerons then embarked on an application to the High Court for special leave to appeal. The procedure chosen for this manoeuvre was a statement of claim. Remarkable though this might be thought, Mr Prisk's solicitor (wanting to avoid further delays) dutifully filed a statement of defence. A praecipe was then filed, together with the appropriate fee and the matter – the leave application – was set down for trial before Hammond J. It would not be going too far to describe Hammond J's reaction as one of unbounded astonishment. As His Honour put it:

> The procedure which should have been adopted on the s 71A(5) application was a straightforward application, based on the statutory authority in the District Courts Act, and supported by affidavit. The application would immediately have been given a Chambers List fixture in this registry.

A decision would presumably have been made within weeks, rather than taking a further two years.

An inquiry into the running

The argument put forward by the Camerons was that R 458D of the High Court Rules does not permit an application for special leave to be brought by originating application; in such situations the default procedure is the statement of claim. To be fair to the Camerons' representative, the procedure is not a model of clarity and has given rise to a difference of judicial opinion. While Hammond J described the proper procedure as a "straightforward application", even he did not explain where that is provided for.

In truth, the application is an interlocutory application in an intended proceeding, which is the appeal. The Courts have not always agreed as to whether a leave application is interlocutory, but this is the more sensible approach, and the one which now seems generally accepted: see *Parris v TVNZ Ltd* (1996) 9 PRNZ 444; *Hodge v Residual Health Management Unit* unreported, Master Venning, 19 May 2000, HC Dunedin CP 39/99. It is certainly the usual practice in respect of applications for special leave to appeal.

Perhaps the ultimate irony is that in fact that whole application for special leave was probably out of time. Section 71A(5) provides that an application for special leave to the High Court has to

be made within one month of the expiry of the period prescribed in s 71A(4). Section 71A(4) provides that application for leave to the District Court must be made within 21 days after the order is sealed. Assuming that the order was sealed (as it should have been) before the application to Judge Wolff for leave to appeal, the time for applying for special leave would have expired some time in 1997 (before the application had been decided by Judge Wolff). This result, while absurd, has been upheld by the Courts: see *Beggs v Beggs* (1996) 9 PRNZ 363; *Cushing v Peters* (1996) 9 PRNZ 369.

It's *Prisk* by a length

In the end, however, the outcome would have been the same. Hammond J was completely resistant to the notion of reopening the proceedings for a further trial, with the inevitable attendant delay in resolution. Having examined the arguments put forward for the Camerons, Hammond J concluded that they were unlikely to affect the merits. He was not left with any sense of injustice, and did not see how the case could be fairly relitigated after so many years. The application was therefore dismissed.

No order was made as to costs, because both parties were held to blame for not bringing the matter to fruition sooner. This seems to have been a consequence of the Court's reaction to the proceedings. While that is understandable, it does not seem relevant to the question of costs. The relevant factors were that the respondent was successful, and that he had been given the run around for years. Some costs should have been awarded to prevent his being completely out of pocket.

The moral

One of the positive spin-offs from *Bleak House* was the comprehensive reform of the Courts of Chancery. It might be hoped that a case such as *Cameron v Prisk* could provide an impetus for a much-needed reform and clarification of appeal procedures.

SERVICE ON COMPANIES – AGAIN

The perennial problem of serving documents on companies has once again raised its weary head: see previous comment in [2000] NZLJ 208. Despite the fairly extensive legislative provisions – presumably designed to curb uncertainty – it remains difficult to ascertain exactly when service is effective.

Part of the difficulty stems from the fact that service performs a dual function: it informs the recipient of a claim, but at the same time establishes time limits for the benefit of the server. Both parties have an interest in ensuring a proper process, although for different reasons.

Because of the importance of natural justice, the Courts generally tend to stress the aspect of actual notice coming to the recipient's attention. In the case of companies, however, there is a competing interest: because companies are ethereal creatures, there has to be a designated method of providing them with documents. The Companies Act 1993 therefore provides a standard procedure for the service of documents.

The legislation

Section 387 governs the service of documents in legal proceedings as follows:

> 387. **Service of documents on companies in legal proceedings** – (1) A document, including a writ, summons, notice, or order, in any legal proceedings may be served on a company as follows:
>
> (a) By delivery to a person named as a director of the company on the New Zealand register; or
>
> (b) By delivery to an employee of the company at the company's head office or principal place of business; or
>
> (c) By leaving it at the company's registered office or address for service; or
>
> (d) By serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or
>
> (e) In accordance with an agreement made with the company; or
>
> (f) By serving it at an address for service given in accordance with the rules of the court having jurisdiction in the proceedings or by such means as a solicitor has, in accordance with those rules, stated that the solicitor will accept service.

Section 387(2) goes on to provide that these are the only ways in which service can be effected; the section takes precedence over the High Court Rules (although R 198(2) now refers simply to the requirements of s 387). Section 388 allows for additional methods of service by fax and post in respect of documents other than those in legal proceedings.

The main purpose of these provisions can only be to make the service of documents on companies certain for those doing the serving. By virtue of the statute, the company must be taken to know that it will be deemed to have received a document if any one of the paragraphs is complied with. This immediately places the onus on the appropriate officers of the company to ensure that they are aware of anything delivered to its head office, registered office, or address for service.

Every company is required by the Act to have both a registered office and an address for service. A person serving documents on the company may elect to use any of the available options in s 387: there is no order of priority, nor any sanction for choosing one in preference to another. If the company decides to change its registered office, or to move away from its address for service, it has an obligation to ensure that the companies register is kept up to date (ss 186-188; 192-193). The Act also requires that the address specify the name of any firm at which the company has its registered office or address for service; or to give particulars of the location if it is in a building occupied by persons other than the company.

Consequences

Service is of particular significance to companies in two situations: statutory demands and notices setting aside voidable transactions. While neither of these documents actually commences a Court proceeding, the consequences are severe. If the company fails to deal with a statutory demand within ten working days, liquidation proceedings may be instituted. If a voidable transaction notice is not disputed within 20 working days, the transaction is automatically set aside. As the time limits are so short, any company would want to know about these matters as soon as possible.

A matter of some importance is whether these notices are to be regarded as documents in legal proceedings for the purposes of s 387. If the technical meaning of "proceeding" is adopted as in the High Court Rules, there would have to be some application to the Court for the exercise of

its jurisdiction. This is not the case: both notices are only the precursors to possible proceedings. However, s 387 appears to use the words "legal proceedings" in a looser sense than the rules, and it is not specified that there be "Court proceedings" on foot.

This was the view of the Court in *Bond Cargo Ltd v Chilcott* (1999) 13 PRNZ 629 in connection with voidable transaction notices. The grounds for Laurenson J's conclusion were that there was already a Court proceeding in existence; that the notice was the necessary precursor to a proceeding; that it had to be filed in Court; and that it commenced a rigorous time limitation period. Statutory demands are slightly different, because they are not filed in Court. (There is no prior Court proceeding either, but this is not the case in every liquidation, so that cannot be determinative.) Similar legal consequences ensue, and there are accordingly good policy reasons to require service pursuant to s 387, rather than the more expansive provisions of s 388. Any person serving such notices would, in any event, want to be able to prove delivery, and would therefore not want to rely on posting or faxing a document.

Taking it as given that s 387 is the relevant provision, the real issue becomes whether a person who has complied with it can rely on that fact, or whether the Court has some residual discretion to protect the interests of the company. This is illustrated by two recent decisions.

ASB Bank v Info-Touch

In *ASB Bank Ltd v Info-Touch Technologies Ltd* unreported, Master Anne Gambrill, 2 August 2000, HC Auckland M718-IM00, Info-Touch had given as its address for service "Level 4, 142 Broadway, Newmarket, Auckland". On 30 March 2000, ASB Bank served a demand at this address, using the agency of a process server. It subsequently appeared from the process server's report that the demand had been affixed to a door, which was closed at the time.

The directors of Info-Touch did not become aware of the demand until an application for liquidation was subsequently served on one of the directors. Info-Touch then disputed the validity of the service of the demand on which the liquidation application was founded. It became apparent that the company was no longer using the particular address for service, and had given notice of a change of address in May 2000.

Master Gambrill commenced discussion of the issue by reference to *Kirton v Prospecdev Holdings Ltd* (1992) 2 PRNZ 412, where service was effected by handing a document to an unnamed person at an address divided into flats. That was held to be deficient (although the irregularity was cured by the Court), because the company's office was only at one of the flats. The Court held that it was the process server's obligation to bring the documents to the attention of the company. That case was, however, decided under the 1955 Act. It was no doubt precisely because of this type of problem that the more detailed description of a registered office and address for service is required by the 1993 Act.

The Master considered that the service had not complied with the Act, commenting that:

> If there is no service in a form which enables any of the people acting on behalf of the company or conducting the business of the company to know of the documents then one questions whether service has achieved the objects of the Act and the general intention of service.

She did note, however, that had the process server explained how the registered office had been identified, that might have amounted to sufficient compliance.

While it is important to keep in mind the ultimate objective of service as far as the recipient is concerned, that cannot be elevated to a rule above the statute. If a company has abandoned a particular office, no amount of banging on the door will make an iota of difference. The point is that it is the company's responsibility to describe its address with sufficient particularity, and to give proper notice of any change. It is not for the server to inquire whether it is still the office, or to worry whether the document will in fact come to the notice of the company – that is the whole object of requiring a definite address in a public register.

In this case, given that the address for service was described as "Level 4" the process server was entitled to assume that the entire level 4 was the company's office. Affixing the notice to a door on that level must be sufficient to comply with the Act. As it appears that the company no longer had any presence there at all, any further inquiry would have been futile, but the Act does not require that. It is a necessary consequence of the section that there may be occasions where service does not actually come to the attention of the company.

The Master said that:

> If a company office is clearly abandoned or shut up and has no indication that it is indeed the company office, or place of business then I think the safe practice would be also to serve a director or apply for directions.

It may be prudent to follow such a course of action, so as to avoid the possibility of a future application to set aside a default judgment, but it cannot be a requirement. There are countless situations where fly-by-night operations have disappeared and a search for directors would be time-consuming and expensive for no benefit. That is why s 387 is in the Companies Act.

The approach followed by the Court gives too much weight to one of the objectives of service and pays too little regard to the other. As a result, an unacceptable gloss has been placed on s 387. This is a matter of considerable significance for any creditor of a company, and the uncertainty created is undesirable. The scheme of the Act is quite clear, and ought to be adhered to.

As an aside, it might be noted that there is no mention in the judgment of any defence to the statutory demand. At the very least one would expect some evidence of a reason to defeat a liquidation order if a technical matter like this is to win the day. Although the particular company's situation is not known, there is in general a public interest in ensuring that a hopelessly insolvent enterprise does not continue swallowing creditor's funds.

Valda Video v United Video Franchising

The second case is *Valda Video Ltd v United Video Franchising Ltd* unreported, Master Anne Gambrill, 27 July 2000, HC Auckland M762-IM00. This case also involved a statutory demand, but on this occasion the application was a conventional one to set the demand aside.

Just as in *ASB Bank v Info-Touch*, the demand was served at an address obtained by searching the company register, although this time it was the registered office rather than the address for service. The complicating factor was that the search was made on 12 April, but the company had

given notice of change of address on 29 March. That change was only processed on 13 April.

