THE NEW ZEALAND LAW JOURNAL
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RIGHT OF REPLY

DRINK DRIVING DEFENCES

I refer to the editorial in the September edition of your Journal.

I look forward to each issue of the Journal and the commentaries and analysis from your contributors. In every issue there is something of worth for a commercial lawyer such as myself.

However the editorial in the September edition appalled me. I was not impressed to see the Journal used as a platform from which to launch an illogical and scathing attack upon the lawyers practising in the traffic jurisdiction. In particular your assertion that such practitioners are "the most valueless section of the legal profession" and that they perpetuate "one of several useless rorts operated by the lower end of the legal profession" seem nothing other than a baseless and generalised slur.

Undoubtedly, the purpose of an editorial is to provide comment and provoke debate. However in the present climate where barristerial immunity is under challenge, waiver of privilege is being debated, encroachment by the accounting profession, Public Trust and others is advancing it seems ironic that the Law Journal should turn on its own. While your issues with the state of the law may well be valid the attack on the legal profession did nothing to advance your cause.

This is not an issue which concerns me personally. I do not practice in Court at all. Nonetheless I remain disappointed at the quality of this particular editorial.

Paul Anderson
Govett Quilliam
New Plymouth

I have just had the above editorial brought to my attention.

As a senior practitioner with almost 40 years' experience at the Bar, at which for the last 30 years or so I have specialised in criminal and traffic law, I take strong exception to the sweeping generalisations which you make in your editorial.

I very much resent being categorised as amongst "the most valueless section of the legal profession". You demonstrate your ignorance in the breath and blood alcohol fields when you describe the current issue as being "the ten minute rule". For your information this issue was dead and buried many years ago and the law is quite plain and exact. I would also remind you that a citizen caught up in this statute namely the Land Transport Act 1998, is just as entitled to have the safeguards and protection that the law provides for those people charged with serious crimes such as murder, aggravated robbery, rape etc. A citizen charged with excess breath or blood alcohol offences is equally entitled to have oppressive and unfair behaviour by the Police punished by the Court when evidence obtained by such means is ruled inadmissible. This has been said on many occasions by Judges both in the District and High Courts.

In the penultimate sentence of your editorial you again demonstrate your woeful ignorance of the subject when you say "there is also no need to consult a lawyer at any stage". I am unaware of the High Court Judge you refer to or the judgment but I would remind you the Court of Appeal has said on more than one occasion that there is a need for legal advice to be available to a suspect at any stage of the procedure as is the case in the criminal law. I find it amusing to have you infer that the case of *Rae* was a tawdry fatuous appeal because the principles established in that case are of importance not just in the breath blood alcohol legislation but all facets of the criminal law. The right to advice is a right at any stage of the detention.

Practitioners experienced in this field are often called upon to exercise a judgment as to whether to advise suspects to politely refuse an evidential breath test and request a blood test. A similar judgment is called for when deciding to advise a suspect to request a blood sample when that option is given to them if their breath alcohol level is below 600 but over 400.

Finally, I strongly object to the language used by you in the last sentence of your editorial. It implies that as a practitioner in this field I operate "useless rorts" and belong at the "lower end of the legal profession". Your comments border on the defamatory and are not worthy of a Journal which once occupied a place of prestige in the library of practitioners.

D S G Deacon
Barrister & Solicitor
Wellington

I refer to your editorial in the September edition of *The New Zealand Law Journal*. Amongst other things you refer to "fatuous appeals over details of drink-drive procedure". You go on to say "these cases provide nothing

more than a living for the most valueless section of the legal profession". You end your illuminating editorial by referring to the aforesaid section as "the lower end of the legal profession".

Such derogatory and baseless comments I would have thought unbecoming the editor of *The New Zealand Law Journal* and indicates little appreciation of the role of the advocate. At times the defence lawyer (invariably on limited resources) is all that stands between the power of the state and the individual in a job often difficult, stressful and thankless. Surely without creative reasoning and so called "legal technicalities" the process of the law would be dull indeed.

This editorial is an ongoing example of what I perceive to be a continuing decline in the standard set by the previous incumbent. For one at the "lower end of the legal profession". I am seriously considering whether to renew my subscription.

J K Miller
Lawyer
Dunedin

PRISONS

I am writing in response to your editorial in the *New Zealand Law Journal* October edition. I would like to clarify several inaccuracies printed in this article.

Firstly there is no evidence to support statements made in the editorial about the state of the prison system. Indeed the "latest scandal" mentioned by the author occurred in 1992 and in no way reflects the current Public Prisons Service.

The reality is that the Public Prisons Service clearly sets and maintains high standards and the Department of Corrections is closely monitored by the Ombudsman, Prison Inspectorate and its own Internal Audit group to evaluate all the procedures and processes employed by staff within the department.

It is important to note that the main areas the department is monitored on, ie escapes, have in fact been trending downwards (refer attached escape statistics and information) and other types of prison incidents continue to steadily decline.

As for Public Prisons Service staff, there is a robust recruitment process for those applying for positions in the service and all applicants must fulfil strict selection criteria.

Public Prisons Service staff receive in depth training prior to taking up positions within the service and have a career structure that is qualification based, linked to the NZQA qualifications system to ensure integrity and professionalism.

The actions of all Corrections staff are governed by the Department's Code of Conduct. This document adheres to strict legal and ethical standards.

In regards to your comments about community involvement, as part of the department's aim to reduce re-offending, it is imperative that close links are maintained with local communities that surround prisons.

This is particularly important with Maori communities when links with local iwi are vital to ensure successful re-integration by offenders back into the community following their release from prison.

I hope that you will take the time to re-consider the opinions expressed in your editorial in light of the points I have made. I have also included additional background reading for your further information.

Phil McCarthy
General Manager
Public Prisons Service
Department of Corrections

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employers. Practical everyday examples are considered by the authors to assist employers to determine whether or not the defence can be relied upon.

In chapter three, the authors look at other reasons proffered by employers for discriminating against older employees. For example, employers who consider older employees to be too costly. Terminating an older employee's employment contract for such a reason will be a decision based on age according to the authors and, therefore, unlawful and in breach of the Human Rights Act.

In the final chapter of the legal part of the text, chapter four, the authors consider early retirement incentives. Are such incentives to retire, discriminatory? The book considers different contexts in which incentives are offered to see whether the employee has in fact retired involuntarily in which case the incentive would be regarded as unlawful discrimination.

The second half of the book entitled "The Human Resource Perspective" examines the changing work environment with more and more older workers and what this will mean for the workplace.

The authors invite readers to question the logic of assumptions made about older workers and point to overseas research to dispel many of the common myths and stereotypes before concluding "that, overall, older workers are just like any other group of workers in that among them there is a wide range of abilities, problems and neuroses".

The book then looks at ways in which organisations can change their culture to deal with employment issues surrounding older workers.

The text is particularly useful, it sets out a legal framework as to age discrimination in the first part and in the second, challenges common assumptions made so that employers focus on ability not age when making employment decisions.

When performance issues do arise, the authors offer practical steps and solutions.

The work will be an indispensable aid for employers and managers dealing with issues surrounding "older workers" and for practitioners advising clients on employment and human rights issues. ❑

MANAGING OLDER WORKERS

Anna Fitzgibbon, Jackson Russell, Auckland

reviews Stephen Trew and Jennifer Wyatt Sargent Working On, A Guide to Managing Older Workers *(CCH 2000) 161 pp*

The prohibition of "age" discrimination in employment in New Zealand is fairly recent and reflects a change in attitude, not only in New Zealand society but in overseas countries towards older workers and also a questioning of the rationale behind the once widely accepted practice of compulsory retirement.

Discrimination in employment on the grounds of age was first outlawed in New Zealand as recently as 1 April 1992 with the enactment of the Human Rights Commission Amendment Act 1992. Age was defined as being from the time a person ceased to be required to be enrolled in a registered school and the date on which he/she became entitled to national superannuation. The Human Rights Act 1993 retained this definition of "age" but substituted 16 years as the beginning date of the definition of "age" rather than the date the person ceased to be required to go to school.

It was the removal of the upper age limit (being the age on which a person is entitled to New Zealand Superannuation) on 1 February 1999 that has led to much debate on the implications for workplaces. The first decision since removal of the upper age, on the prohibition of age discrimination in the Human Rights Act and how it affects compulsory retirement clauses in employment contracts has recently been determined by the High Court, *Fogelberg v AUS* (8 September 2000) per Elias CJ. The High Court held that such clauses in employment contracts entered into after 1 April 1992 were unlawful.

Working On is a comprehensive work which deals in depth with the legal issues and practical implications which arise as a result of the prohibition of age discrimination.

The work is aimed at managers and employers working with the prohibition of compulsory retirement in the Human Rights Act. However, it will also be an extremely valuable tool for practitioners working in the employment law field advising clients on their rights and obligations in respect of age discrimination under the Human Rights Act.

The underlining theme of the book is that managers and employers should base their employment decisions on the ability of an employee and not his or her age.

The scope of the book is all encompassing. It is divided into two parts, the first half examines "the legal implications of the outlawing of mandatory retirement" and the second half considers management of older workers and the practical day to day aspects of complying with the legal requirements of the Human Rights Act in the work environment.

The first chapter of the book examines the meaning of "age discrimination" in the Employment Contracts Act 1991 and the Human Rights Act 1993.

The definition of "age" is the same in both pieces of legislation, "age" commences at age 16 and has no upper limit. Under both these pieces of legislation protection from discrimination in employment is extended to all employees in that age category.

The newly enacted Employment Relations Act 2000 which repealed the Employment Contracts Act 1991 from 2 October 2000 repeats the prohibited grounds of discrimination contained in the Human Rights Act 1993 in s 120A and also the exceptions in relation to discrimination in employment matters in s 120B.

Readers should be aware that references in the book to the Employment Contracts Act 1991 are now to be disregarded because of the enactment of the Employment Relations Act. However, the book's thesis regarding age discrimination is not affected by the new legislation which ties in and expressly refers to the Human Rights Act.

The rest of chapter one of the book considers the meaning of age discrimination in the employment context and what elements must be established by the person complaining of age discrimination before the Human Rights Act will apply to them.

Elements which must be established by the complainant include:

- is the person an employee?
- is the person qualified for the job?
- has the employee been subjected to "discriminatory" conduct by the employer as specified by s 22(1) of the Human Rights Act eg treated "less favourably" than other employees;
- is the employer required to accommodate the employee (ie organise his/her working environment so that the older worker can do the job required).

These questions are the starting point for examining age discrimination and implications for the workplace and the authors thoroughly consider each element and provide useful examples to help employers and managers monitor their own conduct in the workplace.

Chapter two considers a defence under the Human Rights Act to unlawful age discrimination that of "genuine occupational qualification" which may be available to

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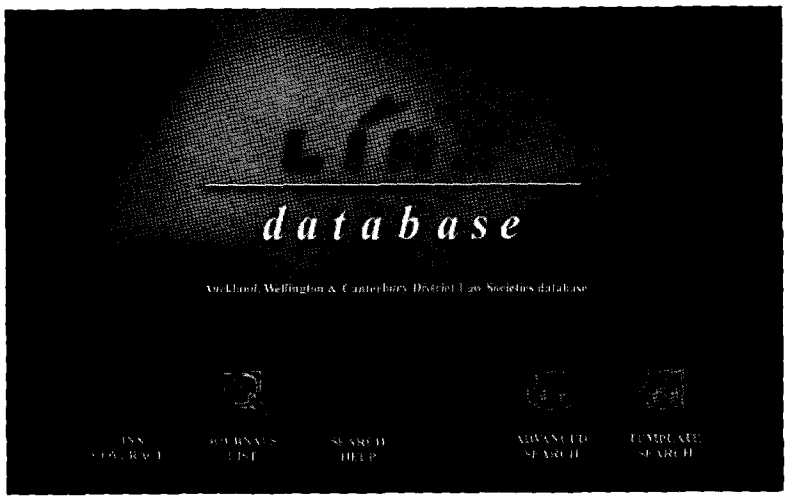
LINXPLUS

Stephen Dunn, Business Development Manager, Butterworths

describes the newly launched LinxPlus *service*

LinxPlus, a joint venture between Butterworths and the Auckland, Canterbury and Wellington District Law Societies, is a new initiative aimed at ensuring that the legal profession gets the best from online electronic judgment databases.



Linx has been servicing the profession since the mid-80s. However the time has come to broaden its scope. As a con- sequence *LinxPlus* has been created jointly by the three law societies and Butterworths.

LinxPlus builds on the headnotes already in *Linx*, mainly from the Court of Appeal and High Court judgments, and references to articles in legal journals and publications and introduces headnotes from Employment and Environment Court judgments.

But wait, there's more!

Along with the increased coverage of the law, with more to be added, *LinxPlus* will feature the full text of judgments. The text of these judgments will be fully searchable.

The full text judgments will be hypertext linked to the appropriate headnote in *LinxPlus*. The linking continues with the ability to click on further from your original judgment and headnote to mention of the judgment in *Butterworths Online* (you will need to subscribe either to a *Butterworths Online* publication or *Butterworths Direct* in order to view the Butterworths material).

Another enhancement of the original *Linx* is the linking of the references to articles in legal journals and bulletins to the actual articles if they appeared in recent Butterworths' publications, such as the *Conveyancing Bulletin*.

All these features provide the user with an invaluable legal research tool.

As with *Linx*, *LinxPlus* features headnotes dating back to the mid-1980s. The newly added full text includes a large number of High Court judgments, and judgments from other Courts; the majority being from the mid-1990s onwards.

Don't be fooled by the appearance of some of the full text of the judgments. Although they look like simple scanned images of judgments, they are in fact fully searchable. The way they are viewed provides confidence for the user that what they are looking at on screen is in fact what was recorded in the original paper version of the judgment. Being able to search the text of the judgment will allow the user to go straight to the most relevant part; perhaps using the same search that was used to find the relevant headnote.

For those who have already entered the clickable age *LinxPlus* adds something new to legal research as the boundaries or the Berlin Walls around legal databases are pulled down. For the first time in New Zealand, the inhabitants of cyberspace are free to come and go as they please between a law society neutral zone and a legal publisher's camp. The intermingling of this content provides greater convenience; in that a much larger amount of information can be accessed with greater ease.

In an ideal world all New Zealand online legal databases would be linked together so that the user could click and move between different legal publishers' content without there being any barriers to usage, in the same way that books on a library shelf are grouped by subject and not by publisher. It is my hope that this seamless approach to legal databases and information becomes reality in the very near future. *LinxPlus* is a large step forward in that direction.

Butterworths is pleased to have the opportunity to be working with the Wellington, Canterbury and Auckland District Law Societies. The joint venture brings together the talents of the people who have successfully produced *Linx* for many years with a legal publisher that has made rapid strides forward in the past few years with its online publishing programme.

The concept of doing legal research via online electronic databases is still new or even unknown to many. Hopefully *LinxPlus* is the reason to find out more about that concept. For those who are well acquainted with the electronic age of research the ability to have, a click away, New Zealand legislation (through Status Publishing), a comprehensive New Zealand judgment database (*LinxPlus*), and authoritative commentary and report series (*Butterworths Online* and *Butterworths Direct*), and available in one package, will bring together a whole lot of answers into the one place. ❑

TAX UPDATE

Jan James and Raj Singh, Simpson Grierson, Auckland

with more on the amendments to the GST Act

The Taxation (GST and Miscellaneous Provisions) Act 2000 ("the Act") received the royal assent on 10 October 2000. Some of the proposed amendments contained in the Bill when it was first introduced into Parliament were outlined at [2000] NZLJ 189. This article discusses some further aspects of the recently enacted legislation.

ZERO RATING AS A GOING CONCERN

Where a GST registered vendor sells a business as a going concern to a purchaser the "zero-rating" provision in the Goods and Services Tax Act 1985 (the "GST Act") ensures that the vendor is not liable to account to the Revenue for GST on the sale. One of the reasons for the inclusion of this zero-rating provision in the GST Act is to avoid adverse cashflow implications to the purchaser having to fund the GST component of the transaction.

The going concern zero-rating provision has caused difficulty in its application and, in particular, the timing of the application of the going concern test has generated much debate. Case law had established that the going concern test was to be applied at settlement, when the purchaser took over the business.

The Bill originally proposed amending the zero-rating provisions so that in order to qualify for going concern zero-rating the business being sold had to be a going concern at the "time of supply" (generally the earlier of the issue of an invoice or receipt of any payment by the vendor). The Bill also required in effect that for a sale of a business to be zero-rated the business must be capable of being carried on by the purchaser as a going concern as at the time of transfer or settlement. This was stated in the commentary on the Bill as following the policy behind the zero-rating provision – that in order for a sale of a business to be zero-rated it must be capable of seamless operation during its transfer.