Had that been the end of the matter, it is quite likely that, applying the approach of *ASB Bank v Info-Touch*, the service would have been regarded as defective in the absence of any evidence at the address that it was in fact the company's registered office. However, the demand was forwarded to the company's new address, and it took the necessary action to apply to set the demand aside.

In the circumstances, the Master took a robust approach, and held that the object of service had been achieved. As there had been minimal prejudice to the company, there would be no point in requiring a further demand to be served. The Master considered that any irregularity could be cured under R 11, but stressed that it was a rare instance where the non-compliance with the stringent conditions of the Act could be countenanced.

Just as in *ASB Bank v Info-Touch*, the creditor came in for some criticism, this time for not checking the address nearer the time of service of the notice. It is true that there was a delay of some three weeks between the search and the service, but the real problem – acknowledged by the Master – is that there was no record of the fact that the company had given notice of a change of address. Had this information been thrown up in the search, the particular difficulty would never have arisen. If this gap in the system is endemic, it is undoubtedly a matter which requires attention.

As the notice of change of registered office must allow at least five working days before the change takes effect, there is always going to be a danger over the transitional period unless the notice itself is made public. As the notice is required to be registered (s 187(3)), it would seem that this is the intention. It ought to be a matter which is simple enough to accomplish, and would carry significant benefits.

Returning to the situation in *Valda Video*, the Court ultimately refused to set the demand aside because the defence was based on a counterclaim which was held to be independent. Although United Video was therefore successful, the Master did not award them costs. She fixed the costs and held that they were to be costs in the cause of the counterclaim proceeding which had already been filed. This unusual costs order was made because of the irregularity in service, and because the United Video was apparently aware of the complaint leading to the other proceeding.

Costs orders are of course discretionary, but the notion of tying an award to success in a completely separate proceeding is highly unconventional. The general principle under the new costs regime is that costs are to be predictable. United Video did nothing wrong, and succeeded in its application. That ought to have led to an automatic costs award. There should not be a punishment because there happens to be a glitch in the system which ultimately causes no prejudice.

Conclusion

Recent cases demonstrate an attitude towards service on companies which is not in accord with the main reason behind the provisions in the Act – to provide certainty for those serving documents. The result is to impose additional duties on those claiming against companies, and on process servers trying to ensure that their actions are valid. This is precisely what the rules are designed to avoid. Unless the Courts are prepared to enforce actions taken in reliance on the statutory provisions, and to hold companies responsible where they do not comply with their obligations relating to the register, the section might as well not be in the Act.

SUBMISSIONS AFTER TRIAL

In *McDonald v Arrigato Investments Ltd* unreported, Chambers J, 13 June 2000, HC Auckland M126/00, Chambers J commented wryly:

> I doubt whether there was a case I argued in practice where I did not have a brain-wave after it was all over.

The universality of this experience is the reason for the Practice Note issued in [1968] NZLR 608, requiring counsel to apply for leave in order to make further submissions after the hearing, and restricting such applications to exceptional circumstances.

That Practice Note remains of full effect, but it is unusual to find it giving rise to a decision of the Court. *McDonald v Arrigato Investments* is therefore a timely reminder of the proper approach.

Counsel sought to make further submissions in order to refer to a further authority of the House of Lords, and to provide a more satisfactory answer to a question put by the Court. Chambers J held that neither of these matters constituted exceptional circumstances, noting that the 1971 House of Lords case was a very well-known authority in the area of administrative law. He nevertheless allowed submissions on that point because the matter could be shortly disposed of, and to prevent the plaintiff feeling disadvantaged.

One can appreciate the sympathies of the Court, particularly where an individual is taking on various authorities. It would be very unfortunate, however, were this to be seen as a precedent to allow further submissions simply because counsel turns up something new at a later stage. That would fly completely in the face of effective case management and finality of litigation.

The submission of further material after conclusion of the hearing drew some strong criticism on the Victorian Court of Appeal in *Stockdale v Alesios* [1999] 3 VR 169. The situation there was exacerbated by the fact that the other side responded to the material, and it resulted in a rejoinder from the originating party. Phillips JA said (at 179):

> This is quite unsatisfactory. Unless the Court gives leave or otherwise invites the making of further submissions the conclusion of oral argument should be taken to be the end of the matter, save for judgment. Of course that can be no more than a general precept; there will always be exceptions, such as an unexpected change in the position of the parties which bears upon the disposition of the appeal or the discovery after argument concludes of relevant legislation or some further decision of authority to which the Court should be referred.

Just as in the 1968 Practice Note, the point made by the Court is that circumstances have to be truly exceptional to justify such further expense and the demands on Court time. Delay is a continual enemy of effective justice, and practices of this nature have the potential for endless exploitation by unscrupulous litigants. It is therefore appropriate for opposing counsel to insist on leave as a matter of course; it is also appropriate that it be granted only where circumstances are truly exceptional. ❑

COMMUNICATION WITH EMPLOYEES

Peter Churchman, KPMG Legal, Wellington

says it has been and will remain a vexed issue in a paper given at the Institute for International Research conference on the ERB

The explanatory note to the Employment Relations Act states that the employment relationship itself should be conducted in a manner that promotes good faith, fair dealing and mutual trust and confidence between the parties. Communication is therefore crucial to operating effectively under this framework. For many businesses, appropriate lines of communication between management and staff will already be established, so the Act will make little difference. However, what is important to understand is the limits that the ERA put on communications and the consequences of inappropriate communication.

DIRECT COMMUNICATION

The North American model of Good Faith Bargaining has shown it to be necessary to encourage good faith bargaining by restricting alternatives. The ERA seeks to do this also, by enforcing mediation prior to industrial action, by restricting replacement labour during a strike and by regulating the flow of information to try and prevent distortion and coercion. This latter duty is found in s 32(d) of the ERA and reads:

> (d) the union and the employer:
>
> (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and
>
> (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for ...

This prohibition on direct communication is a statutory recognition of Thomas J's strongly worded dissent in *New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 85. In effect it reasserts the "neutrality principal", which may well have been the original intention of s 12 of the Employment Contracts Act. In cases such as *New Zealand Fire Service*, the Court of Appeal interpreted the concept of negotiation narrowly, so as to allow a wide variety of persuasive communications to be exchanged directly between parties to an employment contract. The policy makers behind the ERA believe that sending coercive or threatening communication to an employee colours their choice regarding collective bargaining issues, and therefore contravenes their freedom of association and the obligation to act in good faith.

Shared responsibility

Communication and the provision of relevant information is of utmost importance to the good faith bargaining process. It is also important to note that mutual obligations are involved, and that the duty to act in good faith imposes obligations on the recipient of information. It would be a breach of good faith for an employees' representative to use any information provided as bargaining leverage in an unreasonable way, or to reveal anything of confidential nature. As noted elsewhere, in North America it is common for conditions to be imposed on information provided. Section 34(3) of the Act has now been amended to expressly provide that where information could reasonably be considered as confidential, instead of being given directly to the other party it may be given to a mutually agreed independent reviewer. If the reviewer decides that the information should be treated as confidential they are to indicate whether it supports the claim or response to claim in a manner that maintains confidentiality. This will give some comfort to employers – and takes much of the force out of the criticism that the good faith requirements would lead to sensitive financial information becoming public knowledge. There is also statutory recognition in s 34(7) ERA that information provided can only be used for the purposes of collective bargaining.

Broadening s 12 ECA

The obligation to recognise representatives parallels the obligation set out in s 12 of the ECA, however, it is more extensive. The Courts, in interpreting s 12 ECA had imposed some limitations on the obligation. The drafters of the ERA have deemed it necessary to broadly define bargaining, which will have the effect of overturning certain cases which have narrowed the concept. For example, under the ECA it was clear that employers had no obligation to remain "union neutral" (*Adams v Alliance Textiles (NZ) Ltd* [1992] 1 ERNZ 982) and that employers could provide certain types of information direct to their employees notwithstanding the fact that those employees were represented by a union (*NZ Fire Service*). This is no longer the case.

Unfortunately for those seeking clarity and certainty on the subject of communications, the ERA contains a number of statements that are not necessarily consistent one with the other. The Act starts by stating that the general obligation of good faith "does not prevent a party to an employment relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's

business or unions affairs". This is set out in s 4(3) ERA, and preserves "freedom of expression", as recognised in the New Zealand Bill of Rights Act 1990. A number of cases under s 12 ECA refer to this freedom, and it has been held up until now to be consistent with varying sorts of direct communication. In *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 the Court indicated that even under the ECA there was a duty to bargain in good faith once negotiations were under way. However, that duty of good faith did not include a requirement to negotiate (*Adams v Alliance Textiles*). Neither did it prohibit practices such as captive audience speeches (*Adams*), "take it or leave it offers" or refusing to meet or negotiate with employees (*Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894. This will all now change, where parties are represented for the purposes of bargaining under s 32 ERA. During the select committee process the definition of bargaining was narrowed somewhat from including any communications or correspondence between or on behalf of the parties before during or after negotiations to just including communications or correspondence that relate to the bargaining. However this is still a very broad area in respect of which communication is prohibited "before during or after negotiations".

BAD FAITH CONDUCT

The good faith provisions of the Act are likely to be breached if the following activity occurs:

- captive audience speeches;
- mail drops of information which is more than factual;
- newspaper advertisements regarding matters that are the subject of bargaining;
- threatening consequences of strike action;
- requests for feedback on proposals;
- unilaterally enhancing conditions;
- factual information which is communicated in a secret manner or with timing that appears to be strategic;
- a sudden change in position at the last moment;
- behaviour which has the effect of cutting across the authority of the bargaining agent even if such a consequence is not claimed to be the intention;
- giving the bargaining agent no effective opportunity to comment on proposals;
- making proposals directly to employees;
- breach of agreed negotiating protocol; and
- the intention not to recognise the bargaining agent even if the employer's conduct does not achieve this aim.

In contrast, actions considered overseas not to amount to evidence of bad faith include:

- non-coercive communications detailing such things as workplace operations, proposals already put to representatives and the outcome of negotiation meetings. (Whether this would be allowed under s 32(d) ERA and what time frame is involved is a little unclear);
- taking a firm stand on an issue, whilst still genuinely seeking a resolution;
- making certain decisions because of proven financial necessity;
- continuing to operate during a strike or lockout (subject under the ERA to the 40 day stand-down, the mediation provisions and the prohibitions on replacement labour); and
- failing to make concessions or reach a final agreement.

It should also be noted that under s 4, the bargaining representative falls within the obligation of good faith and is under a duty not to misrepresent the other party's position to his or her own party. This may well alleviate the type of concerns that led to the employer's somewhat provocative actions in *NZ Fire Service*.

COMPARATIVE LAW

In the United States, changing entitlements unilaterally while concurrently negotiating with the union, and before reaching an impasse, is evidence of bad faith (and sometimes treated as a "per se" violation). Changing entitlements includes making positive changes such as wage increases. In *NLRB v General Electric Co* 2nd Cir (1959), the Court held that the company's bargaining stance and conduct as a whole was designed to denigrate the union in the eyes of its members, and the public at large, for two reasons. The first was the take it or leave it approach to negotiations in general which emphasised the powerlessness and uselessness of the union to its members. Second, the company's communication programme pictured the company as the true defender of the employees' interests which further denigrated the union and sharply curbed the company's ability to change its own position.