One of the concerns raised with the Finance and Expenditure Committee with this proposed amendment was that it required the going concern test to be met at two points in time – once at the time of supply and again on transfer or settlement. A potential difficulty arising from this is that a business could be a going concern at the time of supply, and treated as such for the relevant GST period, but not at the time of transfer. In such a case the zero rating treatment would need to be reversed, possibly requiring collection from the purchaser of GST after the fact.

As a result officials proposed that the zero rating provision be amended so that rather than the stricter requirement that the business must actually constitute a going concern at the time of transfer, the parties must merely intend, at the time of supply, that the supply is of a business that is capable of being carried on as a going concern by the purchaser. The current requirement that the vendor and purchaser agree in writing that the supply is of a going concern remains.

In one sense, the new zero-rating provision provides certainty as to the timing of the application of the going concern test by making it clear that the test applies at the time of supply. Whether a provision which also incorporates an intention based requirement achieves requisite certainty in terms of the stated policy objective that the business continue to operate as a going concern up to the time of transfer remains to be seen. One obvious issue will be evidential requirements as to intent, and whether objective or subjective standards are to be adopted. It is also noted that both parties must have the requisite intent.

Where a transaction involving the sale of a business is entered into, it may be prudent therefore for the parties to not only record in writing their agreement that the supply is of a going concern, but also their intention that the supply is of a business that is capable of being carried on as a going concern by the purchaser.

A further point to note is that previously case law suggested that what was important at the time of transfer was whether a going concern was supplied by the vendor, regardless of whether the purchaser could actually carry on that going concern (see *Pine v CIR* (1998) 18 NZTC 13,570) which involved a supply of a commercial leasing activity to the lessee, ensuring that that particular purchaser could not continue the commercial leasing activity as the purchaser's lessee and lessor interests merged). The new legislation ensures that it must be the actual purchaser who can carry on the going concern, thus effectively overriding this case law.

GST ON IMPORTS

The new Act also brings a welcome amendment for importers acting as agents for non-resident principals. These agents previously suffered from a difficulty arising from their status as agents, which was painfully highlighted in *Case T35* (1997) 18 NZTC 8,235. In this case, the taxpayer imported computer parts from, and as agent of, a non-resident manufacturer. The parts were warehoused and distributed to purchasers of the manufacturer's computer products under warranty obligations of the manufacturer. On the one hand the agent was not able to uplift the parts from Customs until it had paid to New Zealand Customs any Customs duty and GST levied under the GST Act. Having paid the GST however, the agent could not recover the GST paid as an input tax credit, because the agent had not "acquired" the goods for the principle purpose of making taxable supplies (ie legal title to the goods did not pass to the agent).

The new Act rectifies this anomaly by inserting a new definition of "input tax" in the GST Act, so as to allow a credit for GST levied on imported goods which are "applied or acquired" for business purposes. This new definition will allow agents who pay import GST to recover this GST as an input tax credit if the imported goods are used in New Zealand for business purposes even though the agent has not acquired legal title to the goods.

Further submissions were made to the Finance and Expenditure Committee highlighting a difficulty not covered by the above amendment where goods are imported but turn out to be faulty. In such cases the importer would pay import GST, but may not "acquire or apply" the faulty goods for business purposes. In these circumstances, the GST paid would not meet the input tax definition, and a credit for the GST paid would not be allowed. A refund of the GST may not be allowed, as refunds were not permitted if the goods were imported for the purpose of carrying on the importer's taxable activity, which the faulty goods may well have been.

The Act therefore also amends the GST Act to permit a refund of import GST where there has been an error in calculating the tax, unless the importer is actually entitled to an input tax deduction.

Temporary imports

The Act also amends the provisions dealing with the zero-rating of all services provided directly in connection with temporary imports. Previously under the GST Act these services could only be zero-rated if they were supplied to a non-resident. The Act extends the zero-rating to services provided to New Zealand residents in connection with temporary imports.

For example if an overseas based owner of a yacht who was in New Zealand (for, say, 60 days) temporarily imported a racing yacht into New Zealand, any services supplied to the owner, such as repairs to the yacht, would be zero-rated as the owner would not be a New Zealand resident. Under the previous rules, if the overseas owner were to stay in New Zealand for more than 183 days (and thus become a New Zealand resident for tax purposes), the supply of services in connection with the temporary import would no longer be zero-rated. The amendments ensure that in such a case the services would continue to be zero-rated.

REDUCING COMPLIANCE COSTS – ADJUSTMENTS FOR CHANGE IN USE

A registered person is able to claim input tax credits for goods and services which are acquired for business purposes. To the extent those goods and services are subsequently used for private or exempt purposes, the GST Act requires the registered persons to account for output tax on those goods and services – this is a way of effectively "clawing back" the input tax deduction.

At present, adjustments for changes in use need to be made in each taxable period in which the registered person owns the asset, in order to reflect the continued changes in use. In many cases this generates high compliance costs.

The Act provides registered persons the option to pay additional output tax for private or exempt use on a one-off or annual basis rather than in each taxable period. If, however, a one-off adjustment is chosen by the registered person, further adjustments are required if a change in use of 20 per cent or more occurs. Registered persons will also be able to make input tax adjustments on an annual rather than a taxable period basis.

The Finance and Expenditure Committee noted that the next stage of the GST review process will revisit the rules being enacted relating to change in use adjustments. In the meantime, however, the current changes will assist taxpayers to reduce compliance costs.

The retrospective amendment will, however, deny an input tax deduction to those taxpayers who currently have claims lodged

RETROSPECTIVE AMENDMENT

Perhaps one of the more controversial provisions enacted by the Act is one that has retrospective effect to 1 October 1986.

Under the GST Act prior to its amendment by the Act, an input tax credit was allowed for assets acquired since 1 October 1986 and not originally used for business purposes which were subsequently used for business purposes. The input tax credit was available when the assets were first applied to business purposes, and was not dependant on whether GST had been charged on the acquisition of those assets. This provision was designed to allow actual GST paid on the assets to be recovered.

The concern is with assets originally acquired without the imposition of GST – for example temporarily imported goods – which are subsequently (albeit again temporarily) used in making taxable supplies. In such a case an input tax credit would have been available without any actual GST outlay.

The Act removes this opportunity by allowing input tax credits in such a case only to the extent either actual GST has been paid in acquiring the goods, or, if the goods are secondhand goods, they have always been situated in New Zealand.

When the proposal was first discussed in a document released by the previous government there was no suggestion that the change would be retrospective. This is acknowledged in the officials' report to the Finance and Expenditure Committee. The justification for the retrospective application provided by the Finance and Expenditure Committee was that there was a growing proliferation of such structures involving GST refund claims which could cause an unquantifiable level of input tax credit claims in respect of past periods, given that there is no time limit for making GST refund claims.

The retrospective amendment will not apply to taxpayers who have made an unqueried or agreed claim for a deduction before 16 May 2000. The retrospective amendment will, however, deny an input tax deduction to those taxpayers who currently have claims lodged which the Commissioner has queried and has not agreed to in writing before 16 May 2000.

Retrospective legislation must be of concern to the business community in terms of the uncertainty generated. It is particularly disquieting to note that the savings provision was not extended to protect taxpayers with live claims before the Revenue. If retrospective legislation becomes an accepted practice, particularly without sheltering existing claims, this could create incentives for the Revenue to protract consideration in the face of anticipated law changes. ❑

THE DISPUTES TRIBUNAL

Grant Aislabie, Principal Disputes Referee

talks about the aims and achievements of the Tribunal

As a practitioner for twenty-seven years my knowledge of the Disputes Tribunal was much as I expect it is for most of the legal profession – minimal, ill-informed and coloured with prejudice. The hoary chestnut of "it is a Court of compromise, all they do is toss a coin" probably formed part of my vocabulary. Suffice to say that it most assuredly does not now.

Let me bore you with some facts:

- the Disputes Tribunal is the entry level of civil jurisdiction of the District Court of which it is part. Its orders are impressed with the seal of the District Court;
- there are 59 Disputes Tribunals situated between Whangarei and Invercargill and, coincidentally (and counting the position of Principal Disputes Referee) 59 referees;
- the Disputes Tribunal disposes (either at hearing or settlement/withdrawal prior) of 30,000 cases in a year. By comparison the District Court in its civil jurisdiction disposes of 27,000 undefended cases and a further 2,730 defended;
- recent amendments to the Disputes Tribunals Act 1988 have fixed the limits of jurisdiction of the Disputes Tribunal to $7500 as of right or $12,000 when both applicant and respondent consent. Rumour has it that these limits may be raised in the future. Now before you panic please remember that $12,000 was the maximum jurisdiction in the District Court not too long ago (it is now $250,000);
- there are 40 female and 19 male referees. Many are legally qualified and most have tertiary qualifications. All are selected by way of a proscriptive process set by statute and are appointed on warrant by the Governor-General for a term of three years. They must reapply, along with anyone else who may be interested, at the expiry of their term.
- they are given substantial training (by a professor of law, a practising Lawyer and a senior referee) as to the Disputes Tribunal itself and embark upon a 12 month mentored programme of education and examination including contract, quasi contract, tort, natural justice and legislation (as it affects the Disputes Tribunal). Each year referees undergo further training on specific matters.

The overall impression that I have gained in the first twelve months of appointment is of a well chosen and well trained, hard working, well informed, intelligent and articulate group of judicial officers (for that is what they are) doing a job that many of our profession currently practising would find quite daunting.

When first appointed as Principal Disputes Referee I resolved to ensure that all the horror stories that the profession hears as to the attributes, attitudes and decisions of the Tribunal would simply not be tolerated. Decisions would be made on the facts, and not by the toss of a coin. Hard decisions would be made and soft options resiled from. Cases would not be terminated simply because they had run out of time. I need not have worried!

In the first months of office I visited every District Court in New Zealand. That in itself is another tale. How to visit them all, retain my home life, and not plunge the country into further debt was a logistical process that almost defied solution. What that exercise showed me however was that the administration processes applying to the Disputes Tribunal for the resolution of disputes was, in the main, in very good hands. Disputes Tribunal staff were informed, innovative, helpful and very much aware of their role in ensuring that the wheels of justice received the correct amount of oil to enable them to roll smoothly on.

Of late I have commenced a process of spending a day with each referee, observing the process and the outcomes of the Disputes Tribunal in its day-to-day operation. The list of cases for the day is very ordinary as the visits are made when the list has long since been settled. Again, having completed 80 per cent of this task, I am much reassured by the total professionalism and attention to the role of referee exhibited by all of the referees that have thus far been observed.

Referees take very seriously the responsibilities that they have conferred upon them. Their knowledge of the recognition and implementation of the principles of natural justice would leave postgraduate students embarrassed. They are so fair to ensure that each party before the Tribunal is given a "fair go" that on occasions the wheels of justice "grind inexorably slow". But in so doing, "justice" is at least seen to been done.

Absolute legal concepts in contract, quasi contract and tort are well understood, well interpreted and very well applied to often complex (but not necessarily "expensive") fact situations. In the main the referees get it right. On occasion they don't! Most parties accept the process, and the outcome. Some don't. Some, even though the issues are explained to them never do and the perceived wrong begins to take over their life, forgetting that in the first instance it was they that did not even prove their case "on the balance of probabilities". Nothing will ever be done that will enable that perception to be righted. But, it is not any shortfall in the ability of referees that is causative of this malaise as even higher Courts could have reached the same decision on the same evidence.

Parliament deliberately set up the Small Claims Court, which then matured into the Disputes Tribunal, to allow parties an informal, though structured, forum in which they

could seek to settle their differences with the guidance, and ultimate decision making function of a referee. Lawyers were expressly prohibited from appearing as advocates and generally a party, unless under a disability, is obliged to conduct its own case. There is a strong emphasis in allowing the process of mediation to take precedence at hearings. For the mediation purists amongst the profession that which is practised in the Disputes Tribunal does not readily fall within any of the generally accepted definitions within the mediation industry. Perhaps it is a process, and a style of mediation, all of its own? Only when it becomes apparent that settlement is not an option does the referee don a judicial hat and make a decision.

I have diligently searched and have requested representative national bodies of persons who are frequent users of the Disputes Tribunal to refer to me any instances were the decision of a referee has been seen to be a compromise or "coin tossing" one. There have been none!

I similarly await advice as to other oft held prejudices of the efficacy of the Tribunal in actual rather than anecdotal form. To date there have been none!

This year I have received a total of 80 "complaints" about the Disputes Tribunal or its referees. In all but two instances the complaint relates to a misunderstanding of the process of the Tribunal ("please change the order as it's not fair" – I mean, do you write to the Chief Judge or the Chief Justice when the case is found against you in Court?) or the allegation (easily made but not so easily defended) of bias or improper judicial behaviour at a hearing. Even in the two cases where an issue required further investigation there were, as usual, two sides to the complaint and when viewed from a distance what seemed a major slight by one party was accepted as reasonable given the circumstances by the other party who was at the hearing and observed it. On each occasion the referees have had good grace to apologise for any transgression, real or imagined, that they may have caused to a party. This statistical information indicates that the dissatisfaction with the Tribunal is not so great as would be imagined considering 59 referees and 59 separate Courts are dealing with some 30,000 cases a year.

Finally, what can the profession do for, and with the Disputes Tribunal.

First. Ensure that when you have a client who is involved in the Disputes Tribunal that they understand that it is a fully constituted Court and the decisions of it are of the District Court. They need to be prepared. Many are not. It is helpful if you can write the Brief of evidence for them, copy and label all their exhibits and don't forget the Tribunal will need three copies of anything which is to be brought to the Tribunal. One each for the applicant, respondent and the referee.

Ensure that you have read the Act before you give advice. It never ceases to amaze me to hear the legal adviser quoted as asserting something that may have been in the Small Claims Act but has changed in the Disputes Tribunals Act. (This also applies to the Tenancy Tribunal.)

Be aware that even though there is no dispute the simple expedient of filing a claim (provided it is within the jurisdiction of the Disputes Tribunal) in the District Court will probably mean that the Judge or Registrar will, with some joy I might add, transfer those proceedings to the Disputes Tribunal for deliberation. In that forum your client can appear and represent himself.

Understand and accept that despite your misgivings Disputes Tribunal Referees are well-trained people both in their knowledge of the law and their knowledge of life. They will generally get it pretty much right on the day given the right evidence. Don't panic and think that only a District Court Judge understands the issue. Your client will thank you forever if you can facilitate a structured and economic resolution of a dispute within a very modest time frame.

Ultimately, and this bears some consideration, become a Disputes Tribunal Referee yourself! It is a part-time position. The initial appointment is for three years. There are practising lawyers who are or have been referees. Contact your local Disputes Tribunal Clerk and inquire as to whether your local referee would allow you to observe a few cases to see what really goes on, bearing in mind of course that this could only take place with the consent of the parties. Watch your local newspapers for vacancies and give it a go. I know one thing, you will end up using and knowing a whole lot more law than you do at present.

Those of you who wish to take issue or comment upon any if the foregoing or who are able to provide me with substantiation of what otherwise is an urban myth can contact me:

Principal Disputes Referee, Box 10 949, Wellington or Grant.Aislabie@Courts.govt.nz or 04 914 3461. ❑

THE STATUTORY DERIVATIVE ACTION

Andrew Borrowdale, Barrister, Christchurch

has problems with the case law under the new Companies regime

Provision for a statutory derivative action was a feature of the Companies Act 1993 when enacted and there have now been several cases construing this important innovation. Unfortunately the judgments tend to be ex tempore, and the result is confusion of thought.

The scheme of s 165 is straightforward enough. A shareholder or director may apply to the Court (the High Court, a point not without significance) for leave to bring proceedings on behalf of the company. (Leave may also be granted to intervene in proceedings already on foot, or to defend proceedings, but for simplicity sake this discussion is confined to leave to bring proceedings.) A derivative action is justified where the company is unable to sue through wrongdoer control or is compromised in some other way. Accordingly the Court, in granting leave, must be satisfied either that the company does not intend to bring proceedings (s 165(3)(a)) or that it is not in the interests of the company that the conduct of the proceedings be left to the directors or the determination of the shareholders as a whole (s 165(3)(b)).

None of this is problematic. However, s 165(2) prescribes various factors to which the Court must have regard in determining whether to grant leave, although the Court is not limited to these. To quote s 165(2) the mandatory factors are:

(a) the likelihood of the proceedings succeeding;
(b) the costs of the proceeding in relation to the relief likely to be obtained;
(c) any action already taken by the company ... obtain relief:
(d) the interests of the company or related company in the proceedings being commenced ....

A false step was taken in *Vrij v Boyle* (1995) 7 NZCLC 260,844 where Fisher J, in an oral judgment, posed a test that has been applied in all subsequent cases. In relation to the first factor mentioned, the likelihood of the proceedings succeeding, Fisher J said:

> It is not for me to conduct an interim trial on the merits. The appropriate test is that which would be exercised by a prudent business person in the conduct of his or her own affairs when deciding whether to bring a claim. Such a decision requires one to consider such matters as the amount at stake, the apparent strength of the claim, likely costs and the prospect of executing any judgment (at p 260,847).

A number of points arise. First, where s 165(2)(a) refers to the likelihood of the proceedings succeeding, this must mean "success" in the sense of practical, as opposed to legal, success. It is not enough to win the proceedings if the judgment cannot be enforced, or if the cost of bringing the action is greater than the recovery. Second, "likelihood" means the probability, not the possibility, of success. Against this background Fisher J introduced "the useful test suggested in a slightly different context in *Smith v Croft* [1986] 1 WLR 580" (at p 260,847). It is important to note that Fisher J adopted the prudent business person test only in relation to the likelihood of the proceedings succeeding, and not in relation to the other factors prescribed by s 165(2).

It is difficult to see why the prudent business person test is justified. The discretion lies with the Court, and why should not the Court use its own intelligence in assessing the likelihood of success? No prudent business person would embark upon legal proceedings without taking legal advice as to the likely result, and the Court is of course competent to form its own view. There may be two reasons why the prudent business person test has been seized upon. The first is that the prudent business person is attracted only by practical success, and therefore the test emphasises the nature of the outcome envisaged by s 165(2)(a). Second, Fisher J was concerned that he should not have to conduct "an interim trial on the merits". In this context, it is suggested that the prudent business person test serves to limit the scope of the investigation that a Court need make. Just as a prudent business person must make a decision on preliminary and probably incomplete facts, so too must the Court take a robust approach and of necessity come to a conclusion upon tentative facts. Apart from these limitations, properly suggested by the business person test, there is no basis, in the statute or otherwise, for substituting for the Court's own determination of likelihood of outcome that of a prudent business person. It defies common sense to do so.

The way in which the reference in *Vrij v Boyle* to the prudent business person test has been taken up has obscured the proper test of likelihood. The proper test, it is suggested is simply: is the proceeding more likely to fail than not? (That does not determine the matter, for there are considerations to be taken into account, and it is possible that an action is justifiable, exceptionally, if it is more likely to fail than not.) But the prudent business person test implies that the Court need not make this assessment, that it is sufficient if some lesser degree of probability suffices. This effect can be seen most starkly in the judgment of Master Venning in *MacFarlane v Barlow* (1997) 8 NZCLC 261,470. The applicants complained that the majority shareholders, also the company's directors, had breached fiduciary duties of

good faith and proper purpose by paying themselves excessive salaries and other indirect benefits. As to the likelihood of success, Master Venning stated that he approached the matter "on the basis of the *Smith v Croft* test". From this point the trail runs hot and cold. At different points Master Venning categorised the company's claim as arguable (at 261,476, 261,477) and appeared to confuse the arguability of the claim with its likelihood of success. Still under the rubric of the likelihood of the proceedings succeeding, the Master concluded finally:

> Standing back and considering the matter overall would a prudent business person in the conduct of his affairs bring a claim in this situation? In my view he would. At the least, this is the type of claim where the respondents would have to accept that there was a real litigation risk to them. That must lead to a reasonable prospect of an overall settlement of any proceedings that may be issued by the company against them. In the circumstances, and bearing in mind the potential quantum of the claim, I consider a reasonable prudent business person would bring a claim (at 261,477).

In reality, the application for leave to bring a derivative action is simply the opening of a new front in the struggle between the shareholders

This is a key passage in the jurisprudence that has so far crystallised about s 165, for several reasons. It has to be remembered that at this point the Court is still considering the likelihood of the proceedings succeeding. Yet by applying the prudent business person test the specific inquiry as to likelihood of success has suddenly expanded into a consideration of the overall issue: should the proceedings be brought? This is no fault in the reasoning of Master Venning; it is simply a consequence of invoking the prudent business person test. Second, the reference to "a real litigation risk" reinforces the Master's apparent view that the threshold of likelihood of success is met if the claim is arguable. Third, the reference to "the potential quantum of the claim" is actually immaterial to the likelihood of the proceedings succeeding, except in the sense that the likely recovery would far exceed the costs. Otherwise emphasis upon the quantum of the claim encourages gold-rush litigation.

The third point of our triangle of cases is *Techflow (NZ) Ltd v Techflow Pty Ltd* (1996) 7 NZCLC 261.138, an oral judgment of Elias J. In that case the four shareholders were evenly divided along marital lines into two camps. All four shareholders were directors. The applicant for leave, a director and shareholder, had already instituted proceedings in the District Court against one of the other directors, and now sought leave for the company to intervene in those proceedings. Elias J said:

> The significant matters the Court has to address in deciding whether to invoke the power under [s 165] is (sic) whether the proceedings are in the interests of the company, whether they will be maintained by those in control of the company, and whether they are proceedings appropriately brought. I agree with the test suggested by Fisher J that whether the proceedings are appropriate should be judged by the standard of a prudent businessman in the conduct of his own affairs (at 261,141).

Relating this restatement of the law to the criteria mentioned in s 165 is not easy. One has to remember that the judgment was not reserved, and therefore cannot fairly withstand close legal parsing. What one can say with certainhty, however, is that Fisher J did not suggest the standard of the prudent business person as the test of the appropriateness of the proceedings. That is a matter for the Court after taking into account all the factors specified in s 165(2). Fisher J invoked the prudent business person test only in relation to the likelihood of success.

As a matter of logic the prudent business person test simply cannot be applied to the criterion of the interests of the company. To make sense the prudent business person test must be applied in this way: would a prudent business person *in the position of the company* bring proceedings? The prudent business person of course acts out of pure self-interest. But in the case of a company the concept of "the interests of the company" is a notoriously fragmented concept because it is almost impossible to say who is "the company". Must the prudent business person consider the interests of creditors, the innocent shareholders who do not support the proceedings, employees? Stated in this way, it is obviously facile and misguided to apply the prudent business person test to any such inquiry: it is for the Court to weigh up the interests of the various elements comprising "the company".

In reality, as shown by the facts of the cases discussed here, the application for leave to bring a derivative action is simply the opening of a new front in the struggle between the shareholders in which "the company" has no interest at all. In *MacFarlane v Barlow*, for example, the shareholders comprised the applicants for leave, the estate of their deceased brother, and the two director defendants who held 77.5 per cent of the shares. The company was extremely profitable with ample reserves, and there was no question of any creditor having an interest in the outcome of the litigation. Who then is "the company" in this situation? It is surely absurd to divorce the company from the underlying protagonists in such a situation.

In the result it is suggested that the better approach to that begun in *Vrij v Boyle* and somewhat slavishly followed in subsequent cases is quietly to suppress the prudent business person test. It obscures the purpose of the legislation, which is that a derivative action should not be allowed to proceed unless it is more likely than not to succeed in a practical sense. It is not enough that the applicant is able to show that the company has an arguable case. The fact that a derivative action is often a vehicle to carry on a fundamental dispute between shareholders is one reason why leave should be granted only where there is a likelihood, ie probability, of success in the mind of the Court. Giving the word "likelihood" in s 165(2)(a) (it is echoed in s 165(2(b)) causes no hardship. An action considered at the outset to be arguable but unlikely to succeed may ultimately bring rewards. But there is no reason why such an exceptional action should proceed by way of a derivative action. All the cases so far demonstrate starkly that the applicants are equally able to frame a claim under s 174 for oppressive conduct towards a minority. If an action is unlikely to succeed, then the applicant for leave should be told to commence (or continue, for typically there are parallel proceedings on foot) a s 174 proceeding. ❑

CLOSELY HELD COMPANIES

Julie Crengle, Crengle Shreves & Ratner, Wellington

reviews Dugan, McKenzie & Patterson: Closely Held Companies – Legal and Tax Issues *(CCH, 2000)*

It will surprise many practitioners to learn that it may be administratively simpler for a closely held business in New Zealand to incorporate off-shore and do business here, than to incorporate under the Companies Act 1993 ("Act"). Those practitioners not surprised are likely to be those who regularly advise closely held companies.

This conclusion is among those reached by the authors of *Closely Held Companies – Legal and Tax Issues*, after an examination of the advantages and pitfalls of the corporate structure under the Act.

It is hard to disagree that the Act does not suit the needs of companies with only one or two shareholders (approximately 86 per cent of New Zealand companies). The Act's governance regime is based on a separation of ownership and control. Thus, while its provisions may work well where there is such a separation, they often do not make sense where the directors and shareholders are identical.

Instead, many provisions of the Act require compliance by closely held companies with "pointless formalities" (para 720). For example, suppose the shareholder-director of a one-person company enters into a general s 107 agreement to minimise the formalities otherwise imposed on a range of transactions. Whenever such a transaction is subsequently entered into, that person, as a director, must give notice to him or herself as a shareholder, of the transaction. The notice serves no purpose, but failure to provide it constitutes an offence.

The text cites numerous other examples of unsuitable provisions. Consequently, it both alerts the reader to the pitfalls of the statutory regime for closely held companies, and identifies areas requiring reform.

The text also contains an excellent discussion of the extent to which the pitfalls identified can be ameliorated by way of the company constitution, a s 107 agreement, a s 42 resolution, or a shareholders' agreement. The authors conclude that while each document may afford the company some greater flexibility in its affairs than does the Act, taken together they still do not go far enough.

Consider, for example, whether the constitution can amend troublesome statutory provisions. The prevailing view is that if a provision in the Act is not stated to be subject to the constitution, then it cannot be amended in the constitution. The authors note that if the prevailing view is right, then the constitution cannot afford the closely held company greater flexibility – but conclude that the prevailing view is wrong. However, the matter is likely to be the subject of ongoing debate.

Similarly contentious will be the proposals that:

- shareholders should, by way of a s 107 agreement, be able to waive the statutory requirement that the company have at least one director;
- the right given to a shareholder who has given a general assent under s 107 to withdraw that assent should be removed;
- shareholders should be able to contract out of the statutory minority buy-out rights, and to limit or exclude liability of directors for breaches of the statutory duties.

As well as provoking debate on corporate law matters, the text serves as an excellent source of practical advice for advisers of closely held companies. Its discussion of corporate law is complemented by a consideration of accounting, tax and matrimonial property issues. It deals both with the company structure, and with the alternatives – the sole proprietorship, the partnership, and the trust. By providing key information on each, the text enables advisers to advise on the structure most suited to their clients' objectives. They will also be able to advise on different ways of structuring specific transactions – including returns to principals and the sale of the business – again so as best to achieve the desired outcome.

It is inevitable that there will be topics covered in less detail than some users might like, or, indeed, that by presenting some information in summary form, details that could be relevant to some users will be omitted.

Into the first category falls the treatment of deadlock resolution in closely held companies. The authors discuss the inclusion in the constitution of a clause providing for liquidation of the company in the event of a deadlock. Liquidation is, however, a fairly drastic step to take when the deadlock may concern only minor matters. Some users may have welcomed a lengthier discussion of deadlock resolution mechanisms, particularly since the difficulties that can arise in a 50/50 situation are seldom thought about at the time of entering into the venture. For an excellent description of deadlock resolution mechanisms, see the chapter by G Shirtcliffe in *Company Law Update* (NZLS May 2000).

Into the second category lies the authors' description of an "exempt company" under the Financial Reporting Act 1993 as "one with no more than $450,000 in assets and annual turnover of not more than $1 million". The further criteria that the company "was not a subsidiary of another body corporate or association of persons and ... did not have any subsidiaries" are not mentioned. Advisers need to be aware that if a company that would otherwise be an exempt company has a subsidiary, it will instead be a reporting entity.

Those few matters aside, *Closely-Held Companies* is a valuable tool for legal and accounting practitioners who advise on the closely-held company structure. It will continue to be of value, despite the rapidity with which change in this area of law occurs, if the authors commit to providing an annual supplement updating the original text. ❑

HARMFUL TAX COMPETITION?

Ross Fazzini, Brookfields, Auckland

sounds the alarm at the building of the OECD tax cartel

In May 1996 the OECD launched its campaign against what it describes as "harmful tax competition". Two years later the OECD's committee on Fiscal Affairs issued a report entitled *Harmful Tax Competition: An Emerging Global Issue* ("the report"), which was approved by the OECD Council, with abstentions from Luxembourg and Switzerland, on 9 April 1998. In implementing the recommendations of the report the OECD has now begun exerting influence over countries in an attempt to curb harmful tax practices. On 26 June 2000 the OECD presented its progress in identifying and eliminating harmful tax practices in a report entitled *Towards Global Tax Co-operation* ("the progress report"). The progress report can be downloaded from the OECD's website www.oecd.org.

The OECD currently comprises 29 countries, including New Zealand, "sharing the principles of the market economy, pluralist democracy and respect for human rights" according to the Founding Convention signed in Paris on 14 December 1960. This article questions whether the OECD's actions as a group, and the actions of its member countries, satisfy the principles of a market economy or whether they constitute anti-competitive conduct and are therefore anti the market economy.

HARMFUL TAX COMPETITION

The OECD's view is that harmful tax competition is tax competition intentionally designed to redirect capital and financial flows, and the corresponding tax revenue, from high tax jurisdictions. This is described as "bidding aggressively for the tax base" (p 16 of the report) of high tax countries and notes that this has been described by some as "poaching" the tax base that "rightly" belongs to another country. The OECD views this as harmful because such practices, it is thought, do not to reflect different judgments about the appropriate level of taxes and public outlays or the appropriate mixes of taxes in an economy, but are tailored to attract investment or savings originating elsewhere or to facilitate the avoidance of tax in other countries.

The OECD concentrates its attention on mobile activities and the report identifies a number of effects of tax havens or preferential tax regimes. The effects identified are the distortion of financial and (indirectly) real investment flows, undermining the integrity and fairness of tax structures, discouraging compliance by all taxpayers, re-shaping the desired level and mix of taxes and public spending, causing undesired shifts of part of the tax burden to less mobile tax bases (such as labour, property and consumption), and increasing the administrative and compliance burdens on tax authorities and taxpayers (p 16).

A further element of harmful tax competition, as identified by the OECD, is the "free rider" effect. "Free rider" is an economic term used to describe the situation where a person derives benefits from a public good without paying for that benefit, and without the ability of being excluded from enjoying that benefit. The report states at p 14:

> Countries face public spending obligations and constraints because they have to finance outlays on, for example, national defence, education, social security, and other public services. Investors in tax havens, imposing zero or nominal taxation, who are residents of non-haven countries may be able to utilise in various ways those tax haven jurisdictions to reduce their domestic tax liability. Such taxpayers are in effect "free riders" who benefit from public spending in their home country and yet avoid contributing to its financing.

At p 8 the following passage is posed as a question, however when read with the rest of the report it provides a useful summary of the OECD's view as to what constitutes harmful tax competition:

> tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine fairness, neutrality and broad social acceptance of tax systems generally. Such harmful tax competition diminishes global welfare and undermines taxpayer confidence in the integrity of tax systems.

At p 15 the OECD recognises that some forms of tax competition are accidental, and further, that some forms of tax competition are acceptable. Accidental tax competition occurs as a result of unintentional mismatches between existing tax systems, which do not involve a country deliberately exploiting the interaction of tax systems to erode the tax base of another country. Acceptable tax competition occurs where countries with specific structural disadvantages, such as poor location and lack of natural resources, use special tax incentives to offset non-tax disadvantages.

ACTIONS OF THE OECD

The OECD seeks to discourage the spread of tax havens and harmful preferential tax regimes and encourage those countries which presently engage in harmful tax practices to review their existing tax systems and associated laws (see p 8 of the report).

The OECD recognises that the problem is inherently global in nature, and therefore seeks to involve as many countries as possible in the harmful tax practices dialogue, and in the actions taken against such practices (see p 10 of the report).

The present actions of the OECD follow the recommendations made by the Fiscal Committee in the report. These include encouraging member countries and non-member countries to change their tax legislation to meet "tax norms". Examples of this being put into practice include both New Zealand (see the Taxation (Annual Rates, GST and Miscellaneous Provisions) Act passed on 5 October 2000) and the United States (see US President Clinton's proposed budget for the fiscal year 2001, released 7 February 2000) which have sought to implement rules that preclude the use of foreign tax credits in circumstances where the credits are tainted by tax havens. The OECD has also invited a number of countries which it considers to be low tax jurisdictions to meet at the OECD headquarters in Paris to discuss the issues. Some nations such as Liechtenstein accepted, but later left the meeting after discussions broke down. Apparently over half of the countries that were approached by the OECD declined the invitation as a means of protesting the OECD (taken from *OECD Still Plans to Release Tax Haven Black List, But May Delay Call for Sanctions*, Robert Goulder, [2000] *Tax Notes International* 1919, 1920).

The OECD asserts that it will not be necessary for countries to increase their tax rates (para 41 on p 20 of the report), however it is difficult to see how this could not be one of the major drivers behind the OECD's actions. Low tax in a jurisdiction is identified by the OECD as an element that must be present before a country will be considered to be practising harmful tax competition. Thus to avoid the attention of the OECD a country could simply increase its tax rates.