Engaging in conduct that undermines the authority of a union is also one of the indicators of bad faith bargaining in the United States and Canada. As the law currently stands, New Zealand employers have more scope than their North American counterparts to indulge in behaviour undermining the union or encouraging employees to disavow their union affiliation. For example, tactics such as the "captive audience" speech (where the employer calls a compulsory meeting of staff to speak out against the union) are prohibited in North America but in *United Food and Chemical Workers Union v Talley* [1993] 2 ERNZ 360, the Chief Judge refused to apply the line of North American jurisprudence which bans such conduct in New Zealand. However, this will change in light of a statutory duty to bargain in good faith.

CONCLUSION

Communication between employers and their employees, particularly in relation to matters that are the subject of negotiations will have to be undertaken very carefully. The broad statements in s 4(3) authorising statements of fact or opinion reasonably held are, in practice, heavily qualified by the obligation to bargain in good faith. Many of the types of communication permitted under the ECA will become unlawful under the ERA.

While negotiations for a collective employment agreement are under way, employers would be well advised to address all communications on any issues related to the negotiations, to the union rather than directly to their employees.

OVERSEAS EXPERIENCES

It will have been obvious from previous comments that overseas jurisdictions, in particular in Canada and the United States, have highly developed systems of good faith bargaining. Certain good faith obligations, such as the supply of relevant information during collective bargaining, are also evident in the United Kingdom and Europe. In the United Kingdom the Advisory, Conciliation and Arbitration Service issued a revised code of good faith practice for collective bargaining in 1998. However, this code, issued

pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992 does not require disclosure of any specific item of information and failure to observe the code does not render anyone liable to proceedings. Closer to home, Australia has flirted with the concept in its 1993 Industrial Relations Reform Act, which empowered the Industrial Relations Commission to direct parties to negotiate in good faith. This statute has since been repealed, and the current Workplace Relations Act 1996 is designed to support "fair and effective agreement-making", but without specific reference to good faith. The 1996 Act is more akin to the Employment Contracts Act.

The duty to bargain in good faith has been an enduring feature of the Labour Relations system in both Canada and the USA for most of last century and remains so, despite numerous changes in government. The duty encourages informed and constructive bargaining and prohibits conduct likely to impede these objectives. The process is largely unobtrusive, as long as the parties show commitment to reaching an agreement (whether successfully or not). The duty has been refined over many years of case law in the United States, but has not resulted in significant levels of litigation or uncertainty in Canada, which is closer to our own legal system. Their codes of good faith place emphasis on mediation (as does the ERA) and the vast majority of disputes never make it to Court.

WHAT DOES BARGAINING IN GOOD FAITH MEAN OVERSEAS?

The requirement to bargain in good faith, as noted above, means that the parties must show an honest desire to reach an agreement. There must be a common willingness between the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason: see *NLRB v George P Pilling & Son Co* 119 F.2d 32, 37 (3rd Cir 1941). The employer is obliged to make some reasonable effort, in some direction, to compromise differences with the union: see *Reed and Prince MFG Co* 205 F.2d 131, 134-35 (1st Cir). While the good faith obligation will be of particular importance during bargaining, it is important to note that under the ERA, New Zealand has adopted the US model whereby the duty is continuous and applies "at all times" to the employment relationship.

Section 50 of the Federal Canadian Labour Code provides that:

> The bargaining agent and the employer (within 20 days after appropriate notice) shall:
>
> (i) meet and commence ... to bargain collectively in good faith; and
>
> (ii) make every reasonable effort to enter into a collective agreement ....

It was held in the case of *Royal Oak Mines v Canada LRB* [1996] 1 SCR 369, that the first limb of this section must be measured on a subjective standard, while the "reasonable effort" should be measured objectively by looking to comparable standards and practices within the particular industry. Similar formulae are found in Canada's ten provincial Labour statutes.

In the United States, the National Labour Relations Act 1935, as amended in 1947, states:

> To bargain collectively is the performance of the mutual obligations of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Basically this section obliges the parties to be open minded and, similarly to the Canadian equivalent, to make reasonable efforts to come to an agreement.

It can be seen, therefore, that "good faith" is a subjective state of mind which is determined by objective behaviour. In both countries, the Courts have established several indicators of bad faith bargaining. They have also adopted the "totality of conduct" approach which means that the presence of one indicator does not necessarily mean that overall, the offending party has failed to act in good faith. It is likely that New Zealand Courts will adopt this in turn, under the ERA.

Despite the duty of good faith including no obligation to reach agreement (a policy codified in the ERA), in both Canada and the USA parties must show a willingness to consider the other parties' proposals and a willingness to compromise. The Courts are alert to the practice of surface bargaining or "going through the motions". As stated in *Re Connecticut Coke Co* (1934), NLB PT.2,88,89:

> True collective bargaining involves more than the holding of conferences and the exchange of pleasantries ... while the law does not compel the parties to reach agreement, it does contemplate that both parties will approach the negotiations with open minds and will make a reasonable effort to reach a common ground of agreement.

Accordingly, the bottom line appears to be that both parties must be willing to listen, with open minds and a genuine willingness to adjust differences to reach an agreement or to qualify a particular position on any particular point.

The ERA, as previously noted, lists several factors which will be indicators of good faith bargaining, most of which are codification of factors which have developed over time in Canada and the United States. However, the list is not exhaustive, and it is likely that the Courts will draw on the case law of those two countries in adopting other relevant factors and in interpreting what good faith means generally.

Remedies for breach of good faith overseas

In the United States and Canada the typical remedy for cases of refusal to bargain or bargaining in bad faith has been the issuing of a "*cease and desist*" order which requires the wrongdoer to bargain in good faith. However, it has been the experience in those countries that such orders are impotent and do little to deter wilful violators who can still reap the benefits of months/years of delay before they must begin to bargain with the union. Accordingly, the regulators have begun to use additional remedies including compensatory damages. This has included ordering employers to reimburse members of a union negotiating committee for lost wages, for attendance at negotiation meetings at which the employer's "*surface bargaining*" (going through the motions) had been a waste of time and to reimburse the union itself for negotiating expenses. The Canadian Courts have gone even further and have required companies to make whole the employees' and unions' losses.

Canadian Labour Boards' jurisdiction allows discretionary relief in such forms as the following examples:

- interim relief via a "cease and desist" order;
- an order to withdraw certain proposals;
- mandatory reinstatement of striking workers;
- imposition of certain terms to counteract consequences of bad faith bargaining; and
- reinstatement of employees discharged in the context of an unfair labour practice.

Canadian authorities retain the power to order innovative remedies, if appropriate to the circumstances. There are limits on this power, however. A remedial order will be held to be unreasonable where:

- the order is made by a Labour Board and is punitive in nature (Only the Court may make such an order.);
- the remedy infringes on the Canadian Charter of Rights;
- the remedy conflicts with the object of the legislation; or
- there is no reasonable connection between the breach, its consequences and the remedy imposed.

Remedies for breach under the ERA

While it is all very well for the ERA to define the obligations of good faith, these really are only given meaning by the consequences which are imposed for their breach. It is in this regard that there are significant weaknesses in the ERA. The roles of the proposed Employment Relations Authority and the Employment Court are broadly defined and it is likely that, initially at least, they will be reluctant to extend relief beyond declaratory orders.

The provisions of the ERA are disappointing to those who are looking for effective sanctions for their breach.

Section 172 of the Act gives the Employment Relations Authority exclusive jurisdiction to make determinations about whether good faith obligations have been complied with and there is a mandatory requirement for reference of matters to mediation. The authority can also make compliance orders and a person who fails to observe a compliance order is potentially subject to a variety of penalties including a fine of up to $40,000. However, if a compliance order simply directs parties to go away and genuinely bargain in good faith it may be difficult to prove a breach other than in relation to non-compliance with one of the specific statutory criteria.

Obvious breaches of the Act such as failure to meet or to supply any information can clearly be the subject of a compliance order. However, it may be far more difficult to prove that there has been a failure to "*consider*". The ERA asks a lot of the mediation process and it is perhaps unrealistic for the drafters of the Act to think that in circumstances where one party to collective bargaining is determined merely to go through the motions, that mediation is likely to change that. A more likely scenario is that those employers who are well advised will be able to comply with the letter of the law without any meaningful attempt to enter into collective bargaining or to reach a concluded agreement. As the Act stands there are relatively limited options for a union to pursue faced with such an attitude on the part of an employer.

The notion of "good faith" has been labelled by opponents of the Act as an intangible concept. However, the ERA expressly includes minimum requirements for good faith, which are not found in overseas jurisdictions that have similar good faith bargaining policies. The drafters of the ERA are fortunate that they could draw on many years of developing case law from overseas and encompass those lessons in statutory form. Having said this, there is still large scope for discretion under the Act, which means that the law as it relates specifically to New Zealand will be decided, at least to some extent, by future cases. In spite of the minister's expressed intentions to the contrary, there will be a significant role for lawyers to play in clarifying the limits of the obligation of good faith and inevitably some degree of uncertainty until the Courts have had the chance to interpret the concept in the context of New Zealand employment relationships.

LIKELY PRACTICAL EFFECT

It remains only to make some more general observations about the likely effect the Act will have on workplace relationships when it is enacted. The law is a relatively poor instrument for modifying human behaviour and it is probably naïve to expect that, merely because of the enactment of the ERA, all employment relationships will change their nature or improve in quality. However, the law can prescribe certain minimum standards of behaviour and insist that parties observe those standards. Undoubtedly, some employers will resent the intrusion of the law into the relationships they have with their employees and will attempt to circumvent the obligations imposed by the ERA. In assessing whether an employer is genuinely acting in good faith or merely going through the motions, the Courts will have to make some fine distinctions and bring an element of subjective judgment to bear.

With regard to bargaining, especially collective bargaining, we can expect that the New Zealand Courts will follow principles developed overseas. This means that a distinction will be drawn between "hard bargaining", which is allowable and "surface bargaining", which is not. The test in Canada for assessing the genuineness of a party's intention to reach agreement is carried out in light of the entire context of the negotiating history of the parties and includes:

- whether the party is engaging in conduct which may break down the decision-making framework of bargaining;
- whether a party is engaging in conduct which unreasonably inhibits the process of achieving agreement; or
- whether the party is otherwise failing to make reasonable efforts toward agreement

The accepted norms and practices within a particular industry form the objective criteria for the above factors to be weighed against. Examples of unacceptable conduct are dealt with elsewhere in this paper, but as a general rule, any position taken by a party which is unjustifiable in the circumstances is likely to violate the good faith duty. Under the Act, an employer bears a new responsibility to unions to adhere to this duty *at all times* and the union bears the same corresponding responsibility to the employer.