COMPETITION LAW

It is now generally accepted by most modern market economies that there needs to be some regulation of markets in order to prevent abuse of market power and the adverse consequences that are determined (or deemed, depending on your economic viewpoint) to flow from it.

Differences can be found between the competition law legislation of every country. See for example New Zealand's Commerce Act 1986, Australia's Trade Practices Act 1974, the European Union's Articles 85 and 86 of the Treaty of Rome and the US's Sherman Act 1890. The underlying competition policies and objectives, however, are generally consistent with the following ideas. First, competitive markets are generally thought to lead to a more efficient allocation of resources than do markets where either buyers or sellers have significant market power (Office of Economic Planning Advisory Council, *Promoting Competition in Australia*, Council Paper No 38 (AGPS, Canberra, 1989), p 5). It is also thought that competitive markets provide greater incentives to respond to problems and opportunities in the market and greater incentives to innovate. In addition, some commentators believe that competition policy is motivated by considerations of fairness, to disperse economic power and to provide free access to markets (see G Spivak, *The Chicago School Approach to Single Firm Exercise of Monopoly Power: A Response* (1983) 52 Antitrust Law Journal 651 at 653 and the references at no 14 which discuss antitrust's non-economic goals). Thus, competition law can loosely be described as being motivated by considerations of both efficiency and fairness.

One would expect, therefore, that since the OECD presents itself as an organisation that upholds the principles of a market economy (and by implication, if not by direct legislation of its member countries, an organisation that upholds the principles of market competition) that the OECD and its member countries would seek to act competitively, or at least seek to satisfy considerations of fairness and efficiency, in implementing any strategy to limit harmful tax competition.

PROHIBITED TRADE PRACTICES

Competition law generally prohibits any action that causes or is likely to cause a significant adverse effect on competition in a market (see for example s 27 of New Zealand's Commerce Act 1986, s 45 of Australia's Trade Practices Act 1974, art 85(1) of the EU's Treaty of Rome, and s 45 of the US's Sherman Act 1890). It also prohibits a number of specific trade practices including misuse of market power (see for example s 36 and 36A of the Commerce Act 1986), price fixing (see for example s 30 of the Commerce Act 1986, s 45C of the Trade Practices Act 1974, *and United States v Socony-Vacuum Oil Co* 310 US 150 (1940)) and other horizontal restraints such as collusion (see for example s 49 of New Zealand's Commerce Act 1985, s 45(2)(a)(i) and the definition of "exclusionary provision" in s 4D(1) of the Australian Trade Practices Act 1974, and *United States v General Motors Corp* 384 US 127 (1966)).

It is important that each of these prohibitions is judged by reference to a defined market. Thus to determine whether there has been a breach of a prohibited trade practice it is first necessary to define the relevant market.

MARKET DEFINITION

In a somewhat tautological fashion, a market is generally described as the sphere in which competition occurs or where competitive forces operate (see for example Burchett J in *News Ltd v Australian Rugby Football League Ltd* (1996) ATPR 41-466, at 41-667). Central to the definition of a market is the concept of substitutability. Where one product is substitutable for another there is the potential for competition between the two products.

In the present case, the relevant "products" are tax sources. There are a number of different tax sources and their existence depends on the tax legislation of each country. Common examples include residency, business transactions, financial transactions, and consumption transactions. Countries compete for these tax sources, since the more tax sources that are within any particular country's tax net the more tax revenue that country will earn and the more benefits it can provide to its citizens.

Taking residency as an example, individuals will prefer to live in countries that have a relatively low net cost of residency. The net cost of residency is dependent on many factors, however for present purposes we will assume that the net cost of residency is represented by the rate of tax that a resident must pay. Thus the lower the tax cost of residency in a country the more individuals will seek to be resident there. This can be thought of as demand for residency. On the opposite side of the same coin, governments of countries face costs for each resident. Examples include health, education, social welfare, defence and so on. As more and more people become resident in a country the cost of providing these benefits increases. Thus there is a marginal cost to governments in admitting more residents. Economists refer to marginal cost as supply, and where there is both supply and demand for a certain product and an overlap between the two, this can be described as a market. There will be competition between countries when people substitute residency in one country for residency in another. The extent of

this depends on whether people are able to choose which country they will be resident in. There is evidence that this is an increasing trend. An example is the emergence of free trade blocks including the EC where individuals may choose to reside in any of 13 countries. Another example is Australia and New Zealand's agreement for Closer Economic Relations (CER), which allows citizens of each country free access to live and work in the other country.

The same analysis applies to financial transactions. Financial transactions will be attracted to jurisdictions where the tax cost of conducting that transaction is smallest. It is contended that the residency market and the financial transactions market are separate and distinct markets, since residency and financial transactions are not substitutable. An individual cannot substitute residency in a country with anything other than residency in another country. Residency is distinct and different from a financial transaction and there is no scope for substituting between the two.

The difference between the residency market Ágd the financial transactions market is that the marginal costs of allowing financial transactions to occur within a country are significantly less than the marginal costs of admitting residents. Once the legal and technical infrastructure has been established there are virtually no further costs for permitting financial transactions to occur. Tax havens can therefore be successful at charging no or very low taxes for financial transactions, because tax havens do not incur any significant costs to allow those financial transactions to occur. Tax havens also recognise that there can be a significant benefit to the country by allowing such transactions to take place. Examples of the benefits include some (yet minimal) additional tax, revenue through administrative charges, and revenue to resident individuals through legal requirements that require non-residents to spend money in the tax haven.

COMPETITION OR ANTI-COMPETITIVE CONDUCT?

We have seen that competition law prohibits the abuse of market power in a market. The OECD has significant market power and influence in the tax source markets described above. This is evident from the fact that the OECD comprises 29 countries including some of the largest, wealthiest and most powerful nations in the world, eg United States, United Kingdom, France, Germany, Japan, and Canada. The question is whether the OECD is abusing that market power by attempting to influence the tax policy of other countries. There are a number of tests for determining this, ranging from mere use of market power to exercise of market power that results in a substantial lessening of competition in a market. There is no doubt that the OECD is using its market power. Whether the OECD is abusing its market power is really a question of political opinion, however if the OECD is successful in pressuring tax havens to change their tax systems it will be evident that competition in some tax source markets will be substantially lessened.

There is also the question of whether the member countries that make up the OECD are acting anti-competitively by colluding. In this respect the OECD member countries can be likened to the members of OPEC, which is a cartel of oil producing countries that regulates the quantity and thus price of a significant proportion of the world's oil. In a similar fashion, the OECD could be referred to as a cartel of tax raisers that regulate the markets for tax sources so that the price (ie tax) remains higher than if countries freely competed to attract tax sources.

In the author's opinion it is relatively clear that the OECD is guilty of breaching the general competition law prohibition by acting in a manner that is likely to cause a substantial lessening of competition in at least some tax source markets. It is also clear that the OECD is guilty of abusing its market power in the tax source markets and its member countries are guilty of collusion in those markets.

FAIRNESS AND EFFICIENCY

The report identifies low or no taxes as a necessary but not sufficient condition for a jurisdiction to be considered a tax haven. In the second article in this series it is argued that the tax rates should be irrelevant to identifying harmful tax regimes. That argument is based on economic efficiency considerations which are premised on the contention that a jurisdiction's tax rate in a "market" should not be significantly higher than the jurisdiction's cost in allowing the relevant tax source to be located there.

There are also fairness considerations that count against any attention being paid to tax rates. The point was made well by Switzerland at p 77 of the report:

> The report recognises that each state has sovereignty over its tax system and that levels of taxation differ from one state to another. However, the same report presents the fact that tax rates are lower in one country than in another as a criterion to identifying harmful preferential tax regimes. This results in unacceptable protection of countries with high levels of taxation, which is, moreover, contrary to the economic philosophy of the OECD.

Notions of sovereignty and unacceptable protection of high tax jurisdictions weigh against the OECD's conduct being fair.

There is an argument that price competition (ie competition by reference to tax rates in different countries) in a tax source market is efficient, and that anti-competitive restrictions, such as those propounded by the OECD, are inefficient. Switzerland considers that a certain degree of competition in tax matters has positive effects. In particular, Switzerland says (at p 76 of the report) that tax competition "discourages governments from adopting confiscatory regimes, which hamper entrepreneurial spirit and hurt the economy, and it avoids alignment of tax burdens at the highest level".

CONCLUSIONS

It is important to remember that tax is only one factor in a whole range of factors that influence people's decisions on where to locate their tax sources, and to some people tax will not even be a factor at all or will be overridden by more important factors to the point of becoming insignificant. The natural inference is that countries can compete for tax sources in many facets other than tax. This is what economists refer to as non-price competition. Relevant factors include political stability, stable or high performing currency, interest rates, skilled and educated workforce, low crime rate, absence of corruption, a quality legal system, the environment and many other factors. The OECD should be encouraging countries to develop new tax systems and to compete on the basis of both tax and non-tax factors for varying tax sources in varying tax-source markets. This is not only desirable in relation to economic efficiency and fairness, and in accordance with the principles of competition law, it is mandated by the OECD's own economic philosophy. ❑

TRANSACTIONS

ACCOUNT OF PROFITS FOR BREACH OF CONTRACT

with

Jane Anderson

A-G v Blake

In *Attorney-General v Blake* [2000] 3 WLR 625 a majority of the House of Lords (Lord Hobhouse dissenting) accepted that in an "exceptional case" an account of profits may be awarded for breach of contract.

A-G v Blake is a "Spy and Tell" case. Blake was a secret service ("SIS") agent who signed an undertaking in 1944 not to divulge information gained in his employment. Between 1951-1960 he disclosed secret information to the Soviet Union, and was subsequently convicted and imprisoned for spying but managed to escape to Moscow. In 1989, without obtaining permission from the Crown, Blake wrote an autobiography which divulged a great deal of information acquired while he was in the SIS.

The Attorney-General for UK brought proceedings against Blake seeking all profits paid and to be paid to him for this publication. The action was based principally on an allegation of breach of confidence. It failed because none of the information remained secret or confidential.

In the Court of Appeal it was held that Blake was in breach of contract for failing to comply with the undertaking he had given to the Crown. However, only minimal damages had been suffered by the Crown. The Court of Appeal nevertheless was able to prevent Blake receiving any profits on the basis that he was in breach of the Official Secrets Act and the Court could prevent a criminal from retaining profits from a crime at the suit of the Attorney-General.

The House of Lords held unanimously that the Court of Appeal had acted outside its jurisdiction by making a confiscatory order in the absence of any statutory power to do so. However, the House of Lords majority (Lord Hobhouse dissenting) held that it was appropriate to award an account of profits for breach by Blake of his contract.

Principle and policy

The remedy of account of profits is "restitutionary" to the extent that its purpose is to disgorge from the defendant the benefits resulting from a breach of obligation. The basic remedy for breach of contract is an award of damages whose object is compensatory – to place the plaintiff in the position he or she would have been in had the contract been performed (*Robinson v Harman* (1848) 1 Exch 850, 855). If damages are an inadequate remedy, a plaintiff can try to obtain the equitable remedies of specific performance or injunction, although these may not be available in the facts of the case.

Where these remedies are not available, the plaintiff may sometimes be left with nominal damages, even if the defendant has profited substantially from the breach. The law of contract has traditionally been impotent to require a party in breach of contract to disgorge the benefits he or she has obtained from it.

The Courts have sometimes in fact been able to require a defendant to disgorge the profit made from a breach. Classification of the relationship between the parties as fiduciary will allow the remedy of an account of profits (*Reading v Attorney-General*). Another means is to attach a different label to what is in effect an account of profits (see *British Motor Trade Association v Gilbert* [1951] 2 ALL ER 641). These efforts to do justice have been criticised because they involve an instrumental use of legal concepts (*Birks*, [1993] 109 LQR 518, 520). The result is remedial uncertainty in commercial law.

Restitution lawyers have led a charge extra-judicially in favour of restitution as a remedy for the "wrong" of breach of contract. However, there has been disagreement on the circumstances in which such a remedy should be permitted. All of the writers have appreciated the need for a principled approach to when restitution should be permitted. As much is demanded to prevent uncertainty. Uncertainty in this context arises not only at the level of when a restitutionary remedy is appropriate, but the extent of restitution that is required. For example, the remedy of account of profits could well require some theory of "remoteness of gain".

The issue raises fundamental questions about the nature of contractual obligations. A breach of contract is not necessarily a "wrong" at all. The doctrine of efficient breach asserts that a party ought to be able to break a contract with impunity in favour of an alternative more profitable venture since that is economically efficient, and therefore maximises wealth for all. This can be contrasted with the view that contractual obligations have moral force as promises. Fundamental questions of principle as to the relationship between legal and equitable remedies and between property and contract also arise.

At a policy level, there is real attraction in preventing a defendant (particularly a deliberate wrongdoer) retaining the profits of his or her wrong. However, that does not justify why it is appropriate for the plaintiff to reap a windfall as a result of the wrong done.

The Lords' approach

Lord Nicholls reviewed the contract authorities and the various discrete areas of law in which the remedial response is not compensatory but restitutionary. These include the various torts (for example trespass, wrongful

detention of goods) where common law "damages" effects restitution; the intellectual property torts for which an account of profits may be sought, and fiduciary obligations. His Lordship concluded that there was nothing in principle or in the authorities why an account of profits ought not be ordered for breach of contract.

However, Lord Nicholls did not seek to rationalise the cases or isolate any principled approach to when such a remedy was appropriate other than to say that such cases would be "exceptional" where the other available remedies are inadequate:

> 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 provision which has been breached, the circumstances in which the breach occurred, the 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 (at 639).

Two factors were viewed as justifying the remedy in *Blake*. The first was the Crown's "legitimate interest" in preventing SIS members from the disclosure of official information. This derived from the jeopardy to the effectiveness of the service if there was a financial incentive for members to break their undertaking (at 641).

The second factor identified by Lord Nicholls was that the undertaking was "closely akin to a fiduciary obligation". Had the information still been confidential, an account of profits would readily be awarded. In the "special circumstances" of the intelligence services, it was considered that an account of profits was a just response to the breach, even though no information remained confidential. Lord Steyn delivered a short speech which also stressed an analogy here with fiduciary duties and referred to the ability of the cases in this area to develop case by case using practical justice as an objective as it does in the negligence area.

Academic writers who have sought to identify a principled rationale to the "restitution for wrongs" issue in order to achieve certainty will be disappointed with the majority approach. Lord Nicholls considered that this "all the circumstances" approach met the requirements of certainty in commercial contracts on the basis that the issue of such a remedy being available will only arise exceptionally, when other remedies are inadequate. This presents little practical certainty to lawyers who will need to advise that there is a potential for categorisation as an exceptional case with insufficient criteria for determining whether "their case" qualifies for that dubious honour.

The two factors isolated in *Blake* seem unconvincing. The "legitimate interest" issue appears to beg the question whether an account of profits ought to be awarded. "Akin to fiduciary duty" is also problematic. It is odd to base the availability of a remedy on whether the facts of the case came close to, but fail to meet the requirements of another cause of action. Moreover, the use of fiduciary concepts to seek to obtain a greater remedial armoury already creates uncertainty in commercial law. Pity the lawyer who must advise on whether the client is at risk of being viewed as breaching a duty "akin to a fiduciary duty".

> Lord Hobhouse's dissent was founded on an analysis of restitution as analogous to property. His Lordship stated that restitution effects an order for the return or transfer of property owned in law or equity by the plaintiff. The basis of the order, he said, was that it effects the performance of the defendant's obligations by ordering the payment of money to which he is actually entitled.

In the present case, Blake's obligation was not to disclose information. Having done that (and no injunction having been sought be the Crown in time to stop disclosure) Blake had no remaining obligation left to perform or of which performance could be enforced. The Crown had no proprietary right to the profits of publication or right to be paid them. There was therefore no basis for restitution of the profits.

How the New Zealand Courts will greet the House of Lords approach is unclear. In *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3NZLR 299 it was held that the fusion of law and equity means that damages were recoverable for breach of confidence even if that is a solely equitable wrong. The Court of Appeal could thereby at the least be said to have opened the door to greater remedial flexibility which could accommodate an award of account of profits for breach of contract.

SECURITIES ACT

Statutory supervisors responsibilities: causation

Brian Keene

Deloitte v Christchurch Pavilion Partnership CA 79/99 18 September 2000

The Court of Appeal (judgment Tipping J) addressed the scope of statutory supervisors' liabilities. It reaffirmed the importance of a clear causative link between an alleged breach of duty and losses claimed against the statutory supervisor.

The facts were complicated. Deloitte was sued as statutory supervisor of an offering in the Christchurch Pavilion Partnership. That offering was 10 per cent share capital and 90 per cent as participatory security representing partnership units. The prospectus stated that the minimum amount to be raised was $4.5m. Eventually that amount was raised although not before interests associated with the promoter had to come in and for a time subscribe for more units than they had originally intended.