There is debate about the extent to which laws can change attitudes. The real consequence of the inclusion of the good faith provisions in the ERA may not be that certain outcomes are achieved or patterns of conduct imposed but rather that the mind-set of parties to the employment relationship is changed so that parties see collective bargaining as a genuine option and do their best to see the employment relationship in a new light where parties cooperate to achieve a mutually beneficial outcome rather than simply as a contractual exchange where the parties to the contractual relationship have no greater obligations imposed upon them than do parties to contracts generally. ❑

PROTECTION FROM ACCIDENT

D F Dugdale, the Law Commission

spoke to the Aviation Industry Association of NZ (Inc) Rotorua 21 July 2000

One of the basic reasons why we have a state at all, even the rolled back and minimalist state of today, is to provide physical protection to its citizens. The premise of this paper is that New Zealand law does not do enough to protect the safety of New Zealanders from accidental injury and death. I confine myself to identifying the problems as I and some of my Law Commission colleagues see them, and to discussing one possible solution. I propose no definitive answer. Teasing out the most appropriate solution calls for skills that I do not profess in disciplines other than the law and for research and consultation that has not taken place. On this occasion I will be content if I can persuade you that there is a gap in the law that needs filling and that one possible solution that I will shortly outline to you is not totally meritless.

ACC CREATES A GAP

The scheme broadly stated of the Accident Compensation Act 1972 was to put an end to fault as a foundation for civil liability for personal injury or death on the basis partly that the ability to prove fault (in the context of a road accident at high speed for example) was too much a matter of chance and partly that the very great cost of establishing or resisting allegations of fault would be better applied in compensating and rehabilitating victims. So civil liability for causing injury or death was done away with, and instead all injured persons are entitled to periodic compensation calculated according to a scale.

There was general acceptance that the scheme as described in the previous paragraph lacked effective disincentives to acting carelessly and that a regime of criminal penalties was needed to round out the scheme. The Woodhouse Commission's view was:

> There should be no reluctance to use the penal sections of the various Acts and regulations when (in more serious cases at least) advice and persuasion has clearly failed (*Compensation for Personal Injury in New Zealand; Report of the Royal Commission of Inquiry* (1967) para 327).

The officials' commentary said:

> **New Offence** – In view of the wide coverage of the proposed scheme, it might be desirable to create a new criminal offence whereby a person guilty of reckless conduct causing or likely to cause injury to any person (perhaps including himself) can be convicted and fined or imprisoned. This would serve the function, which is inadequately carried out by the law of negligence at present, of punishing the wrongdoer. Such a law would remove one of the objections to the abolition of the common law right of action for personal injury. It would also be freighted with whatever deterrent value the present tort law has in preventing accidents. (*Personal Injury; A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (1969) para 252.

The Gair Committee said:

> The general policy should be to avoid punishment of persons who have been careless for a brief time or on an isolated occasion and to concentrate on penalising effectively those who have been really reckless or who have pursued or permitted improper practices on a number of occasions. (*Report of the Select Committee on Compensation for Personal Injury in New Zealand* (1972) (I.15) p 55.)

It is important to note that this necessary part of the overall proposal has never been acted on. It was not until 1992 that the Health and Safety in Employment Act was enacted. That statute went some distance toward filling the gap but its scope is strictly limited.

The unfortunate consequences of this gap have been exacerbated by economic circumstances and by legislative acts. The weakening of the trade unions as a consequence of the Employment Contracts Act 1991 stilled a voice diligent (some would say over-diligent) in demanding attention to safety concerns. Workers themselves are less likely to complain about workplace hazards in times of high unemployment. When work is short small construction contractors are under a temptation to take safety shortcuts to keep their tenders down.

The view of the select committee on the Bill that was to become the short-lived Accident Insurance Act 1998 was that:

> In a competitive environment, the price employers will pay for accident insurance should reflect the decisions they make with respect to work-place safety and rehabilitation, thus providing the incentive to invest in these areas.

Whether this would have provided an adequate incentive to safety consciousness will now never be tested. The literature on experience or merit rating suggests that it has no great effect as an incentive to workplace safety.

FILLING THE GAP

If the objective is to protect individuals from personal injury or death, what can the law do to achieve that end? The options range from deterrents to incentives, with somewhere

between stick and carrot such measures as the encouragement of voluntary codes coupled with audits to check compliance. Somewhere along this spectrum should be located examinations to determine the cause of accidents where that is uncertain. Although in the balance of this paper I will be concentrating on the enforcement of mandatory rules (sticks in other words rather than carrots) this is because that area is appropriate to a lawyer's expertise and not because I am in any way dismissive of the merits of alternative solutions. I confess however to the uneasy suspicion that such softer measures as codes of practice, audits and inspections tend in practice to carry most weight with those who are in any event mindful of their obligations. They reinforce in other words the good behaviour of the well conducted, but do nothing to discourage the misbehaviour of the scoundrels.

A criminal law solution?

For a number of reasons it seems unlikely that the deterrent effect of a criminal prosecution affords an answer. These reasons are:

- it is often difficult where the basic cause of the death or injury is systemic to sheet home liability against any individual. Consider in this context Erebus, Cave Creek and the Zeebrugge disaster involving the *MV Herald of Free Enterprise*;
- this difficulty in sheeting home can be because of one of two reasons. One is that if the failure is of a system no individual human actor may be sufficiently at fault. The other is that the rules of criminal procedure which entitle defendants to refuse to make self-incriminating statements can have the consequences if a corporation chooses to slam the door in the face of enforcement authorities, that those authorities are simply not able to get to the bottom of just what happened;
- it is often impossible to prosecute a corporation on the basis of a failure to establish a safe system of work. In such cases there are problems in attributing to the defendant corporation any mental state that is likely to be a necessary element of the various offences which might be charged. As the law now stands, moreover, in New Zealand a corporation cannot be convicted of manslaughter because the Crimes Act 1961 defines homicide as "the killing of one human being by another", a wording which excludes the criminal liability of any artificial person. Also there can under our law be no criminal liability of the Crown. (It would be possible to change the law to make corporations liable for manslaughter, but there are obstacles that are probably insuperable to imposing criminal liability on the Crown);
- finally, the requirement of the criminal law of proof beyond reasonable doubt can in practice present enforcement authorities with an insurmountable hurdle.

In Erebus Mr Justice Mahon referred to:

> ... the incompetent administrative airline procedures which made the mistake possible.

There were no prosecutions.

Of Cave Creek Judge Noble said:

> This was a case where there was simply not in place (at least not within the West Coast conservancy) a managed system structured to ensure that projects were adequately and properly conducted from conception to final inspection.

There were no prosecutions.

In *The Herald of Free Enterprise* Mr Justice Sheen said:

> ... a full investigation leads inexorably to the conclusion that the cardinal faults lay higher up the company. They did not apply their minds to the question: What orders should be given for the safety of our ships? ... From top to bottom the body corporate was infected with the disease of sloppiness.

In subsequent proceedings it was held that neither individuals at the more menial end of the chain, the men for example who failed to close the bow doors, nor senior officers (because not one of them could be said to be the directing mind and will of the shipping company) could be convicted of manslaughter.

An English study published last year sums up the matter in these words:

> A catalogue of some other recent incidents culminating in the Southall rail crash in September 1997 clarifies the scale of the problem. In all the following cases the relevant company has been implicated by the evidence (and with some an official inquiry report) of contributing in some significant way to the cause of death: the Kings Cross fire, 31 deaths in November 1987; the Piper Alpha oil rig fire, 167 deaths in July 1988; the Clapham train crash, 35 deaths in December 1988; the Purley train crash, five deaths in March 1989; the sinking of the Marchioness, 64 deaths in August 1989. Six disasters, 494 people dead, yet no successful prosecutions. (G Slapper *Blood in the Bank: Social and legal aspects of death at work* (1999) Ashgate, Dartmouth p 7.)

An alternative solution

It is this situation that has led some of my colleagues to toy with the idea of an alternative approach. What is contemplated is the enactment of what might be called a Physical Safety Protection Act. The purpose of this statute which would bind the Crown would be to discourage acts or omissions likely to put people's physical wellbeing at risk by imposing a defined duty of care. The statute would then go on to provide that in civil proceedings which could be instituted by any person, swingeing penalties might be imposed for a breach of such duty.

As to the formulation of the duty of care, the suggestion is that there not be a return to the prescriptive and detailed requirements of past legislation spelling out for example how many pit props should be inserted per length of coal mine tunnel. We have as a model the simplicity and directness of s 9 of the Fair Trading Act 1986 which is only 20 words long and says:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Using this as a model, we have suggested the following formula:

- every person (including legal persons) in carrying on a business must exercise reasonable care to protect other persons from death, personal injury and disease;
- the Crown, every Crown entity and every local authority must in the exercise of his, her or its functions exercise reasonable care to protect other persons from death, personal injury and disease but nothing in this Act shall apply to the lawful application of force by members of the police or of the Defence Force.

Then as to the type of proceedings, we have already discussed the difficulties for enforcers in a reliance on the criminal law. But it seems that acts are criminal only if the legislature chooses to criminalise them, and that the only

precise definition of a crime is Glanville William's "an act capable of being followed by criminal proceedings having a criminal outcome" ("The Definition of a Crime" [1955] *Current Legal Problems* 107, 130). There exists the brazen example of ss 80 and 83 of Commerce Act 1986 as a method of jumping over the problems attendant on criminal prosecution. Each of those sections provides for the imposition of very large pecuniary penalties for breaches of the Commerce Act (maximum $500,000 in the case of an individual and $5,000,000 in the case of a body corporate) but effectively categorises them as civil proceedings by express provisions that the standard of proof shall be the standard of proof applying in civil proceedings and permitting the prosecutor to elicit information from the defendant by the processes of discovery including the administration of interrogatories. Under our proposal an operative section could be along the following lines:

> If a District Court or the High Court is satisfied on the application of any person that the Crown or any person on whom a duty of care is imposed by this Act or by the Occupiers' Liability Act 1962 has breached such duty the Court may order the Crown or such person (the wrongdoer) and any servant or agent of the wrongdoer by reason of whose act or omission the wrongdoer is vicariously liable to pay such pecuniary penalty as the Court determines to be appropriate not exceeding in respect of each act or omission the sum of $5,000,000 in the case of a body corporate and the sum of $500,000 in the case of any other person.

The standard of proof would be that of civil proceedings. As in the Commerce Act the applicant would have the right to discovery. The Court would have the right as well as, or in lieu of, ordering a payment, to enjoin future breaches and to require publicity.

The intention would be that the amounts ordered to be paid, apart from costs that would go to the applicant, would be paid to a prosecuting authority, which aided by such recoveries could be self-funding. The present common practice of awarding portions of prosecution fines to injured parties or their estates, a judicial recognition of the inadequacy of present compensation levels, can scarcely be regarded as fair or even-handed. Some injured parties or their relicts receive payments (usually demeaning in amount) calculated on no fixed basis and some do not, depending on whether there is a prosecution, whether there is a conviction, the amount of the fine and whether and how the Judge chooses to exercise his discretion to apply part of the fine to the solace of the injured or bereaved.

It is too easy for commercial organisations which engage in potentially hazardous tasks simply to cost in expenses on deaths and maimings as part of the outgoings on a particular job or activity. Anyone who doubts whether such cold-blooded calculations occur may care to ponder the 1970s case of the *Ford Pinto*. This model was found by Ford to have a defective fuel line as a result of which it was likely to catch on fire following crashes, but the manufacturer decided to keep quiet about the risk, calculating that compensating for an estimated 180 burn deaths, plus 180 serious burn injuries, plus 2100 burnt vehicles would cost only $49.5 million as against $137 million which was the cost of recalling and repairing at $11 per car or truck the 11 million cars and the 1.5 million light trucks that had been sold. Such a calculation is no doubt logical to the worshipper at the altar of profit maximisation, but does seem a trifle inconsiderate to the general public. Our reason for recommending so high a level of penalty is in the hope that Courts will regularly impose penalties sufficiently high to have an effect on the wrongdoer's balance sheet. If the bottom line is all-important, attack the bottom line. Our reason for recommending liability of individuals is that in the end it is individual people who must learn the need to take the care that will avoid accidents. Liability under our proposal should rest on those employers and those employees whose careless acts or omissions have contributed to the danger.

One reason for our proposal that any person may bring proceedings of the sort that we contemplate is that it would provide an outlet the need for which is not uncommonly felt by the families of those killed in industrial accidents. Often they believe that the law provides no way in which they can indicate to the world their belief that the employer has been at fault. The procedure we propose would have as an incidental benefit the provision of just such a procedure, litigation as therapy.

Fish-hooks

It will be readily apparent that in relation to what has been proposed there are all sorts of subsidiary questions requiring answers. They include:

- Is it possible to establish such a system without undermining the work of the existing specialised enforcement agencies?
- There are situations such as air crashes where the ascertainment of the causes of accidents is important to prevent repetition. Is it possible to devise a procedure (perhaps a system of immunities) to ensure that the frankness necessitated by the need to ascertain cause does not dry up because of the potential liability for a deterrent penalty?
- At present the legal position is probably that a contract insuring against criminal liability is illegal and unenforceable. Given the deterrent effect intended, should it be unlawful to insure against liability to make payments under the scheme proposed?
- Should an alternative order available to the Courts be a sort of corporate probation which (for example) would enable Courts to stipulate for supervision of a corporation's internal safety compliance regulation?

CONCLUSION

What I have outlined is no more than the bare bones of a proposal, which if it has merit needs lots of consultation, research and hard thinking if the bones are to be fleshed out. The Law Commission has the right to choose for itself the areas of law on which it reports and in exercise of this right has developed its thinking as far as this very preliminary stage. We are unlikely to take the matter further, because although we have the power of self-referral that I have mentioned, we also have to remember that it would be irresponsible to expend public money on exploring proposals as to which it seems much more likely than not that they will never get off the ground. Neither the present administration nor its predecessor has shown any enthusiasm for our proposal which is wide-ranging in its effect, novel, and trespasses on too many jealously guarded cabbage patches. For the proposal ever to get anywhere, it would need the energy, determination and crusading zeal of a person or persons rather nearer the centre of political power than is the Law Commission. My own view remains that for all the political difficulties that would have to be surmounted before it could be adopted, the proposal is a fundamentally sound one. ❑

CONFIDENTIALITY IN MEDIATION

Virginia Goldblatt, Massey University

asks whether confidentiality is a myth or a reality

Mediation is described, repeatedly and approvingly, as a "confidential" process. Separate discussions and joint meetings, and disclosures or offers made therein, are typically spoken of as being "without prejudice". Both the process and possible outcomes may be confidential to the parties and the mediator.

The emphasis on confidentiality arises because it is recognised as one of mediation's biggest assets. Mediators, and often legal representatives, use it as a means of encouraging parties to choose consensual forms of dispute resolution.

The presentation of confidentiality as a defining feature of the mediation process has been justified in several ways. Boulle, Jones and Goldblatt in *Mediation: Principles, Process, Practice*, Butterworths, Wellington 1998, at 276-277 state that:

> it makes mediation attractive to potential users who wish to avoid publicity and increase the willingness of parties to enter into it in the knowledge that any disclosure cannot be used against them subsequently. [A second reason] is that confidentiality can make mediation more effective by encouraging the parties to be frank and to disclose their real needs and interests, which promotes the prospects of settlement. The third is that it protects the reputation of mediators and reinforces their impartiality by excluding them from pressure to make disclosures during or after the mediation.

Palmer and Roberts in *Dispute Processes: ADR and the Primary Forms of Decision Making*, Butterworths, London, 1998 at 141, express the same commitment to confidentiality in the United Kingdom context:

> Unless the substance of discussion taking place in mediation is protected against subsequent revelations, the process of mediation is likely to be affected. In particular, the exchange of information between the parties will be influenced, the independent position of the mediator may be undermined (especially if he or she is later required to report on the mediation), and third parties may be left in an exposed position. Moreover, in some systems, one of the perceived advantages of mediation is that it is often a private process, and this privacy needs to be protected.

There is a practical element, too, in the promotion of confidentiality. Where there is an economic power imbalance between the parties or where only one party stands to benefit financially from a mediated outcome, then all the other party stands to gain is an end to the dispute without adverse publicity. Because the settlement reached with one employee or one consumer can be sealed off from any similar claims, it does not create a precedent or encourage further claimants.

Boulle, Jones and Goldblatt at p 277, remark further that "In reality, however, mediation is not as confidential as it is sometimes claimed to be". Indeed it is the view of this author that it is increasingly unrealistic to assume that the parties will respect the confidentiality of either the process or the outcome, including "without prejudice" communications.

The extent of the "without prejudice" protection has been the subject of recent judicial deliberation. In *Crummer v Benchmark Building Supplies Ltd* (2000) WEC 70/99, p 25, the Court held that while public policy is to encourage litigants to settle their differences rather than litigate them, exceptions to the rule exist for the purposes of the ECA where:

> as a matter of public policy, there was good reason to admit the evidence, such examples being: (i) where there was a strong risk that the Tribunal in its adjudication jurisdiction would be deceived by the exclusion of the evidence; (ii) where the exclusion would defeat the legislative intent; or (iii) where the statement of admission gave rise to a new cause of action.

This decision was reached despite submissions from both the chair of the Employment Tribunal and counsel for the ET who made particular mention of the need for mediation to have a "confessional aspect". Mr Dumbleton, the Chief of the Employment Tribunal filed an affidavit in the Court in which he deposed that statements may be made by parties "about a fact or an alleged fact in a confessionary or admissionary way". He said:

> that the key to a successful mediation will usually be the preparedness of a party to candidly acknowledge conduct which may well be relevant and even adverse to that party's position in any adjudication hearing, should the dispute proceed that far. Any undue observation or scrutiny of this process would have a stifling effect on it. (*Crummer* p 11.)

It is, however, the extent of confidentiality, particularly in terms of settlements reached at mediation, that is my present focus. Of concern is the ease with which parties, and sometimes their advocates, can use the news media to render confidentiality provisions or confidential outcomes meaningless.

Over the past year a series of incidents have raised alarms. A number of these have been reported in the press and therefore can be referred to freely. Several more have

emerged from my own private mediation practice throughout the country and these can only be described in a non-identifying way. Towards the end of 1998 I was mediating in a consumer dispute. Two clients, separately represented, had concerns about the service they had received from an organisation and were looking for redress. I was approached initially by one of the consumer parties and needed to meet with representatives of the service provider to explain the process prior to obtaining their agreement to mediate.

After discussing the key features of mediation, and highlighting confidentiality and "without prejudice" as amongst these, I was taken aback by the response. I was informed that they had been assured of this before in a different mediation and it was simply untrue. The previous occasion had resulted in a confidential settlement, including a monetary amount paid to the other party. Within two weeks the organisation had read the details of that "confidential" agreement in the local news paper.

While the organisation continued to believe in the value of mediation as a constructive means of dispute resolution and while they would participate again, they made it clear they would do so with limited confidence that any confidentiality clause would be respected. They asked how either they or I could prevent the other parties from going to the media, or the media from publishing the details if they received them. The answer was, of course, that in any practical sense, we could not do so.

Unfortunately this was not an isolated incident and a number of other examples have come to my attention over the past year alone.

For instance, *The Dominon* ("Expelled Student paid $9100", Wednesday August 11, 1999) stated:

> A former Wanganui Polytechnic student revealed yesterday she had been paid $9100 in a confidential settlement after being expelled following her complaint of racism ... [Ms Searancke] said the Race Relations Office helped mediate an agreement with the polytechnic in which she was promised a payment to compensate her for the expense of taking up a Maori Visual Arts course at Massey University. She estimated her expenses to be $36,000 but she said she was pressured into agreeing to the $9100 payment. Breaking the confidentiality agreement did not worry Ms Searancke "I don't care, they can sue me. I've got no money".

The problem also appears where parties fail to understand the fundamental nature of a negotiated outcome: consensual processes are generally interest-based and not rights-based. Any settlement reached is relevant only to the particular parties and the confidentiality clauses in negotiated outcomes are often an important aspect of such resolutions. They do not set precedents nor do they necessarily involve any admission of liability. The focus is on resolving a problem or dispute not on proving guilt or innocence.

Off Campus (Massey University Extramural Student Society magazine) September 1999, p 11 published an article relating to extramural students who felt disadvantaged by a change to Massey University's points system for papers. This included publishing the details of some students whose difficulties had been resolved. One student whose case had been settled was angry about being asked to sign a confidentiality agreement. "It was like being gagged and I thought it was unethical. It's like they don't want people talking and comparing notes."

Indeed, while the published details might well have produced a favourable impression of the university's willingness to address individual cases, that publicity could be unhelpful to other students. Where results depend on the particular merits of the case, comparisons with others are potentially misleading.

The problem highlighted here is the damage done to other complainants in cases where confidentiality is breached. Parties will be reluctant to negotiate or mediate if they believe settlements will be publicised. Moreover, it is unfortunate that ignorance about process, and complex agendas mean that "successful" parties in a mediation or assisted negotiation, ie those who achieve a resolution of their own differences, want to be seen to have "won" as well. Winning and losing belong to adversarial processes. Settling problems belongs to consensual ones. However, unrepresented or poorly represented parties who do not understand the distinction between these processes, often feel unfairly silenced by confidentiality claims and irresponsible press reporting creates the impression that these parties are the victims of large organisations, employers or business rather than satisfied claimants.

The role of the advocate here is crucial. Advocates in mediation or negotiation are advocates for parties and not for causes. Parties need to be educated about process choice and the consequences. For every consumer who reveals the details of a non-precedent setting, non-liability acknowledging, confidential settlement, other users are discouraged from mediating, so some consumers may miss the potential opportunity for a negotiated or mediated outcome.

Of concern, too, are legal representatives who choose to go public following a mediation. Even where there is no legal issue involved, ethical questions can still be asked about the appropriateness of doing so.

The Sunday Star-Times (20 February 2000) carried a piece headed "Sacked by Fax", and described the case of a worker who received his dismissal notice by fax. After the case was filed, at the Employment Tribunal, the employer, Elanco, and the worker came to a settlement. Elanco director Derek Moore said that confidentiality terms in the settlement precluded him from commenting.

However, while not commenting on the detail of the settlement itself, the employee's representative did reveal details of the facts which led to the settlement: "His boss phoned him to see if he was home and then said 'I want to send you something'" says the man's lawyer, Geoff O'Sullivan. "So my client waited by the fax and out spewed his dismissal notice."

The *Sunday Star-Times* also obtained a copy of the fax and quoted from it liberally.

While this employee was clearly willing to have details of the allegations about him made public he, in doing so, damaged the credibility of the mediation process and weakened the chances of it being a preferred option in future disputes, not only for this particular employer, but for others who read the article.