Section 37(2) of the Securities Act provides an allotment to be irregular and void if the minimum amount stated in its prospectus is not received by the issuer within four months after its date. This prospectus offering provided for a payment in two tranches. The second tranche was not due until outside the statutory four month period. The Court therefore concluded that the prospectus was in prima facie breach of the Act, even although it correctly and expressly set out the bargain to which the investors willingly committed themselves.

The investor's case against Deloitte was that the statutory supervisor had failed to ensure that the share capital for the venture had been properly subscribed and paid for at the time of allotment. They argued this left the venture substantially under-capitalised, which caused it to fail with consequent loss of their money.

In answer Deloitte both disputed the contention of under-capitalisation and that any such under-capitalisation could have been causative of the investors' loss.

On the first key issue of under-capitalisation, Cartwright J at first instance found against Deloitte. This was largely based upon her preferring the account of Professor Don Trow to that of Deloitte witness Mr John

Hagen. It is unusual for an appellate Court to go behind the trial Judge's discretion in preferring the evidence of one witness above another. The Court of Appeal did so in this case quite simply because the trial Judge had failed to recognise the blinkered view which Professor Trow's instructions and lack of access to relevant materials had caused him to take. The Court must be commended for being prepared to reopen such issues when the justice of the case on appeal compelled that course.

The second key issue was whether, if there were any under-capitalisation, it was causative of the loss to the investors. The Court carefully analysed the money trails compared to the prospectus document. It found no material departure. Although moneys were paid by interests associated with the promoter into the Pavilion Partnership and then immediately paid out to other related interests of the promoter against the building contract, nonetheless in reality, the transaction ended up by being completed very much in terms of the prospectus. Therefore the risk which investors took in reliance upon the prospectus up to the completion of the building contract was materially the same as happened as events unfolded.

The trial Judge, preferring the investors' expert evidence, had formed the conclusion that there was a close nexus between Deloitte's failure to notice the deficiencies in the investment and the ultimate failure of the project. This was not apparent to the Court of Appeal from the figures and evidence put to the learned trial Judge. Her conclusions were therefore reversed.

The investors' case was that the project failed because, to compensate for its under-capitalised state, the Pavilion Partnership had to sustain more borrowing than was envisaged. The interest costs caused the collapse of the venture. Deloitte's riposte was that the added borrowing was associated with the failure of the venture to achieve revenue projection, not because of any initial under-capitalisation. The revenue risk was one plainly pointed out in the prospectus and not the responsibility of Deloitte.

Tipping J pointed out that actual interest expenditure was less in the earlier period of the venture than prospectus forecast. It rose after three years to exceed forecast by $345,111. In comparison revenue in the same period was $2,391,980 less than forecast. Clearly the substantive cause of the liquidity stress resulting in interest bearing borrowing was revenue based.

Throughout the judgment there is a repeated distancing by the Court from a "but for" view of causation. A rigorous relationship was demanded between the investor loss and the alleged deficiencies of Deloitte. It was not proven so the investors' case collapsed on appeal.

Whilst some investors may characterise the Securities Act as a toothless tiger, the decision is, with respect, right. The commercial community can rely upon the professionals to ensure that the transactions they enter into are properly presented and risks fully advised. Professionals to the extent of statutory responsibilities, must see that those responsibilities are honoured. However that is the metes and bounds of their obligations. It is for the investors to decide to take the risk. They look forward to receiving the fruits so cannot seek that the professional advisers insulate them from the commercial misfortunes when, as happens from time to time, investments fail.

FORMS OF AFFECTION FROM THE IRD

The second greatest debate in taxation law, after the big questions of what constitutes taxable income and deductible expenses, is the form over substance debate. It is featured in many tax cases around the world and lies at the very heart of the legal challenge mounted against the findings of the Wine Box Inquiry. Must the IRD look at transactions as manicured by accountants, merchant bankers or lawyers or may it go to their substance to make its decisions on taxability? The Courts have tended to answer the broad philosophical question by favouring a substance approach. Regularly however, in individual cases, they have become beguiled by the form of the structures or of the payment received or expended. In practice they have ended up favouring form above the substance.

Naturally one would expect the IRD to argue a substance view spearheading the fight against taxpayers, usually characterised as tax avoiders, who champion form. The IRD's purity of position and persistence in this role has been recently questioned, most notably by its arch critic Tony Molloy QC. In the Wine Box litigation, which seems peculiarly prone to have organisations doing things for one purpose but not for others, the Revenue supported the comprehensiveness of its inquiries by, in effect, arguing form over substance.

Changes in accruals legislation came into force on 20 May 1999 under the Taxation (Accruals Rules and Other Remedial Matters) Act 1999. Formerly the Accruals Rules provided that the forgiveness of any amount (whether income or capital) under a financial arrangement gives rise to income to the debtor. An exception is where the debt forgiveness is by a natural person and arises "in consideration of natural love and affection". But how far did this extend? For example, does it apply to a debt owed by family trust or company? A 1996 IRD binding ruling held that the natural affection exception could not apply to a company but did extend to forgiveness made to a trust provided its primary objects or potential beneficiaries were people for whom the creditor had natural love and affection.

The openness of this wording has left professional advisers charged with drafting or amending trust deeds with somewhat of a challenge. What of mixed purpose trusts? How substantial must be "the primary" objects? How certain the class of potential beneficiaries before the exemption applied? The IRD was asked for further clarification. In September 1998 it released a further draft ruling for comment. Additional detail included the prospect that trust deeds which included charities as more than a minor beneficiary or included the power to add beneficiaries who might include persons for whom the creditor did not have love and affection may bring the trust outside the exception. The ruling seemed likely to cause as many problems as it solved.

The new Act provides that the natural love and affection exception applies to a trust established primarily to benefit persons or classes of persons for whom the creditor has natural love and affection or charities whose income in New Zealand is tax exempt. Trustees will incur tax on the difference between the amount of the forgiven debt and the amount distributed to beneficiaries in the above categories. The IRD has just released a redraft of its ruling which, whilst materially similar to the draft ruling that sparked the initial concerns, removes the previous dichotomy between primary and minor beneficiaries. Instead all beneficiaries to the trust, other than default beneficiaries, must be people for whom the creditor has

some natural love and affection. A default beneficiary in this context is a person who may take only if the primary beneficiaries are deceased or no longer exist.

From this draft ruling it is clear that trusts which have family companies as a class of beneficiary or the power to add beneficiaries will not qualify under the exemption. Debt forgiveness by a natural person to such trust will result in taxable income to the trust under the accrual rules. All of this has little to do with the existence or otherwise of natural affection. The power to appoint further beneficiaries may never in fact be used. Rather it is largely about the IRD engrafting on the legislation manageable rules to facilitate its administration of the exemption.

All of which brings one back to the form over substance debate. Conceding, as one must, that the whole of the income tax legislation is postulated on a income versus capital distinction, nonetheless one would have thought it behoved the Revenue to preserve the substance arguments to the maximum extent possible rather than retreating into defensive mode behind the battlements of form. A Court addressing a specific instance of the new legislation in the light of the department's draft ruling may be expected to take its lead and review the transaction in the light of the formal criteria of the department's own making not, as many taxpayers would prefer, by having regard to its substance.

DYMOCKS IN THE COURT OF APPEAL

The long-standing dispute between the Australian Dymocks' franchisor and its New Zealand franchisee ("Todds") has now been considered by the Court of Appeal (*Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd* [2000] 3 NZLR 169).

The issues in the High Court were whether the franchise agreements had been validly terminated by Dymocks, whether this entitled Dymocks to take over the book stores run by Todds, and whether Todds were induced to enter into the agreement by misrepresentations and/or misleading or deceptive conduct (refer March Issue [1999] NZLJ). The agreements were subject to the law of New South Wales.

Hammond J had held that Dymocks was entitled to cancel the franchise summarily because Todds had breached an implied obligation of confidentiality – Todds had handed over key financial information to a competitor about its own business for the purpose of potentially joining forces with it. Hammond J rejected an argument that the contractual consequence of termination (that Dymocks could take back the business) was a penalty and rejected Todds' misrepresentation claims. All of these issues were pursued by way of appeal and cross-appeal.

Delivering the decision of the Court, Henry J upheld Hammond J's rejection of the penalty and misrepresentation arguments. However the Court reversed the decision that Dymocks lawfully cancelled the franchise agreements, after rejecting the existence of the implied term found by His Honour. The Court therefore declared that the agreements were lawfully terminated by Bilgola for repudiation by Dymocks.

Hammond J had derived the implied term from his classification of franchise agreements as contracts of a "relational nature" in which parties are involved in a working, ongoing and often relatively open-ended relationship that is set up for the parties' mutual benefit. He appeared to see the obligation as to confidentiality as a subset of an overall duty of good faith, similar to that in employment contracts, and referred to the developing Australian law of good faith in contract and new Australian legislation protecting the franchisee.

The Court of Appeal had two difficulties with this analysis.

First, nowhere had Hammond J applied the test for implied terms in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 established by the expert evidence to be part of Australian law. Applying this test, the Court rejected the implication of the term. There was lack of clarity of expression in an obligation of good faith, or a refined obligation relating to use of information. Nor was it necessary for business efficacy since the agreements were careful in detailing the parties' respective rights and obligations. The term was wider and therefore inconsistent with an express term of the contract relating to trade secrets. Finally, it was unreasonable to restrain use by the franchisee of its own information in the context of an agreement which entitled Todds to sell or assign the franchise.

Second, Hammond J's exegesis on the nature of franchise agreements as relational contracts, leading him to conclusions as to obligations of good faith/confidentiality, was not derived from views expressed by the several eminent legal expert witnesses called to establish the applicable Australian law. While the expert evidence confirmed that conceptions of good faith are developing in contract law there, Hammond J principally relied upon his own analysis of the Australian case law and legislation, and on North American law on the issue. The Court of Appeal held that it was not open for the Judge to proceed in this way.

The Court of Appeal summarised its conclusion as follows:

> Whether New South Wales law should now develop in a way to recognise the relational nature of some contracts such as franchise agreements, with consequences which will as a general proposition confer rights or impose obligations which are not expressed by the parties is beyond the proper scope of a Court applying that foreign law. That said, the significance of the need for certainty, particularly where parties to an arm's length commercial transaction have carefully set out the details of their relationship, must be an important factor in any particular case. The obligations must always be able to sit comfortably with the express terms of an agreement. In this case, that presented a difficulty to Dymocks (at 15).

This passage leaves little room for doubt as to what the Court of Appeal as constituted in this case (Richardson P, Keith and Henry JJ) thinks about whether New Zealand law should develop in the way Hammond J had suggested. The result is that Hammond J's theory of a duty of good faith in "relational" types of contract has been dispensed a hefty dose of orthodox contract principle. Notably, it is likely that Hammond J viewed the obligation of confidentiality as implied by law rather than a term implied in fact to which the *BP Refinery* test applied.

Those for whom a theory of good faith in contract is an invasion of contract by equity will no doubt applaud the Court of Appeal approach. Franchise lawyers can rest easier with the comfort that implied terms will be considered against the lawyers' painstaking detailed drafting rather than by reference to the "nature of the relationship". ❑

MEDIATION TRAINING

ALTERNATIVE DISPUTE RESOLUTION

edited by Carol Powell

With the emergence of mediation as a profession, much has been discussed on ethical issues that have or may arise during the process and generally codes of ethics for mediators as a profession. While to date there is no one common standard, those mediators who belong to a professional body such as LEADR or AMINZ will be governed by the ethical guidelines developed by that body. Those who choose to mediate independently of any membership can do as they wish provided that they stay within the bounds of the law. Given the prominence of the representative professional bodies, while there are risks, potential clients can minimise those risks by using mediators from a professional panel.

The situation becomes more complex when ethical issues in mediator training are raised. In particular whether there should be a minimum standard or minimum curriculum for all basic mediation training and whether a trainer owes a duty to potential participants to advise of the relatively small opportunities to practice as a mediator in New Zealand.

Standards in training

While there has been discussion of mediation training becoming an NZQA standardised qualification for many years, this has not yet come to fruition and may never do so given the wide range of models and principles which currently go under the term "mediation". So where does this leave mediation training?

As with mediation itself, anyone can hold himself or herself out as a trainer in the mediation process. A hapless would be mediator might well find the cost of some of the better-recognised training prohibitive and choose a less expensive course, which may not meet a sufficiently high standard or may not even teach some of the fundamental principles of the mediation process. At the end of the course, that individual could, justifiably perhaps, feel able to advertise himself or herself as a mediator and conduct "mediations". This is an obvious risk to the profession as a whole, while there are no required standards attached to the label "mediator".

New Zealand, at the moment, has a range of mediation trainers, the universities; AMINZ; LEADR; and the Mediation Training Centre are examples of some of the better-known courses available. Overseas trainers are regularly brought into New Zealand and offer advanced and specialised skills training. Organisations that offer mediation or a similar process have in-house training systems. Individual mediators can also offer training. This latter group is a potential risk for the reason outlined above. Given this risk one might well feel that training outside of a recognised professional body or institution should be avoided. However, this would diminish the value of the training that experienced individuals can offer, such as micro skills, which often can be offered in a financially viable way to small groups or even individuals. Individuals also offer flexibility, which may be difficult to achieve with an organisation that purely offers standardised structured training packages.

While one could argue that mediators (and impliedly would be mediators) are professionals who should have the ability to select for themselves, there are clearly advantages in there being a means of evaluating training and ensuring that a minimum standard is achieved. The use of mediation has reached sufficient levels for this to have become critical to the survival of the process as a recognised and valuable means of dispute resolution.

Implied representation that mediation opportunities exist?

There is another potential ethical dilemma that surrounds the mediation training offered today in New Zealand. Namely, by offering training, is a trainer impliedly representing that adequate work exists as a qualified mediator? While it is not ever the case that by offering a course in skills, a trainer is guaranteeing a participant that there will be opportunities to use those skills in the workforce, when a trainer, particularly a professional body, offers a course effectively on "how to become a mediator", there may well be an expectation in the mind of the participants that on the completion of the course, and perhaps others, there will be opportunities to work as a mediator. In New Zealand, at the moment, there are a large number of people who have mediation training and have not had the opportunity to mediate at all, let alone, to operate a successful practice as a mediator. This is the cause of some disgruntlement where expectations of work have not been met.

It is not appropriate for training bodies to have to set themselves up as careers advisers, however, it may be ethical for trainers to make it clear to potential participants that completion of any mediation training will not open the door to a wide range of opportunities to practice. This is certainly a debate that is taking place in other parts of the world and this should act as a

warning to those offering mediation training in New Zealand.

While the giving of a warning may deter certain potential participants, the overall satisfaction level of participants and thereby the future success of the training, is likely to be greater.

The offering of a clear warning that the profession is still in its relative adolescence should not necessarily deter participants. There are clear benefits to be gained in undertaking mediation training even if a participant has no intention of acting as a mediator. The skills offered include – negotiation skills, interpersonal skills, listening, reframing and dispute analysis, all of which are transferable across most professions and even into everyday life. Most professions involve situations where negotiating on some level is required and the ability to be able to use a range of different strategies, rather than always pitching into a position, will be an advantage. This is recognised in our education system where systems such as "cool schools" means that the skills many learn as adults are becoming fundamental to early learning.

If mediation training, openly advertised itself as offering these skills as well as clearly indicating that there are limited opportunities to practice purely as a mediator, it may well achieve the same success in terms of attendance and at the same time maintain a greater satisfaction level upon completion of the training.

The level of sophistication of participants in the mediation process, and the increased frequency of use of mediation, means that the profession as a whole must address some of the critical issues surrounding training and practice. The sooner there are standard minimum requirements for basic training across the board and that participants are aware of what to expect, the better for the overall continued success of the process in New Zealand.

POWER IN MEDIATION

The relative power of parties involved in a mediation and how mediators deal with differences of power can have a substantial effect on the overall outcome of the mediation. What can create imbalances of power? What steps should a mediator take to deal with situations where there is a clear power imbalance?

Power comes from a number of sources and the party with the most power may not always be obvious from the circumstances as they first present themselves. Power can come from obvious sources such as wealth, negotiating experience or physical power and from less obvious sources such as the emotional hold a party may have over another or the risks associated with alternative courses of action available to one of the parties.

Power is the ability to influence the outcome of the dispute resolution (J David). There are a number of sources from which a party may gain power in a negotiation or mediation process, these include:

Knowledge, which can be knowledge or information about the substance of the dispute, and can be expertise, either in the subject matter of the dispute or in the legal issues surrounding the dispute.

Resources, this can include the ability to reward another party and will also have an impact on a party's BATNA (Best Alternative to a Negotiated Agreement) – a party who can afford to fight it out in Court, for example, will have an advantage over a party for whom this or other options may be financially prohibitive. It goes without saying that financial resources can also assist a party to gain power from other sources, by hiring experts for example.

Legitimacy, a strong legal argument in favour of one party's position will give that party the strength in a rights based process and this will affect that party's BATNA and therefore their relative negotiating power.

Nuisance, sometimes the apparently weaker party, such as an individual in dispute with a large organisation, can gain negotiating power by persistence, publicity or another form of nuisance.

Status quo, change is often hard to achieve and the party who is opposed to change will often have the advantage of being able to argue, "things have always been done this way, so why change".

Personal, an individual's negotiating ability, either from experience or from personal attributes such as charisma, affability, intellect and focus can all affect the power of that individual in mediation. Personal, particularly emotional relationships will also affect the relative power.

Stature, power can be gained from physical stature and size.

Status/position, a party who has relatively high status, either in the community at large or within the community/organisation/whanau within which the parties to a dispute operate may create an imbalance of power.

Precedent, where outcomes of similar disputes have been resolved in a particular way and a precedent has been formed, either legal or otherwise, this will add strength to the party seeking a similar outcome.

Collective action, where one party has the collective strength of many, as in an industrial dispute where employees are represented collectively, this strength in numbers can affect the relative power of the parties.

Morality, sometimes what is seen to be morally the right thing to do, will have an influence on the outcome of a dispute. *(Sources taken from LEADR)*

Not all of these factors will exist in every mediation, however there are likely to be some of these factors prevalent in all mediation. The mediator has the ability to influence some of these factors and indeed, can influence the final outcome of the process. The balance that the mediator must make lies between ensuring that the process is fair and that the mediator remains neutral. In doing this, the mediator cannot substantially alter a power imbalance, where such an imbalance is inherent in the dispute. The mediator can however ensure that the process itself is fair and this can procedurally rectify some types of imbalance.

The mediation process itself will assist to ensure a fair procedural means of dealing with the dispute. The process allows the parties the opportunity to increase the number of options or outcomes which are available to them by broadening the problem beyond the parties' respective rights to include needs and interests.

The mediator's role is to manage the process thereby ensuring that the parties have a structure to their negotiations, that there is adequate opportunity for information exchange and assisting the parties to use interest based bargaining.

Factors such as physical stature, status or personal attributes can be handled by managing the communication. The mediator has set of communication tools which include active listening, reframing and keeping the parties on track. The ability to break from joint session to individual private sessions allows the parties to take a break from one another, it provides an opportunity to test ideas or ways of introducing new information or options and enables a party to use the telephone

or obtain advice or information from outside the process if necessary.

A mediator can assist the parties to identify what information they require in order to be able to make an informed decision. The process allows open exchange of information (within certain boundaries which are not the subject of this article) and will enable a party to receive information about the other party's needs and interests which will open other avenues of negotiation.

While steering away from a purely rights based outcome, a party who has knowledge of their rights will be in a better position to evaluate any option on the negotiating table. The process enables information exchange, which can include the presence and participation or legal representatives and/or experts. There can also be opportunities built into the process to allow for further information to be obtained or for certain aspects of the dispute to be resolved in another way, such as using an independent expert appraisal or arbitration. The process also allows parties to bring legal support people where necessary to assist with the balance of power.

A mediator can take a slightly more proactive role in private session, by exploring with the perceived weaker party, whether the process is able to assist them to resolve the dispute, or whether another more formal process may be better suited. Mediation is not the only dispute resolution process and a formal rights-based process, or a process where the parties are represented by lawyers (or others) may be more appropriate in some situations where the power imbalance is overwhelming.

The mediator can use the private session to create doubts in the parties. This enables each party to test the validity of assumptions being made both by themselves and by others in the mediation. A party is encouraged to consider what is their best alternative to a negotiated agreement (BATNA) along with the worst alternative (WATNA) and the most likely alternative (MLATNA). These will give the party to accurately assess the options available and make an informed decision about the best way to resolve the dispute for them.

The neutral management of the process is probably the most essential ingredient in the problem-solving model of mediation. This will assist the parties to negotiate in a forum that is as fair as is possible without interfering with the natural power differences that will be inherent in every dispute.

"Perhaps the most that should be expected from mediation is that it does not exacerbate inequities nor prevent people from obtaining support, redress or assistance that might otherwise be available to them" – Dr Bernard Mayer, CDR Associates.

FROM THE LEADR CONFERENCE: MEDIATION IN THE WORKPLACE

Susan Freeman-Greene, LEADR NZ

The recent LEADR conference in Sydney saw an emphasis on mediation in the workplace. Given the accent on good faith bargaining in the Employment Relations Act with its focus on early intervention of disputes through its new Mediation Service a number of papers were of particular interest. They provided an encouraging insight into the effectiveness of some well-established programmes in other places and highlighted the range and extent of the application of mediation and conflict resolution within the labour force. These included programmes for early intervention in workplace conflict with external mediators, governmental schemes and highly developed internal dispute resolution systems such as those designed with Christina Sickles Merchant – featured in this section. The following two examples illustrate the depth and breadth of the initiatives. For more information (or the papers) please contact the LEADR office in Wellington.

Federal Mediation & Conciliation Service (FMCS)

This independent agency of the US government was set up over 50 years ago. With 200 field mediators its primary focus is on labour-management relations through mediation of contract negotiation disputes between companies and their unions and providing training in cooperative processes to help build better working relationships.

In his paper, Jan Sunoo, (program director and commissioner) highlighted the value of the independence of the service – it has developed a reputation of a body of trusted neutrals. However, he emphasised that the nature of the work of the service has also changed in the last decade: 38-40 per cent of his mediators' work is now concentrated on what he calls *preventative mediation* – or training. This provides organisations with skills, processes and systems to enhance decision-making and problem solving within the workplace before conflict turns into entrenched disputes. This also includes helping workers and unions move adversarial relationships to more cooperative labour-management partnerships.

Demands for this work are growing. The FMCS has an international arm which draws on its domestic experience to export mediation systems and skills. In a world experiencing rapid changes in economic growth and global competition there is increasing awareness that relationships between labour and management are a critical component in accommodating change. In another form of preventative mediation, the agency's work has also extended to regulatory negotiation: a public negotiation process motivating potential or actual antagonists to participate and become partners with the government in solving a regulatory problem. The benefits include significant cost savings as challenges to regulations are reduced.

ADR in the Navy

The US Department of the Navy has seen a "quantum leap in traditional strategic legal thinking and [has] the courage ... to put action behind its ADR policy that *every issue in controversy is a potential candidate for ADR*". So says Carolyn Houk, ADR Counsel (notably) for the US Navy. Her comment was made in relation to the largest dollar value government contracts case filed to date – a case that had been litigated for ten years. A Court of Appeals decision to remand the case to trial (meaning another five-ten years of litigation) provided the impetus for seriously exploring and engaging in ADR. While the mediation is still in progress, it is significant that the Navy, the Departments of Defence and Justice and two of the country's largest defence contractors have all retained mediators and are participating in a process discussing a billion dollar dispute.

This is just one aspect of the Navy's ADR programme. After multiple successes in individual workplace programmes (such as EEO and Labour relations sectors) it has launched its first *integrated conflict management system* that is designed to handle workplace disputes in a comprehensive and coordinated manner, at the earliest possible time and at the lowest possible

level. The new Dispute Resolution Centre in San Diego offers ADR services to all 30,000 civilian employees serviced by the region's Human Resources Office. Interest-based processes are offered to any employee, whether the dispute is based on a grievance or simply miscommunication. Early results show resolution rates to be high with 48 per cent resolved by a intake adviser trained in dispute resolution and 78 per cent resolved at the next stage – the mediation table.

While in a year from now, the Navy will have better data, both tangible benefits (through reductions in formal complaints) and intangible benefits are heartening with a cultural shift Houk recognises as telling, with "a conversion to ADR champions of many of our personnel who tried ADR for the first time and found it both satisfying and effective".

In both these examples it is striking how mediation (or other ADR) processes and the recognition and understanding of their potential value in both cost savings and personnel management is moving beyond the peripheral to the centre – a thought we, in New Zealand, should continue to hold, explore and develop.

LEADR UPDATE: NEW BOARD

LEADR NZ held its Annual General Meeting on Monday October 9. The 2000–2001 Board of Directors comprise:

Mike Crosbie (Chair) – Partner, Rudd Watts & Stone

Judy Dell (Treasurer) – Mediation Services, Department of Labour

Carol Powell (Vice-Chair) – Dispute Resolution Consultant and Barrister

Bruce Cropper – Mediator

Roger Chapman – Partner, Johnston Lawrence

Carole Durbin – Partner, Simpson Grierson

Graeme Norton – Legal Counsel, Air New Zealand

Geoff Sharp – Barrister and Commercial Mediator

The Board with representatives from large and small firms, the public and corporate sector and individual practitioners stands LEADR NZ in good stead for substantial progress.

Farewell to longstanding board member – Deborah Clapshaw

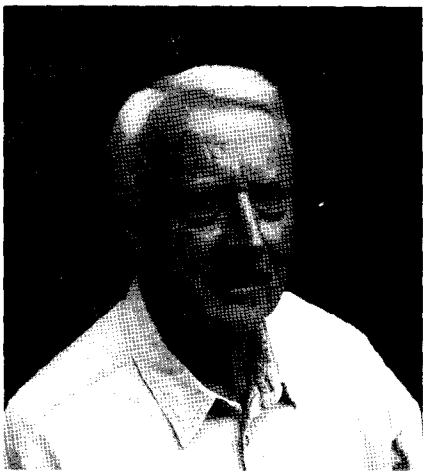
LEADR NZ farewells Deborah Clapshaw from the board, after many years of contribution and two years as chair and a year on the LEADR Board in Australia; Deborah chose not to stand for re-election this year. LEADR NZ acknowledges Deborah's clarity of thought, breadth of perspective, commitment and care as amongst the professional and personal qualities, which she brought to LEADR NZ's management and development.

MEDIATOR PROFILE SIR DAVID TOMPKINS

One of the things some styles of mediation can offer is the opportunity to work with some very experienced and senior lawyers in an independent, confidential forum. For this reason there are several retired members of the judiciary who have found a niche in mediation. Justice Sir David Tompkins is one such mediator.

Sir David's career path began as a practising barrister and Queen's Counsel in Hamilton. He then sat for fourteen years as a High Court Judge. He developed an interest in becoming a mediator upon his retirement as a High Court Judge, three years ago, at which time he did the LEADR mediation course. Since that time he has developed a mediation practice based primarily in Auckland.

His experience as a barrister and Judge has made him a choice for certain types of mediations, particularly those involving commercial disputes. He has now presided over a significant number of mediations, many of which have involved complex commercial issues and significant sums of money. The opportunity to mediate these types of disputes will be a significant advantage to parties who would



otherwise face a lengthy and often expensive litigation process. Mediating with a former member of the judiciary may appeal to parties faced with this choice.

Sir David describes his philosophy of mediation, as a process that enables the parties themselves, rather than their lawyers, to describe their concept of the issues that have given rise to the dispute. He focuses on listening to how they see the problems that have occurred and then endeavours to give the parties the opportunity to explore possible solutions. He is also able, if the parties prefer, to indicate possible strengths or weaknesses in their contentions. A judicial background can assist in making an appropriate assessment that may help the parties in their search for a solution.

One of the attributes that a Judge is likely to have developed is the ability to listen patiently to people. He also finds that his time on the Bench gives him a wide range of dispute experience which can be helpful in option generation, assisting the parties to see possible solutions that may be acceptable to them. He believes that the parties appreciate having a former Judge assist them in finding a solution to their differences.

He believes that an important feature of the mediation process is that it provides the opportunity for the parties to find their own solution to their differences, rather than to have a solution imposed on them. Even if the parties cannot find an acceptable solution in mediation, the parties have a far better understanding of the issues and competing contentions if the dispute has to be resolved in the Courts. ❑

PROFESSIONAL ETHICS – ONCE MORE UNTO THE BREACH

CRIMINAL PRACTICE

with

Robert Lithgow

R v Shepherd (CA 181/00, 9 October 2000, Gault, Ellis and Robertson JJ)

Mrs Shepherd was convicted on two counts of false accounting as an employee. The complainant, W, was her boss. He gave extensive evidence at trial. The defence directly related to his behaviour and amongst other things, alleged that he had fabricated records to set up the appellant and give grounds to sack her. The overnight adjournment fell during his cross-examination which continued the next morning and was followed by lengthy re-examination. During the morning adjournment, the prosecutor admitted to defence counsel that she had spoken to W whilst he was under cross-examination. She said that W had sought her out because he was upset about the cross-examination and she spent an hour talking to him about that and the forthcoming re-examination. In Chambers the prosecutor accepted that she had been wrong to talk to W but maintained that nothing untoward had happened. Defence counsel sought a s 347 discharge on grounds that there had been a mistrial and a new trial could not cure the prejudice. The Judge refused the application and the trial resumed. Defence counsel did not seek to re-open cross-examination to test W on what had transpired with the prosecutor. Mrs Shepherd was convicted and she appealed. [Please record on a piece of paper what you believe the outcome of this appeal will be – then read on.]

Rule 8.05 of the *Rules of Professional Conduct for Barristers and Solicitors* provides that no practitioner has the sole right to call or discuss the case with a witness but that if one does call a witness, one can only discuss the case with that witness up until cross-examination begins. Thereafter, it is only permissible if the Judge allows. *Halsbury's Laws of England* (4th ed, vol 3(1), para 474 and *Cordery on Solicitors* 10th ed, para 743 reinforce).

> *For the criminal law advocate, the decisions of the Court of Appeal represent many things. Principally they are authority for propositions and therefore can be called in aid or be distinguished by further research. Another use is to see what is actually happening around the country with different Judges and different Courts and the advances and stuff ups Judges and counsel make. Watch and learn.*

The Court of Appeal began with the premise that the prosecutor had clearly breached R 8.05 and admitted so doing. The Court noted that the rule is designed to prevent coaching witnesses and that an hour-long meeting provided ample opportunity for mischief. That in itself was not fatal to the prosecution but it did cast an onus on the Crown to satisfy the Court that no miscarriage of justice had occurred. However a certain sloppiness found its way into the decision which, together with certain Freudian slips, raises the question as to whether the Court had sufficiently reflected on its role as the ultimate protector of fair trial process:

> [12] In our view the highly irregular conduct of the prosecutor ... results in the situation where the prosecution must satisfy the Crown (sic) that no miscarriage of justice did in fact occur.
>
> and
>
> [13] Section 385 of the Crimes Act provides ... notwithstanding the point raised might be decided in favour of the appellant, the appeal should (sic) be dismissed if the Crown (sic) considers that no substantial miscarriage of justice has actually occurred [the word in the s 385 proviso is *may* not *should*].
>
> and
>
> [15] In this case the situation arose which gives rise to suspicion that a miscarriage of justice may have occurred. It is therefore necessary for the Crown to show that it has not.
>
> [16] We asked [counsel for the appellant!] if he could point to any passages in the transcript that showed any signs of the effect of the meeting.

The Court was satisfied because in its view the record showed no matter of substance that could have been the result of the interview with the prosecutor. Therefore, whilst it was highly unusual and the irregularity was serious, no miscarriage of justice occurred.

This decision is a very serious signal to the professional trial participants, the Judge, the Crown and the defence. "Highly irregular conduct of (a) prosecutor" will not give rise to a retrial even with a breach as fundamental as talking to a complainant witness, at length, during a break in cross-examination. What about perceptions of justice and process? Is the accused not entitled to be assured that the prosecution has

abided by at least the most basic rules? Is the jury entitled to assume that that unstated proposition will be adhered to? What is the point of having these rules if nothing happens when they are broken?

Prosecutor comment

Faisandier (CA 185/00, 12 October 2000, Gault, Ellis and Robertson JJ)

In this case the prosecutor applied to the trial Judge to have the trial Judge comment on the accused's failure to give evidence. The trial Judge refused. The prosecutor advised that he "intended to push the matter as far as he could though well aware of the restriction about which he was reminded by both the Judge and by defence counsel". There is an absolute prohibition on anyone other that the accused and/or the trial Judge commenting on the failure of an accused to give evidence [see s 366 Crimes Act].

In his final address the prosecutor gave a number of examples of material that could have been produced. Defence counsel's notes recorded that he had said inter alia "where is the evidence from her?" The prosecutor was adamant that he did not. Of course the Court of Appeal would prefer that this dispute was settled before the appeal but, in reality, both counsel believed they were right but neither intended to say the other was making it up.

Again the Court criticised the prosecutor. The trial Judge had decided "by the narrowest of margins" not to grant a mistrial at the very end of a multi-week trial. The Court of Appeal "was not prepared to say that the conclusion reached was wrong" but said:

> [6] That does not mean we are to be taken as approving what Crown counsel said. It is no function of prosecuting counsel to press the limits. As (Crown Law Office Crown counsel on appeal) readily acknowledged, the remarks of counsel went way too far. They undoubtedly conveyed the suggestion that the accused carried an onus of proof, which was entirely wrong.