If an employer settles at mediation to avoid the publicity of an adjudication, what is the basis for releasing details of the complaint to the newspaper? Surely if this were to happen repeatedly employers would be increasingly disinclined to mediate. If you are going to be subjected to the unwelcome publicity anyway, why not tough it out and take the matter to adjudication. You might win there or, even more likely, the cost of adjudication might deter the employee from proceeding. These possibilities become even more pressing with the proposed changes in the Employment

Relations Bill, including the introduction of a national mediation service.

Mediation is damaged as a process by this kind of conduct and parties will lose faith in it as a consequence.

In another instance, the human resources manager of a client company recently received notification of a personal grievance with several clauses referring to an "unsuccessful" mediation and claiming that it was another employee who unilaterally withdrew from the mediation. The referral read, inter alia:

> In fact it was this employee and not X who refused to take part in mediation. My client was willing to attend mediation and Z refused, restricted and obstructed the process.

This employee was legally represented and it was counsel who made these references. I believe that even if the client had wished to do so the representative should have refused to on the grounds that:

- the mediation was "without prejudice";
- it is not possible to establish what "successful/unsuccessful" mean out of context; and
- information about what the mediation achieved, and who, if anyone, wanted to terminate or continue, was protected. Only the mediator could give any useful evidence about the above if the parties' testimony conflicted, and they should not.

I have also been approached regarding a non-employment dispute by a lawyer acting for one party asking what could he say about the mediation I conducted, the intention being at least to let it be known that his client was willing to mediate and perhaps create a favourable impression by doing so.

Again, if references to prior mediation appear in the pleadings and the other party wishes to deny that a mediation took place or argue reasons for its failure to produce an outcome, who can resolve any conflict of testimony? Only the mediator, who should not be required to give evidence.

It is interesting to note that s 148 of the Employment Relations Act, on confidentiality, reads:

> (2) No person who provides mediation services may be required to give evidence in any proceedings, whether under this Act or any other Act, about –
>
> (a) the provision of the services; or
>
> (b) anything, related to the provision of the services, that comes to his or her knowledge in the course of providing the services.

And

> (3) No evidence is admissible in any Court, or before any person acting judicially, of any information, statement, admission, or document disclosed or made to or by any person in the course of the provision of mediation services.

In the draft Bill the then s 170 on the duty of the authority to consider mediation services read:

> (1) Where any matter comes before the authority for determination, the authority:
>
> (a) must, whether through a member or through an officer, first consider whether an attempt has been made to resolve the matter by the use of mediation services; and
>
> (b) if it considers that *no such attempt has been* made or that any *such attempt was inadequate*, must direct that mediation services be used before the authority investigates the matter, unless the authority considers that it is clear, in all the circumstances, that the use of mediation services will not serve any constructive purpose or is not in the public interest; [*Emphasis mine.*]

and subs 2 allowed the authority to:

> ... give a direction under subs (1)(b) or (c), the parties must comply with the direction and *attempt in good faith to reach an agreed settlement of their differences*, and proceedings in relation to the request before the authority are suspended until the parties have done so or the authority otherwise directs (whichever first occurs). [*Emphasis mine.*]

It was difficult to see how these issues could be determined unless the mediator breached the confidentiality provisions in s 148. Who else is in a position to provide the necessary information to the authority?

However the Act shows a significant change. This s (159) Duty of the authority to consider mediation now reads:

> (c) must direct that mediation or further mediation, as the case may require, be used before the authority investigates the matter, unless the authority considers that the use of mediation or further mediation:
>
> (i) will not contribute constructively to resolving the matter; or
>
> (ii) will not, in all the circumstances, be in the public interest; or
>
> (iii) will undermine the urgent or interim nature of the proceedings;

The redrafting of this clause addresses to a large extent my concerns and helps to protect the confidentiality provision of s 148.

However, the question of how the authority will be able to determine what "further mediation ... the case may require" is yet to be established, as is the ability to decide whether the parties "attempt(ed) in good faith to reach an agreed settlement of their differences".

While experience reinforces the importance of a separate signed contract in which the parties agree not to call the mediator as a witness in subsequent proceedings, as held in *M v Independent Newspapers* (1992 1 ERNZ 202), this case does now need to be viewed in light of *Crummer*. Even though the mediator cannot guarantee that parties will protect the confidentiality of process or outcome, and it now seems in some cases, disclosures, a signed agreement at least gives the mediator a degree of protection from being asked to support those disclosures.

All of the incidents referred to affect very significantly the trust and confidence parties can have in the mediation process and consequently damage the reputation and effectiveness of mediation. We are left then with the question of how realistic is the reliance placed on confidentiality in the mediation process and how reasonable or fair it is to use confidentiality and "without prejudice" as ways of encouraging parties to reach a consensual outcome.

When addressing these questions it is relevant to ask what happens when a confidentiality clause in an agreement is breached. The legal situation is that where the first breach of the contract is that of the confidentiality clause by one party, the other party may also refuse to perform its

continued on p 400

PROCEDURES UNDER *WOOLF*

David Cairns, B Cremades & Asociados, Madrid

continues his review of England's procedural revolution

CASE MANAGEMENT

Lord Woolf considered that "the unrestrained adversarial culture" was "to a large extent responsible" for the deficiencies he identified in the administration of justice. Accordingly there was now no alternative to a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the Courts. "Unmanaged adversarial procedure" had led to an unacceptable situation; the solution proposed was "a Court-managed system" (*Interim Report*, ch 4, paras 1 and 2; ch 5 paras 2 and 10). The introduction of judicial case management is therefore the keystone of the new CPR.

Judicial case management is not a new idea. Lord Woolf referred to experiments in case management in English Courts, and also to its use in overseas jurisdictions (including New Zealand). However, notwithstanding a uniform trend in common law jurisdictions towards judicial case management it is not without its problems and its efficacy has yet to be conclusively established. Lord Woolf strongly endorsed case management, and it is instructive to examine briefly the distinctive features of his vision of successful case management.

Case management under the CPR is to be comprehensive and a regular part of all proceedings. The central principle is that the Court will manage every case, but the type of management will vary according to the needs of the case. (*Final Report*, ch 5, para 2.) The CPR apply at both High Court and County Court level and all cases at both levels are to be allocated immediately upon the filing of the defence to one of three "tracks" for case management purposes: the small claims track, the fast track and the multi-track. The hallmarks of the small claims and fast tracks are basic management, fixed timetables and standard procedure. Case management on the multi-track, which includes all major commercial disputes, involves greater judicial involvement (see Part 26 and its accompanying Practice Direction for the rules relating to track allocation. In general terms the fast track is for claims of a financial value of less than G15,000 where the trial is expected to last no longer than one day, and where there is limited expert evidence).

Secondly, case management is active in that the responsibility for the management of cases rests with the Court, not the parties. Case management is not a matter of judicial discretion; R 1.4 imposes a positive duty on the Court actively to manage cases. While Lord Woolf targeted lawyers as responsible for the failure of the adversarial system there is in his analysis an implicit criticism of judicial passivity or remoteness in the face of the widespread flouting of timetables by lawyers, the abuse of discovery and disproportionate attention to peripheral issues (On passivity or remoteness as a judicial vice (the opposite vice to bias) see David J A *Cairns Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (OUP, 1998) at 110-117). The change in forensic culture called for by Lord Woolf includes Judges as well as solicitors and advocates, and is supported by proposals for additional judicial training and changes to the judicial structure.

Thirdly, case management is structured and clearly defined. Rule 1.4 links active case management to the overriding objective, giving an explicit statement to litigants, legal advisers and the judiciary of the matters to be addressed in the case management process:

1.4 (1) the Court must further the overriding objective by actively managing cases;

(2) active case management includes:

(a) encouraging the parties to cooperate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure;

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to attend at Court;

(k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

Further, detailed Practice Directions set out the case management requirements for each of the three tracks. Matters previously party-controlled (within the ambit of general principles), particularly settlement, alternative dispute resolution, the scope of discovery and the use of experts of trial, are now case management issues. There is an emphasis on the early identification and resolution of issues and the setting of a trial date as soon as practicable. Lord Woolf saw the early fixing of a trial date or a trial "window" as the key

to effective case management (*Final Report*, ch 5, para 20. On the fast track the hearing date is fixed at the time of track allocation, at a standard period of not more than 30 weeks: see R 28.2).

Fourthly, case management is not simply imposed on the existing procedural structure, but is assisted by complementary procedural reforms. Some of these reforms are of a fundamental nature, such as the implementation of much firmer judicial control over the scale of discovery and the use of experts, and expanded powers of summary judgment and striking out. Some are directed at increasing party and solicitor compliance, such as the new provisions relating to sanctions and costs. Some are merely facilitative, such as the Court's general powers of management, ability to make orders on its own initiative, and the use of questionnaires and new technology to inform the Court without the necessity of appearance.

Finally, Lord Woolf recognised that judicial consistency was essential to effective case management. There must not be a proliferation of local practices. It was "not acceptable for Judges' approaches to be so different as to lead to significant differences in costs between similar cases. This is likely to result in forum shopping, which must be discouraged". (*Final Report*, ch 5, paras 35-36.) Judicial training and the issue of uniform Practice Directions facilitate the achievement of this objective.

In England as in other common law jurisdictions many lawyers are sceptical as to the benefits of judicial case management. Professor Michael Zander QC, a strong critic of Lord Woolf's proposals, argued that a major review in the United States (the RAND study) had reported that judicial case management adds to the cost of litigation, and while it may also shorten the length of proceedings "the most effective device to achieve that result is the simple one of giving the parties a trial date from a very early stage and then adhering to that date ..." ("The Woolf Report: Forwards or Backwards for the New Lord Chancellor" (1997) 16 CJQ 208, 215-221. The RAND study and the US experience of case management are further discussed in Richard L Marcus "Malaise of the Litigation Superpower" in *Civil Justice in Crisis* (ed Zuckerman, Oxford, 1999) at 104-108). Lord Woolf, however, rejected the criticisms of case management (see *Interim Report*, ch 5, paras 21-26; *Final Report*, ch 1, para 3-7), which he described as an extension backwards in time of the role of the trial Judge. His reports and the new CPR leave no doubt as to his view that the management of litigation is better entrusted to Judges, rather than to the legal advisers chosen by the parties to represent their interests in a dispute, and in doing so has imposed, in my view, heavy expectations on the English judiciary.

PLEADINGS: THE STATEMENT OF TRUTH

The most innovative feature of the new rules relating to pleadings (now called the "statements of case"; Lord Woolf considered that the term "pleadings" had "acquired an unfortunate flavour of obfuscation rather than clarity") is the statement of truth.

Rule 22.1 provides that the following documents must be verified by a statement of truth:

(a) statements of case, ie a claim, defence or reply; and any amendments to a statement of case;

(b) "further information" under R 18.1 (ie in NZ terms, further particulars and interrogatories);

(c) witness statements (including an expert report);

(d) an "application notice" (in NZ terms, a notice of interlocutory application) where the applicant wishes to rely on matters there set out as evidence.

A statement of truth is simply a statement by a party (or in the case of a witness statement, the maker of the statement) that it believes the facts stated in the document are true. A legal representative may sign a statement of truth on behalf of a party. It is punishable as a contempt of Court to make a false statement in a document verified by a statement of truth without an honest belief in its truth (R 22.1(4) and (6); R 32.14. For the form of the statement of truth see Practice Direction to Part 22, R 2, and Practice Direction, Part 35, R 1).