In this case no miscarriage was found because the trial Judge was found to have sufficiently reinforced to the jury that the onus was on the Crown and because the Court thought the case against the appellant was overwhelming. I do not comment on those issues as I was trial counsel.

The issue raised by this case is the appropriateness of the practice of not recording closing addresses. Modern technology allows for a record. In SFO cases, in particular, Crown closings are a unique blend of detailed case analysis and repetition of evidential snapshots with submission. They are a public address and they are an integral part of the case. Until such time as the Court records them, I suggest that defence counsel seek leave to record them by audio tape or shorthand.

SENTENCE

Faisandier credit for time on electronic home detention.

Faisandier got four years less six months for all matters of mitigation and 10.5 months on Home Detention pending trial. The Court upheld the four-year starting point. The critical issue was determining an appropriate allowance for 24-hour home detention. No statutory regime yet exists for electronic bail and whether it is to be considered as time spent on remand, and therefore equivalent to time served, or some other formula. Electronic Home Detention on bail, as with the same process when served as a sentence, can range from 24-hour total house arrest through to no more than curfew enforcement. The practicalities are infinitely variable.

At present the use of the system must be either using the High Court inherent jurisdiction in respect of bail, or (arguably) as a consented to provision in the District Court, that Court having no power to impose it.

Faisandier received a further six months' reduction bringing the value of 10.5 months' house arrest to 12 months off the sentence. Sentence reduced to three years.

Insufficient reasons

Husband & Heath (CA 262 and 263/00, 9 October 2000, Tipping, McGechan and Fisher JJ)

In *R v Barton* [2000] 2 NZLR 459, the Court of Appeal held that leave to apply for home detention is to be granted unless it would be clearly inappropriate but the nature of the offence, in itself, would not make it inappropriate. The Court observed that "extensive reasons" for the decision on leave were not required. In *Husband and Heath* leave was declined and the Judge's reasons simply stated that it was inappropriate given the nature of the offending. When H and H appealed, the Judge filed a Minute elaborating on what he meant by the "gravity of the offending" and "the nature of the offending". The Court of Appeal allowed Husband's appeal but not Heath's. The Court went on to observe that, whilst extensive reasons are not required, if leave is to be refused then the Judge should give sufficient reasons to explain the basic reasoning process which "both informs the person being sentenced and facilitates review on appeal, if such becomes relevant". (para 33.) As for the Judge's Minute, that was disapproved of: sentencing is a public exercise and reasons for taking a particular course should be expressed in public and in the presence of the person being sentenced. "The appearance of an ex post facto minute can be one of retrospectively bolstering an earlier conclusion in the face of a challenge on appeal. ... In future, reasons should be stated within sentence, and such minutes should not be filed."

ANONYMOUS REASONS

Batt (CA 47/00, 3 August 2000, Tipping, Heron and Williams JJ)

Ms Batt was convicted on seven charges of benefit fraud and she appealed against both conviction and sentence. The trial Judge got into a muddle when relating the accused's evidence and case to the ingredients of the offence and wrongly directed that certain critical issues were conceded when they were not. Conviction appeal was allowed and a new trial ordered. The Court was named but it is not stated who delivered judgment as the decision is simply headed up "Judgment of the Court". More importantly, para 33 reads:

> [33] For the reasons given in this section of the judgment (paras [29]-[32]) *a majority of the Court is of the view* that there has been a miscarriage of justice and that the proviso cannot apply. *The minority view* is that in the light of the way the case was conducted at trial it is not open to the appellant to complain about the way the Judge directed the jury as set out in para [29]. *On all other issues the Court is unanimous.* It is unnecessary in the circumstances to consider the ground of appeal based on the

alleged inadequacies of the appellant's representation at trial. In accordance with the opinion of the majority, the appeal is allowed. The convictions are set aside and a new trial is ordered. The sentence appeal does not, in these circumstances, require consideration. (Emphasis added.)

So who are the majority and who the minority? Does it matter? Only one permanent member of the Court sat on this case together with two High Court Judges. Is it relevant to know where the dissent lay? All I can say is that in the perusal of this year's batch of decisions, only ex parte decisions, themselves of questioned legality, are anonymous as to the author.

POLICE OFFICER HAS A GO

R v Hunt (CA 178/00) 26 September 2000 Gault, Ellis, Robertson JJ

After a rape conviction the appellant was given a new trial for the following reasons:

> [11] The interview was lengthy. The appellant gave a long, rambling and at times almost incoherent account of his relationship with the complainant and the events of the night in question. This would have tested the patience of the interviewing officer. But that did not justify the way in which the interview developed towards the end. The officer did not confine himself to seeking the reaction of the suspect to aspects of the complaint. He engaged in an increasingly aggressive confrontation of his suspect culminating in which was described by (appellate counsel) in his written submission as:
>
> > It is submitted that in this case the detective went well beyond what is acceptable in these circumstances. In the second hour, he gradually makes the interview his own. Specifically for the last eight to ten minutes he delivers a largely unbroken jury address of his own expressing fixed views as to what the factual and legal situation in this case is. He starts to raise his voice, gets sarcastic, refers to his own sexual behaviours with his wife, swears, abuses the accused and generally delivers a powerful but legally utterly irrelevant set of supposed beliefs and opinions.
>
> [12] The extracts we were particularly referred to justify that submission. One extract sufficiently conveys the tenor:
>
> Q. So why were you holding her down?
>
> A. I wasn't.
>
> Q. Well, I say you were. I say holding her by both hands on both shoulders like you said not the arm both shoulders, holding a person down when you are having sex with them. If you are having consensual sex with someone, you don't need to do that. I don't buy that's the position you have sex in.
>
> A. Oh.
>
> Q. All right? When you are having sex with a woman in the missionary position like you are talking, your head is there, her head is there. Your arms aren't like that. It's not a natural position to be in. And you can't tell me it is.
>
> A. Well –
>
> Q Now, you started having sex – you started having foreplay with her. She wasn't – this might be another scenario, you tell me what happened. And she wasn't resisting you much. Then you thought oh, well, she must want it. So you then decided to have sex with her. At that stage she decided no, I don't, she's tried to push you off and you have decided, well, she does want it. Is that how it went down and you have continued?
>
> A. No.
>
> Q. No, it's not what happened. But you are feeling bloody guilty the next day; you are writing letters to her when you go to Aussie; you are trying everything in your power to make her feel better the next day.
>
> A. Yeah.
>
> Q. But – and you had consensual sex with this woman. Not only consensual sex, but she seduced you, for Christ's sake. You are trying to – who do you think you are talking to? You obviously think I am a fool sitting here listening to your story-
>
> A. I don't.
>
> Q. – and believing it blindly.
>
> A. I am just trying –
>
> Q. All I want – you are trying to help yourself. All I want you to do is to do the bloody right thing and to tell the truth.
>
> A. I am telling the truth.
>
> [13] ... the Crown fairly accepted that the officer went too far.
>
> [14] It was put in argument that the effect of showing this videotape to the jury was to breach the principle in *R v Halligan* [1973] 2 NZLR 158.
>
> [15] That case generally is regarded as authority against the improper practice of placing before a jury unproved factual assertions of others in the form of questions on which the accused has been asked to comment. But the principle was broadly stated in the judgment of the Court delivered by Turner J (p 162):
>
> > This Court has said before, and it now repeats it, that police officers cannot be allowed to introduce evidence for the Crown by making accusations to a suspect, and, when they receive no damaging admission in reply, retailing to the jury what they said as if it were relevant evidence. Where this is the effect of what was done, and it is the effect of what was done here, this Court will not allow a conviction obtained upon such evidence to stand, unless it is clearly demonstrable that without that evidence the jury must have convicted.

As the Court said, "this was a bad case of overreaching by an interviewing officer". How did it happen that the Crown led this; that defence counsel did not object to it; that having been led the Judge did not tell the jury to ignore it? They were all perfectly competent participants but they missed it. I take from this case that the appellate process must stop having the onus on the appellant to show miscarriage, but that the Crown and the Court, who have asserted and certified guilt and punishment, should have the onus of establishing that was achieved fairly, according to at least basic rules and is correct as a matter of fact.

EMERGENCY OR CASUALTY

Henare (CA 187/00, 26 July 2000, Thomas, Anderson and Robertson JJ)

The Crown alleged that H committed aggravated robbery along with D and an unknown third person. D pleaded

guilty. H went to trial. The Judge was summing up to the jury when he was told that a young man had, that morning, approached police and confessed that he was the third person and that H was involved. The Judge ruled that this was evidence unavailable until the summing up and it was in the interests of justice that the matter be investigated further. Therefore, he declared a mistrial, discharged the jury without verdict pursuant to s 374 of the Crimes Act and ordered a new trial. It is unclear on what basis the matter went to the Court of Appeal but it appears that the appeal may have been against the making of the order for a new trial.

Section 374 creates a discretion to discharge a jury without verdict in the case of "any emergency or casualty rendering it ... highly expedient for the ends of justice to do so". The exercise of the discretion is not reviewable by any Court (s 374(8)) but the Court of Appeal has said that if, on retrial, the offender is convicted and appeals that conviction, then the question of whether the threshold requirements of "emergency or casualty" were met is relevant to the appeal (*Tatana* (1994) 11 CRNZ 708). Although not deciding, the Court advised that in their view it was plainly both an emergency and a casualty (defined as a chance event or something that "turns up ... demanding immediate action") so there was no merit in the appeal.

DRINK DRIVING

Ten Bohmer (CA 242/00, 5 September 2000, Thomas, Goddard and Panckhurst JJ)

Mr Ten Bohmer had a breath alcohol level twice the legal limit when he collided with a motorcycle. The rider died. Ten Bohmer was charged under s 61 of the Land Transport Act with being a person in charge of a motor vehicle, causing death while the proportion of alcohol in his breath exceeded 400 mg per litre of breath. At the summary hearing, his defence was that, although over the limit, that was not established to be causative of the collision. The Judge held that the prosecution was not required to prove a causative link but rather a temporal ie related in time co existence of excess alcohol and driving causing death. The Judge then stated a case for the High Court and his decision was held to be correct in law although the reasons differed. To the non-traffic lawyer this all seems obvious. The root of the argument was a previous decision of the Court of Appeal *R v O'Callaghan* [1985] 1 NZLR 198. In that case Parliament's attempt to create a careless-causing-death-with-excess-alcohol offence (see s 55(2)(c) and s 56 Transport Act) was itself rationalised to death and ultimately failed to achieve that simple legislative intention. Despite the fact that Parliament wanted an offence not carrying the difficulties of the degree to which intoxication played a role it failed. That was because *R v O'Callaghan* was wrong and never did make sense. This Court of Appeal didn't articulate that but it is nevertheless an unstated reality.

Now what have we got? If you have a crash, and someone is killed and you are over the breath/blood alcohol limit you will be convicted. The section uses the words "causes the death" but does not use the words "careless" or "act or omission". The danger identified is that some technically intoxicated person or actually intoxicated person can be the driver of a car and involved in a fatal accident entirely the making of the other driver. Must the intoxicated driver have to do anything *wrong* (other than driving over the limit) to be convicted? This Court thought the word "causes" would ensure the parked but drunk driver who was driven into would be safe but equally affirmed that participation in driving blame need not rise above the "not insubstantial" or "not insignificant" and certainly does not need to be careless or negligent or involving fault as those terms are currently used.

> [30] The defendant, by virtue of being in charge of or driving a motor vehicle, may cause the death of the deceased without being guilty of careless or reckless driving or the like. The question is whether the defendant's driving caused the deceased's death, not whether any act or omission on his or her part amounting to negligent or otherwise blameworthy conduct caused the death. The element of fault is not to be reintroduced into the provision by way of an expanded approach to causation.

The Court seems confident this is not an interpretation creating strict liability. But as to that we will have to wait and see.

Rae v Police (CA 99/00, 10 August 2000, Richardson P, Thomas, Keith, Blanchard and Tipping JJ)

Section 23 of the New Zealand Bill of Rights Act guarantees anyone who is "detained under any enactment" the right to legal advice. This case says that one is entitled to seek legal advice and have the Police facilitate the exercise of that right, it continues throughout the entire testing procedures; may be exercised more than once; and, time spent talking to your lawyer does not count toward the time limit for electing a blood test. These concepts have previously been affirmed at High Court level but are now beyond doubt. For students of the Bill of Rights Act jurisprudence, the case is yet another exposition of fundamental differences of opinion as to what "detained under any enactment" means and should mean.

Livingstone and Kenner (CA 232 and 233/00, 12 October 2000, Gault, Keith, Blanchard, Tipping and McGrath JJ)

Livingstone and Kenner were both charged with drink driving. Both had more than two previous convictions for drink driving and, therefore, under the new legislation, they would be liable on conviction to a maximum of two years' imprisonment or a $6000 fine (as opposed to three months or $4500 for first and second offenders). The increased penalty for repeat offenders creates a right to elect jury trial (s 66 SPA).

L and K both elected jury trial and then indicated to the Crown that they intended to challenge police compliance with the procedures. The Crown applied pretrial pursuant to s 344A of the Crimes Act for a ruling on the admissibility of the evidential breath test results. The trial Judge considered that the real issue was not of admissibility but how and when the evidence would be led and to what standard it had to go. The Judge's ruling stated that he had invited counsel to appeal the ruling in order to get a charter on principle and practice for trying drink driving by jury. His Honour then gave a number of rulings as to how the trial would proceed.

The Court of Appeal held that it was not properly an issue of admissibility and therefore it did not have jurisdiction to hear a pretrial appeal under s 379A of the Crimes Act. However, it did give full guidance on some practical issues. In particular, the Judge/jury division of labour and the allocation of elements of the offence into factual, legal and mixed issues. ❑

CRIMINAL EQUITY

Don Mathias, Barrister of Auckland

considers how Courts should deal with statutes that require unfairness

We live in tranquil times. It is unlikely that the legislature will deliberately endeavour to compel the Courts to come to an unjust conclusion in any case. Statutes apply equally to all and the power of the state is kept within internationally accepted boundaries. Well, not entirely.

In *R v Poumako* [2000] 2 NZLR 695 (CA) the Court considered legislation that was in breach of the Bill of Rights Act 1990, and also in breach of international conventions of human rights in that it retrospectively applied a harsher penalty than had existed at the time of the offending. The victim of these breaches received no relief from the Court. That was because the minimum non-parole period was warranted on the facts of the case and was properly imposed regardless of the legislation. There can be no doubt that the upholding of the minimum period of non-parole of 13 years was just in the circumstances of that case. Accordingly the objectionable legislation did not have an objectionable consequence for the appellant. But what if the legislation did have an unfair consequence in a particular case? What could the Court have done in *Poumako* if it had concluded that it was unfair to the appellant to impose on him that minimum period of non-parole?

Last century the received wisdom was that enactments of Parliament could not be declared invalid and the Courts could not decline to apply them, and this view underlies s 4 of the Bill of Rights. There is no need to depart from that view, although there are now significant changes in the perception of the nature of law and the sovereignty of Parliament, and it is possible that an implied limitation may eventually be read into s 4 so that an unjust result would be a proper reason for declining to apply a statutory provision. These tendencies to challenge conceptions of law and sovereignty reflect an appreciation of the social utility of law and its essentially remedial purpose. It may well be important to avoid a constitutional crisis over the validity of legislation. Hence the properly restrained comments on this possibility from Judges, both judicially and extra-judicially. Changes are under way. The primacy of internationally recognised rights and the scrutiny of domestic laws by international tribunals are symptoms of a *grundnorm* shift towards the concept of the restrained state.

In New Zealand the Courts have recognised the essence of their nature, which is to achieve a just result in each case. There is a growing jurisprudence on the inherent jurisdiction to prevent an abuse of process. See, for example, *R v Noble* (1986) 2 CRNZ 583 Eichelbaum J, *Watson v Clarke and Lawlor* (1998) 3 CRNZ 670 Robertson J, *R v Alexander and Chiswell* (1989) 4 CRNZ 371 CA, *S v R* (1994) 12 CRNZ 78 Holland J, *R v Accused* (CA 357/94) (1994) 12 CRNZ 417 CA, *R v Nichols* (1997) 15 CRNZ 350 Fisher J, and *Jaffe v Bradshaw* (1998) 16 CRNZ 122 Paterson J (in which the jurisdiction was referred to as "residual"). Indeed, the development of the inherent jurisdiction to prevent an abuse of process may prove to be the most important contribution of this country's Judges to solving the problem of the limits of judicial and executive powers in relation to the investigation and prosecution of offences.

A natural extension of the field covered by the discretion to prevent an abuse of process is to the result of the individual case. Concerns over whether a case should proceed, and if so, how it should be conducted, are naturally supplemented by concerns as to the justice of its outcome.