There is a long-established distinction in common law procedure between pleading (formal and sequential exchanges in writing prior to the trial, for the purpose of defining the issues) and evidence (traditionally presented orally and as a "single event" at the trial, for the purpose of enabling the jury to determine the issues). This distinction has broken down with the decline of the civil jury and the increasing reliance on written evidence. Case presentation is further confused by the move from oral advocacy to written submissions, meaning that the parties now submit three sets of documentation (pleadings, evidence, submissions), conceptually distinct but in reality prepared by the same person or team in an increasingly uniform style. The consequences of these changes in New Zealand has at the very least been a loss of purpose in pleading. Statements of Claim are often generated quickly to satisfy client demands to initiate proceedings, and often with the collateral objectives of giving the widest possible scope to discovery or exerting commercial or political pressure. The parties and their legal advisers rely on being able to amend the pleadings to properly define the issues after discovery or as a result of trial preparation, or pleadings are simply dispensed with altogether in favour of an "agreed statement of issues".

The CPR, both through the statement of truth and through the abolition of particulars and interrogatories in favour of the "provision of further information" under R 18, conflate pleading and evidence, recognising that this distinction has outlived its usefulness in a civil procedure dominated by written statements and Judge-alone decision-making. The CPR require that the parties or their legal advisers certify that all statements put before the Court, whether to define or prove a party's position, are true. The statement of truth will compel legal advisers to spend more time investigating a client's claim prior to the issue of proceedings, and therefore act as a brake on frivolous, misconceived and exaggerated claims, and place Judges in a much better position at an early stage of proceedings to decide strike-out applications and to exercise their case management powers efficiently.

A statement of truth makes the parties and their legal advisers responsible and answerable for the accuracy of pleadings. It is a remarkably simple, costless and effective mechanism to improve the usefulness of pleadings. Its adoption in New Zealand deserves to be addressed by the Rules Committee.

DISCLOSURE

In Lord Woolf's view the complexity of modern business life and the proliferation of technology capable of creating and copying documents had got far ahead of the law of discovery.

The authoritative test for the relevance of documents for discovery purposes for over a century in England and New

Zealand has been the statement of Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Campany* (1882) 11 QBD 55 at 63:

> It seems to me that every document relates to the matters at question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can be properly said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences.

Lord Woolf believed that this test had created "a monumentally inefficient process, especially in larger cases. The more conscientiously it is carried out the more inefficient it is". His Lordship considered the radical solution of abolishing discovery entirely, or limiting disclosure to documents on which a party intended to rely (as in continental systems). However, he concluded that "disclosure contributes to the just resolution of disputes and should therefore be retained, but in a more limited form". (*Interim Report*, ch 21, paras 15-20; *Final Report*, ch 12, paras 37 and 45; For recent Court of Appeal decisions in New Zealand following *Peruvian Guano* on relevance see *M v L* [1999] 1 NZLR 747 at 750, and *NZ Rail v Port of Marlborough* [1993] 2 NZLR 641 at 644.)

At the heart of Part 31 of the CPR relating to disclosure and inspection of documents are the new concepts of "standard disclosure" and "reasonable search". Rule 31.5 makes it clear that an order for disclosure means standard disclosure unless the Court otherwise directs. Pursuant to R 31.6 standard disclosure requires a party to disclose only:

(a) the documents on which he relies; and
(b) the documents which –
  (i) adversely affect his own case;
  (ii) adversely affect another party's case; or
  (iii) support another party's case; and
(c) the documents which he is required to disclose by a relevant practice direction.

Standard disclosure eliminates from the disclosure obligation what Lord Woolf called the "story or background" documents and, with reference to *Peruvian Guano*, the "train of inquiry documents"; that is, documents which might lead a party to a train of inquiry enabling him to advance his own case or damage that of the other party (*Interim Report*, ch 21, paras 22-23; *Final Report*, ch 12, paras 30-40).

The concept of standard disclosure would fail in its purpose if a party still had to trawl through all its documents to identify those within the concept. Therefore R 31.7 provides that a party's obligation is to make a reasonable search, with reasonableness being evaluated in light of:

(a) the number of documents involved;
(b) the nature and complexity of the proceedings;
(c) the case and expense of retrieval of any particular document; and
(d) the significance of any document which is likely to be located during the search.

In the disclosure statement in the list of documents a party must set out the extent of the search made to locate documents, and the Court has the power on an application for specific disclosure to specify the nature of a further search to be carried out by the party. (Rules 31.10 and 31.12.)

Lord Woolf recognised the criticism that his scheme might encourage parties to turn a blind eye to documents which might damage their cases. However, discovery had always depended on the honesty and diligence of the parties and that if "the principle of disclosure is to be retained at all, it is important not to make the non-existent ideal the enemy of the better-than-nothing solution". What he proposed, which has now been promulgated, offered "not a perfect, but a realistic, balance between keeping disclosure in check while enabling it still to contribute to the achievement of justice". (*Final Report*, ch 12, paras 43-46. Another jurisdiction recently to abandon the *Peruvian Guano* test, limiting disclosure to documents directly relevant to an allegation in issue, is Queensland. Justice Davies of the Queensland Court of Appeal has written that the new rules "appear to be having the effect of substantially reducing the costs of discovery ... with no noticeable increase in judgment error": see Hon Justice Davies "Civil Justice Reform in Australia" in *Civil Justice in Crisis* at 191.

The CPR also include other disclosure refinements, most importantly an expanded jurisdiction of disclosure before proceedings start – designed to facilitate early settlement – and specific provisions relating to public interest immunity, inadvertent disclosure and the disclosure of copies (see RR 31.16, 31.19, and 31.20).

EXPERT EVIDENCE

Lord Woolf saw expert evidence as one of the two main generators of unnecessary cost in civil litigation, and as a deteriorating problem. In his *Interim Report* he quoted from an article describing modern expert witnesses as "a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be of disadvantage to their clients. The disclosure of expert evidence .... has degenerated into a costly second tier of written advocacy" (*Interim Report*, ch 23, paras 1-2, 10-11). His proposals on experts provoked considerable opposition, particularly his proposals relating to single joint experts.

The main problems with expert evidence were excessive or inappropriate use of experts and the partisanship of experts. This problem was succinctly stated by the Court of Appeal in *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd* [1996] EGCS 23:

> For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend .... to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.

The solution to the problems of expert evidence was to bring expert evidence firmly under the control of the Court. The CPR use the following means to achieve this objective:

Expert evidence a case management issue

The CPR make expert evidence a case management issue, with the Court at case management conferences deciding what expert evidence is reasonably required, and possessing the power on its own initiative to give directions for the use of a single joint expert. Further, R 35.4 provides that no

party may call an expert witness without the Court's permission, and where permission is granted it will be for a named expert in a specified field.

Overriding duty to the Court

Rule 35.3 provides:

(1) It is the duty of an expert to help the Court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

The intention to "departisanise" the expert is here made explicit; an expert is further required to certify in his report that this duty to the Court has been understood and complied with (R 35.10, and accompanying Practice Direction). The expert is further isolated from their instructing party by the removal of legal professional privilege from instructions to experts, who are now required to state the substance of all material instructions, whether oral or in writing, on which the report is written. Further, one party is entitled to put questions to an expert instructed by another party regarding the contents of a report by that expert. The expert's answers are then treated as part of their evidence (RR 35.6 and 35.10).

Expert evidence restricted

Rule 35.1 creates a duty on the Court and the parties to restrict expert evidence "to that which is reasonably required to resolve the proceedings". This restriction is bolstered by the prohibition on calling evidence without the Court's permission, and the provision for single joint experts.

Single joint experts

The predecessor of the CPR, the rules of the Supreme Court, provided (like RR 324 to 333 of the High Court Rules) for the appointment of single joint experts, but the provision was hardly ever used. However, single joint experts, well-established in continental practice, were strongly endorsed by Lord Woolf on the grounds of impartiality, cost effectiveness, equality and the facilitation of settlement, although he acknowledged that the "culture" shift to single joint experts might take some time (*Final Report*, ch 13, paras 20 and 21). Accordingly RR 35.7 and 35.8 provide for the power to direct evidence by a single joint expert and for the instructions to a single joint expert, and Practice Directions encourage the use of a single joint expert unless there is good reason not to do so (Practice Direction, Part 28, R 3.9; Part 29, R 4.10. Early indications are that joint experts are being favourably received: see *The Lawyer*, 10 April 2000, p 31; "While conclusive statistics are yet to appear, the signs are that joint experts are being used in about half the multi-track cases ...").

The most severe problems with expert witnesses in England have arisen in personal injury and medical negligence cases, which in New Zealand are placed outside the jurisdiction of the High Court by the Accident Rehabilitation and Compensation Insurance Act 1992. Nevertheless the excessive and inappropriate use of expert witnesses is undoubtedly a feature of some classes of litigation in New Zealand, and Lord Woolf's reconceptualisation of the role of the expert is well worth consideration in New Zealand.

EARLY SETTLEMENT

"It is a curious feature of our present procedure", Lord Woolf wrote in his *Interim Report*, "as reflected in the rules of Court, that, although the majority of disputes end in a settlement, the rules are mainly directed towards preparation for trial. My aim is to increase the emphasis on resolution otherwise than by trial". (*Interim Report*, ch 24, para 1.) Accordingly the first feature of the new landscape to be created by the CPR identified by Lord Woolf in the "Overview" of the *Final Report* was that "litigation is to be avoided wherever possible" (*Final Report*, s I ("Overview"), para 8). The entire CPR are imbued with the philosophy of the early identification of issues and resolution of disputes, and it is instructive to examine their approach to alternative dispute resolution and settlement.

First, active case management includes encouraging alternative dispute resolution and assisting settlement. The Court is granted an almost complete discretion as to how it performs this duty; the only explicit new case management power directed at encouraging alternative dispute resolution and settlement is the power to stay proceedings prior to track allocation, and initially for one month only, while the parties attempt alternative dispute resolution or some other means to settlement (see RR 1.4 and 26.4).

Lord Woolf thought the Courts should encourage but not compel resort to alternative dispute resolution, and so his *Interim Report* rejected both compulsory alternative dispute resolution as a preliminary to litigation, and the introduction of any Court-annexed alternative dispute resolution scheme. (*Interim Report*, ch 18, paras 3-4, 30-32. For a review of the place of ADR in the civil justice system, with reference to Lord Woolf's Interim Report, see A Marriott "Tell it to the Judge – but only if you feel you must" (1996) 12 *Arbitration International* 1-25.) It therefore has a relatively minor place in the CPR; instead Lord Woolf looked to achieve an increased rate of the early settlement of litigation through rearranging and reinforcing the incentives of lawyers and parties to settle. A priori this does not appear easy; negotiation is a skill not sufficiently valued by litigators, and often conducted in a lacklustre, mechanical fashion, subordinated to other priorities or short-term tactical objectives, until an imminent hearing date concentrates the minds of all concerned. The proverbial settlement on the steps of the Court, when all the costs of trial preparation have already been incurred, is often symptomatic of chronic flawed negotiation skills, and the rise of mediation – facilitated negotiation – confirms both the significance of effective negotiation and the modern litigator's inability to perform the negotiator's role adequately. Nevertheless, a year after the introduction of the CPR, there has been almost universal praise for its success in encouraging early settlement.

At the highest level, Lord Woolf's attacks on excessive adversarialism and his calls for a change in the culture of litigation raise the profile of negotiation. Many of his reforms indirectly encourage reasonableness in negotiation: for example, the duty of the parties (and their advisers) to assist the Court to further the overriding objective, the better investigation and evaluation of claims prior to issue encouraged by the statement of truth, and the early exchange of information facilitated by pre-action disclosure. However, the CPR also include direct incentives to settlement in the form of pre-action protocols and new rules relating to offers to settle and costs.

Pre-action protocols

These are designed to ensure constructive dialogue between the parties before proceedings are issued, and so extend the rules of civil procedure backwards from their conventional

starting point of the commencement of proceedings. To date pre-action protocols are in force only in respect of medical negligence and personal injury cases, and for ancillary relief in family law, but some twenty others are in draft or development, including protocols relating to intellectual property, judicial review, wrongful dismissal, solicitors' negligence and debt recovery. The protocols cover matters such as the form and content of the "letter of claim" (as the letter before action is now called), the form and content of the response, the times when such communications should be made, and the information that the parties should exchange prior to commencing proceedings. The Court will take non-compliance with any applicable protocol into account when giving directions for the management of the proceedings, and when making orders as to costs (Pre-action Protocols Practice Direction, RR 1.4 and 2.1; CPR R 44.3(5)(a)).

Formal offers

Part 36 of the CPR establishes a new regime of formal offers (called "Part 36 offers") to complement payments into Court ("Part 36 payments"). Part 36 offers are normally made by the claimant, but in some circumstances, such as in respect of non-money claims, can be made by the defendant. Part 36 offers are made "without prejudice save as to costs", and so represent a statutory recognition and development of the *Calderbank* offer (*Calderbank v Calderbank* [1975] 3 WLR 586). The powerful attraction of a Part 36 offer to the claimant, and the need for them to be evaluated with care by the defendant, is that if the claimant recovers more at the trial than its offer then the Court may award interest on the judgment at up to ten per cent in excess of the base rate, costs on an indemnity basis, and interest on costs at up to ten per cent above the base rate (R 36.21). Further Part 36.10 provides that offers made by either party prior to the commencement of the proceedings, if they comply with this rule, will be taken into account by the Court in making any order as to costs.

Costs

Finally, the CPR contains extensive general provisions dealing with costs. The general rule remains that costs will follow the event (R 44.3(2)), but the Court must now have regard to the conduct of the parties in pursuing or defending the claim, which includes conduct before as well as during proceedings, and any efforts made before or during the proceedings to try and settle the dispute (R 44.5(3); "the conduct of the parties" is defined in R 44.3(5). There is also provision for "wasted costs" orders against legal representatives who have acted improperly, unreasonably or negligently and caused unnecessary costs (R 48.7 and Part 48 Practice Direction).

CONCLUSIONS

The CPR are a bold reform of English civil procedure, and the impressions after a year are that boldness has been rewarded with success. English adversary procedure as it existed in the mid-1990s was measured against the demands of a modern civil justice system and in many respects was found wanting; solutions have been identified strictly on the basis of simplicity and cost and time effectiveness, and these solutions have been rapidly implemented. The implementation of the CPR is itself a matter of admiration; civil procedure reform having traditionally been a graveyard for the best intentions of the most determined reformers. The keys to the success of the reform have been the frank portrayal of deficiencies, clear solutions, the maintenance of the pace of change – always so important to iconoclastic reform – and the promise of a cheaper, simpler, more accessible civil justice system that has silenced opposition and ensured the political will to make it a reality.

In a broader context the CPR have fundamentally changed the balance between legal advisers and the Judge in modern civil procedure. The adversary system has been measured against modern standards of accessibility, cost and efficiency and had its wings severely clipped. Secondly, a new constitutional dimension to civil procedure has been recognised, and it will be interesting to watch its development. The English Courts will now demand higher standards of their own procedures, and perhaps this can be seen as an inevitable consequence of the higher standards the Courts have demanded over the last thirty years from administrative tribunals (now recognised constitutionally in New Zealand in s 27 of the New Zealand Bill of Rights Act). The relationship between civil procedure and fundamental rights is likely to be further developed in England when the Human Rights Act 1998, which gives effect to various rights and freedoms guaranteed under the European Convention on Human Rights, comes into force later this year (An attempt has already been made (and rejected by a Court of Appeal led by Lord Woolf MR) to use art 6 of the European Convention on Human Rights (the right to a fair trial) to challenge a decision that denied a party, that had agreed to the instruction of a single joint expert, leave subsequently to call its own expert: see *Daniels v Walker*, *The Times*, 17 May 2000.) Thirdly, the CPR and Lord Woolf's reports have some distinct civil law leanings, especially in the scepticism towards discovery, the firm endorsement of single joint experts, and the more pronounced role for the Judge. Again, it will be interesting to watch whether this "continental drift" heralds some closer form of procedural accommodation between common and civil law systems within the European Union. Certainly Lord Woolf has diverted English procedure away from the possibility of US style adversarial excesses, particularly in relation to discovery. Finally, it will be interesting to see how profound and permanent a change in litigation culture the CPR achieve. The aspiration is a more resolution-orientated and less tactical litigation culture which, if achieved, is not only likely to benefit the civil justice system, but also to raise the standards of negotiation, case preparation and, conceivably, professional ethics amongst litigators.

Despite the present optimism, however, more time is required before a final judgment can be made of the Woolf reforms. Much faith has been invested in judicial case management, and serious doubts have been expressed as to whether this will prove justified. Further, features of the methodology of Lord Woolf's reports cause some disquiet. The legal profession was an easy scapegoat to bear the blame for the cost, delay and complexity of civil litigation, but there was little acknowledgment of the pressures faced by the legal profession, or any analysis of features of modern professional, commercial or technological life that may have caused a perception of a deterioration in the profession's performance within the civil justice system. Similarly, Lord Woolf failed to adequately address the virtues of the adversary system, particularly its investigative thoroughness. There was insufficient attention to the subtle but real value of the freedom of the parties and their legal advisers to develop and present a claim or defence as they think best from which, proponents of the adversary system claim, common law justice derives its high quality, not in terms of cost, efficiency and simplicity, but in terms of factual com-

pleteness, truthfulness and legal correctness. Lord Woolf was prepared to take the qualitatively high standard of English justice as a given; he never systematically examined the extent to which his reforms might increase the percentage of error (*Interim Report*, ch 4, paras 5 and 6; Lord Woolf quoted with implicit approval a statement of Lord Devlin that: "Every system contains a percentage of error; and if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt.").

Finally, we return to the implications for New Zealand of the procedural revolution in England. Firstly the CPR should not be ignored; Courts throughout the common law world face similar problems of cost, delay and complexity and the solutions of the CPR, the progress of their implementation, and the analysis of the background reports offer a rich source of ideas and solutions for possible application in New Zealand. It raises the possibility of a thorough review of the High Court Rules, perhaps as part of a general review of the structure of the Courts. The Law Commission would appear to be the proper body to undertake such a review, given that advising on accessibility to justice is one of its principal functions (s 5(d) of the Law Commission Act 1985. The Law Commission is presently considering undertaking a review of the structure of the Courts, provisionally entitled Access to Justice). Secondly, the implications of access to justice as a constitutional value deserve attention in New Zealand. Thirdly, England and New Zealand share similar trends in favour of judicial case management, and the comprehensive and aggressive introduction of case management in England is likely to bring into sharp focus both its virtues and vices. Finally, if a full review of the High Court Rules is not considered necessary or appropriate at this time there are some highly beneficial features of the CPR capable of piecemeal introduction in New Zealand through the Rules Committee; in effect, New Zealand has the opportunity to "cherry pick" the best of the Woolf reforms. The introduction of a certificate of truthfulness in pleadings, consideration of a system of pre-trial offers to supplement payments into Court, the "departisanisation" of the expert, and a formulation of a modern discovery standard all fall within this class. ❑

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obligations under the contract, for instance, the payment of any monetary compensation, replacement, or repair.

The reality is, however, that where those other conditions have already been fulfilled what is the redress? To undo the repair? Reclaim the replacement? Sue and recover the money?

For small amounts, certainly anything less than $20,000, the cost of doing so would be prohibitive but, even more significantly, litigation merely increases the undesirable publicity that the party may have wished to avoid in the first place.

While there may be risks for the mediator where confidentiality is breached by the parties, the greatest damage is to mediation itself – its reputation, its effectiveness and its value. Where confidentiality of either process or outcome is breached we all lose – lawyers, mediators and parties, so we all have an investment in addressing this issue.

We need to ask how can undertakings relating to confidentiality and "without prejudice" be better protected.

It may be that, although litigation following a breach is of limited attraction in many cases, we would benefit from a high profile example of a wronged party who is willing to act in the public good by suing for the breach. That would serve as a warning to others.

The issue might well be addressed by the Employment Relations Authority in the future as breach of a confidentiality clause would clearly be evidence of absence of "good faith". One of the key elements in the Bill is good faith and the explanatory notes describe it at p 2:

> The principle of good faith underpins the Bill, both generally and specifically. The simple requirement of the concept is that the parties to employment relationships (unions, employers and employees) deal with each other in good faith. The intention is that those dealings be based on fair dealing and mutual trust and confidence. This includes, but is not limited to, not directly or indirectly misleading or deceiving each other.

However, reactive measures alone are not enough. We need to raise consciousness in a number of ways. We must educate wherever possible, both the parties and their representatives. Those who pay for the process should understand that they lessen the return on their investment if confidentiality is not respected.

The Law Society also has a role to play here. In particular, the ADR subcommittee should consider the implications as increased mediation under the Employment Relations Act and Court-ordered mediation add to those areas where public and private mediation already occurs.

The media which frequently facilitate breaches of confidentiality need to be subjected to greater censure. Complaints to the Press Council are a case of too little, too late and injunctions require an anticipatory stance which is often impractical and certainly not useful as a standard precaution.

Does legislation have a role here? Perhaps there is a place for a Mediation Act in the way we have an Arbitration Act so that a statutory protection could be provided for mediated outcomes in the way it is provided for awards under the Arbitration Act 1996.

The Mediation Act 1997 which came into force in the Australian Capital Territory in July, 1998 provides an interesting precedent in this regard. In a discussion at [2000] NZLJ 21 the commentator concludes that the Act "ties up in just a few pages a number of loose ends which have plagued the mediation professionals in New Zealand for some time". Of most relevance here are the provisions relating to the admissibility in evidence of communications made in mediation and undertakings given there, and the protection of confidential information unless there is a situation sufficiently grave to warrant disclosure.

While legislation such as this protects the mediator and the mediation process it cannot, without the inclusion of some legal sanction, silence the parties should they choose to go public, nor the news media who disclose confidential information.

In summary, the protection of confidentiality is a concern to all professional mediators. As the situation currently stands, and with particular recognition of the Employment Court's decision in *Crummer*, mediators should avoid making broad assurances regarding confidentiality that they cannot guarantee. On the other hand, in being realistic about the extent of confidentiality and thereby protecting their own reputation, they need to avoid damaging the credibility of the mediation process as a consequence. ❑