It is now suggested that the inherent jurisdiction to prevent an abuse of process is eminently suited to addressing the problem of the limits of the application of legislative powers to particular cases.

APPLYING THE UNFAIR STATUTE

It is in the nature of Judge-made rules and principles that changes will not be radical, but that they will occur gradually in accordance with rules of interpretation of cases and legislation. For this reason, it will be unlikely that the Courts will declare a statute, properly enacted, to be invalid. Although the possibility of such a declaration has occasionally been adverted to, that has been in properly vague terms. A reasonably firm assertion of the limits of the powers of Parliament occurs in the remarks of Cooke J (as he then was), delivering the judgment of the Court in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398: "I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them." Another limitation on Parliament concerns the division of constitutional powers; Lord Devlin in *Connelly v DPP* [1964] AC 1254, 1354 observed: "The Courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused." He also referred, at p 1353, to the "inescapable duty [of the Courts] to secure fair treatment for those who come or are brought before them". In *Bennett v Horseferry Road Magistrates Court* [1993] 3 All ER 138, 155 Lord Bridge said: "There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself." The expression "the rule of law" is vague, as Elias CJ notes in her oration to the AIJA on 16 June 2000, entitled "Constitutions and Courts". She makes the following comment on the role of the Courts: "the Courts operate at the boundaries, not usurping the judgment of the body to which power has been lawfully entrusted, but making sure that it is not abused or exercised arbitrarily". All these observations are consistent with the view that Parliament cannot compel the Courts to act unfairly.

In conservative terms, a proper approach requires accepting the validity of the enactment (assuming the legislature's formal procedures have been complied with) and applying it to the case before the Court. Paradoxically, the Courts must avoid unfairness by applying the statute and recognising the unfair result. No question of invalidity or inapplicability arises. What follows next makes all the difference: the Court is not finished with the case.

INHERENT JURISDICTION

Having applied the statute to the circumstances of the case before it, the Court must then turn to consider the justice of the result. A Court of justice cannot be forced to act unjustly. That is paradigmatic. It gives rise to the inherent jurisdiction to prevent an abuse of process. This jurisdiction is not dependent upon the statute that establishes the Court. It is part of the concept of the Court. It cannot be removed by legislation. Therefore, if the Court decides that the result dictated by statute would be unfair, it cannot order that result. To do so would be to sanction an abuse of the Court's own process. Avoidance of unjust results which are compelled by application of legal rules has been the concern of the equitable jurisdiction which arose in the work of the Chancellor's office.

The Chancellor derived his authority from the King, who was regarded as the source of justice. The King's power was limited to what was just. This had been established in the thirteenth century at Runnymede, where King John yielded to demands that his power should be constrained by the need for fair treatment of his subjects, on many of whom he was placing a heavy burden of taxation. The King recognised, in the Magna Carta of 1215, that should he fail to abide by the charter the barons had the right to correct him by, in effect, warfare. Article 61 of that document provides: "... if we ... transgress any of the articles .... And if we do not correct the transgression ... the ... barons together with the community of the whole land shall distrain and distress us in every way they can".

The point here is that the Sovereign's powers were limited by what was just. Even when Parliament acquired supremacy in the seventeenth century, it can have acquired no more than what had rested in the King. It would be absurd to suggest that the Bill of Rights of 1689 had the result of enabling Parliament to require the Courts to act unfairly.

INVOKING THE EQUITY

The word "equity" is from Aristotle's word epieikia, which he used to refer to the absolute justice which corrects general law in particular cases. It was adopted into English law by writers in the sixteenth century to refer to the process whereby the Chancellor would proceed according to the dictates of "conscience" to remedy defects caused by the application of fixed rules of law in particular cases. Equity operated *in personam*, requiring individuals to act according to conscience on pain of committal for contempt. Its essential quality, relief from the unjust application of fixed rules of law, survives in many forms, and of relevance to the present discussion is the discretion to prevent an abuse of process.

There is, therefore, an equity that overrides the law. It applies recognised principles that have evolved with the Court's jurisdiction which is exercised to prevent unfairness. This equity is not to be discovered by delicate interpretation of statutes or by inconsequential declarations of inconsistency with rights, which are the only reactions to unfairness that the Court in *Poumako* addressed. Recognition of this equity requires an appreciation of the Court's tradition of evolving existing concepts to meet developing community needs. It is for the Courts to formulate the conditions required to give rise to the equity, and principles to guide its operation and the remedies it may compel.

It is likely that a Court would only turn to the inherent jurisdiction to prevent an abuse of process when the legislation that produced the unfair result breached the Bill of Rights and international human rights law. Under a lawfully elected Parliament it is, in the present political climate, unlikely that such legislation would be enacted. Coalition governments may find amendments to proposed legislation being forced at a stage when Parliament's attention may not be drawn to breaches of the Bill of Rights, as was noted in *Poumako*, above. Nevertheless, although it is still unlikely that legislation will qualify to give rise to the equity under discussion here, *Poumako* discloses an example.

APPLYING THE DISCRETION

The process of balancing conflicting values underlying competing rights is well known in criminal law in relation to the admissibility of improperly obtained evidence. See, for example, *R v Grayson* and *Taylor* [1997] 1 NZLR 399, also reported as *R v Taylor* (1996) 14 CRNZ 426 and *R v Grayson* (1996) 3 HRNZ 250 (CA), and my discussion in "Evaluating rights" [1998] NZLJ 105. The same process would apply here. One of the relevant factors would be whether the breach of rights had been drawn to the attention of Parliament before the legislation in question was enacted, or whether it was an unforeseen consequence of an unobjectionable intent. It is not inevitable that legislation in breach of rights compels an unfair result in a particular case, as is illustrated by *Poumako*.

THE REMEDY

When the jurisdiction arises and analysis reveals that application of the statute would result in unfairness, the remedy must be tailored to conform as closely as is fairly possible to the requirements of the legislation. Thus if the Court in *Poumako* had decided that on the facts of that case the statutory result would be unfair, it would have to specify the non-parole period that was fair. This process of rectification preserves as much of the legislative intent as is consistent with basic rights, and the legislation remains in force.

HISTORY REPEATS ITSELF

Readers who are uncomfortable with apparently radical ideas will be comforted by their recollection that this has all happened before. Sir Edward Coke, in 1610, was Chief Justice of the Court of Common Pleas, and in that year he ruled in *Bonham's* Case 8 CoRep 114 that "when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void". This "equity" approach to construction was, by the nineteenth century, replaced by the view that Parliament was sovereign. For this, and other matters of legal history referred to here, see J H Baker, *An Introduction to English Legal History* (Butterworths, 1971). All that can really be said is that views of the relation between Parliament and the Courts tend to suit the mood of the times. As indeed they should. ❑

R v POUMAKO

Edward Scorgie and Anita Killeen, Judges' Clerks

believe the Court of Appeal dodged the constitutional issue

The Court of Appeal recently had to deal, for the first time, with the confused issues surrounding the "home invasion" amendments to the sentencing regime passed by Parliament last year: *R v Poumako* [2000] 2 NZLR 695. Elements of the amendments have retrospective effect, and a number of sentences in the High Court had been adjourned pending the Court of Appeal's determination of the meaning and effect of the legislation. In fact, the Court's judgments raise more issues than they solve, particularly with respect to the relationship between Courts and legislature. The prime question is how the Courts are to express their disapproval when Parliament acts against a founding principle of the rule of law.

"HOME INVASION"

The home invasion amendments are contained in two statutes: the Crimes (Homes Invasion) Amendment Act 1999 ("CHIAA") and the Criminal Justice Amendment Act (No 2) 1999 ("CJAA"). They came into force on 2 July 1999 and 17 July 1999 respectively. The effect of the CHIAA was to amend the Crimes Act 1961 by inserting a definition of "home invasion", and raising the maximum penalty for various listed offences involving home invasion. In the case of manslaughter, the sentencing Judge is obliged to have regard to a home invasion when imposing a sentence.

The CJAA amended s 80 Criminal Justice Act 1985 to raise the minimum non-parole period for murder from ten years to 13 years in cases involving home invasion. The amendment also lowered the threshold for the imposition of a longer non-parole period from "exceptional" to "sufficiently serious" circumstances. The amendments to the CJA import the definition of "home invasion" from the Crimes Act.

The issue with which we are primarily concerned arises from s 2(4) CJAA. This provides:

> (4) Section 80 of the principal Act (as amended by this section) applies in respect of the making of any order under that section on or after the date of commencement of this section, even if the offence concerned was committed before that date.

On its face, this gives the amended s 80 unlimited retrospective application. The new penalties apply regardless of whether the offence was committed before or after the coming into force of the amendments.

NON-RETROSPECTIVITY

As a general proposition, legislation which retrospectively impairs existing substantive rights or imposes additional obligations with respect to past conduct is considered unjust. The principle is set out by R S Wright J in *Re Athlumney* [1898] 2 QB 551 at 551-2:

> Perhaps no rule of construction is more firmly established than this – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

The retrospective imposition of criminal liability is, for obvious reasons, the most extreme example of the potential injustice of retrospective legislation.

For these reasons, it is said that there is a presumption that a statute is not intended to be retrospective. Unless the legislature has clearly spelled out its intention that an Act should have retrospective operation, it will not do so:

> It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. (*Maxwell on the Interpretation of Statutes* (12th ed, 1969) at 215.)

However, it appears that this presumption will not be of equal strength in every case. The matter is one of construction, in which the language of the text, the purpose and scheme of the legislation, and the desirability or otherwise of giving it retrospective effect, will all play their part. As the Court of Appeal stated in *Prouse v CIR* (1994) 16 NZTC 11249 at 11252:

> The ultimate question is one of the construction of the statute. It involves weighing retrospectivity concerns in determining the intention of Parliament as reflected in the scheme and language of the legislation.

The presumption against retrospective operation is enshrined in a number of statutory provisions in New Zealand, all of which were identified by Salmon J in *Poumako* in the High Court (1999) 17 CRNZ 294. The first is contained in the CJA itself. Section 4 provides:

> **4 Penal enactments not to have retrospective effect to disadvantage of offender –**
>
> (1) Notwithstanding any other enactment or rule of law to the contrary, where the maximum term of imprisonment or the maximum fine that may be imposed under any enactment on an offender for a particular offence is altered between the time when the offender commits the offence and the time when sentence is to be passed, the maximum term of imprisonment or the maximum fine that may be imposed on the offender for the offence shall be either –
>
> (a) the maximum term or the maximum fine that could have been imposed at the time of the offence, where that maximum has subsequently been increased; or

(b) the maximum term or the maximum fine that can be imposed on the day on which sentence is to be passed, where that maximum is less than that prescribed at the time of the offence.

(2) Without limiting subsection (1) of this section, except as provided in sections 152(1) and 155(1) of this Act but notwithstanding any other enactment or rule of law to the contrary, no court shall have power, on the conviction of an offender of any offence, to impose any sentence or make any order in the nature of a penalty that it could not have imposed on or made against the offender at the time of the commission of the offence, except with the offender's consent.

Section 25(g) of the New Zealand Bill of Rights Act 1990 states that a person accused of a criminal offence has:

(g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

The presumption against retrospective operation appears to operate in an identical fashion to s 6 Bill of Rights Act:

6. Interpretation consistent with Bill of Rights to be preferred – Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Section 6 requires the Courts to prefer any available interpretations which are consistent with the rights and freedoms in the Bill of Rights Act over those which are not. This will only be so, however, where the relevant provision is reasonably capable of more than one interpretation: *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 272 per Cooke P and at 286 per Hardie Boys J. It is submitted that s 6 must affect s 25(g) in the same way as the common law presumption, at least with respect to criminal liability. Both operate to annul or minimise the statutory imposition of retrospective criminal liability where the legislature has not clearly expressed a retrospective intention.

Section 7 of the Acts Interpretation Act 1999 starkly provides:

7 Enactments do not have retrospective effect – An enactment does not have retrospective effect.

Section 2(4) CJAA conflicts with all these provisions.

THE PROBLEM IN *POUMAKO*

A significant problem arises as a result of s 2(4), and fell for determination in *Poumako*. This is that the amendment to s 80 would not seem capable of a non-retrospective interpretation. Parliament had, through s 2(4), apparently enacted a penal change which applied to offences committed both before and after the amendment came into force. The retrospective application of these amendments is a blatant breach of fundamental human rights as enunciated in statute, in common law, and in international instruments. However, there can be no doubt that Parliament is competent to pass such legislation, and that once passed, it must be applied by the Courts. The issue is how the Courts have chosen to respond to this dilemma.

The High Court

Poumako was convicted as one of the three men who broke into the Bouma family home near Reporoa and, in a particularly brutal crime, sexually assaulted and shot Beverley Bouma. The crime was committed on 30 November 1998, well before the "home invasion" amendments came into force.

In the High Court, Salmon J considered the scheme of the amendments, and came to the view that the unlimited retrospective application of the amended s 80 was the only possible interpretation of s 2(4). He reached this conclusion after analysing each of the existing statutory provisions which conflict with s 2(4). In all cases, he found that the meaning of s 2(4) was so clear that it overrode the more general and previous statutory provisions. In the case of s 25(g), s 4 operated to give the amendments primacy over any of the rights set out in the Bill of Rights Act.

The Court of Appeal

The Court of Appeal split 3-2, with Richardson P, Keith and Gault JJ in the majority and Henry and Thomas JJ writing separate judgments.

All members of the Court dismissed the appeal on the basis that the facts of the case were such that a 13 year minimum non-parole period would have been justified regardless of the operation of the increased starting point in cases of home invasion. All comments regarding the interpretation of the amendments are therefore obiter dicta.

Richardson P, Gault and Keith JJ stated firmly that the retrospective application of s 80 would be a clear breach of fundamental human rights, but acknowledged the logical force of the interpretation given to the amendments by Salmon J in the High Court and by Henry J in his separate judgment: that s 2(4) is "clear and unambiguous" in its retrospective effect. Basing their approach on s 6 of the Bill of Rights Act 1990, they chose however to seek an alternative interpretation which would be less inconsistent with fundamental rights.

Their alternative interpretation is based on the fact that the retrospective provision is found only in the CJAA. There are no retrospective provisions in the CHIAA. Moreover, the amendments in the CJAA are dependant on the definition of home invasion set out in the CHIAA. By the majority's reasoning, the concept of home invasion as enacted only came into existence on 2 July 1999, when the CHIAA came into force. The definition itself has no retrospective effect, because there is no provision for retrospectivity in the Act in which it is found. The retrospective provision came into force, as part of the CJAA, 15 days later. The majority construes this as an indication that the retrospectivity extends only to the 15 days between the coming into force of the two Amendment Acts. They find this alternative interpretation to be less inconsistent with the Bill of Rights Act 1990, as indeed it is, and therefore prefer it.

It is, however, clear that an interpretation preferred under s 6 of the Bill of Rights Act must still be an interpretation available on the wording of the statute. It is not open to the Courts to strain statutory provisions to mean something which, on their face, they do not, or to provide an alternative interpretation where the meaning of the provision is clear and unambiguous. This is inherent in the wording of s 6 itself, and in s 4(b), which forbids a Court from refusing to apply any provision of an enactment solely by reason of conflict with the Bill of Rights Act. As Thomas J put it: (at para [81].)

> to attribute to a statutory provision which is neither equivocal nor malleable in its terms a meaning which

> is admittedly contrary to Parliament's discernible intent is to effectively challenge Parliament's primacy.

With the greatest of respect to the majority, the interpretation of s 2(4) they prefer is simply not available on the words of the statute. In his separate judgment, Henry J states that it is "beyond argument that s 2(4) cannot be given a meaning which is consistent with s 25(g) of the Bill of Rights Act". This is apparent from the wording of s 2(4): "Section 80 of the principal Act (as amended by this section) applies in respect of the making of any order under that section on or after the date of commencement of this section, even if the offence concerned was committed before that date."

It appears from the debates in Parliament when s 2(4) was introduced ((2000) 578 NZPD 17687) that the meaning of the provision was clear to, and accepted by, the House. Unfortunately this was done without the benefit of a report from the Attorney-General under s 7 of the Bill of Rights Act as the critical provision of the CJAA, s 2(4), was first introduced through a supplementary order paper.

The argument of the majority is based on the proposition that the definition of "home invasion" is not itself retrospective in application. It is difficult to understand, however, how a definition alone could be seen to have either prospective or retrospective application. A definition is simply part of the statutory machinery. It explains a term used in other provisions. Per se, it has no effect unless incorporated in an operational provision. When incorporated, the terms of that operational provision, not the terms of the definition, determine its relevance. The question, therefore, is not whether the definition of "home invasion" has retrospective effect, but whether s 80, which incorporates the definition, has such effect.

Henry J addressed substantially the same flaw in the majority argument in a different way. He stated that the definition of home invasion simply sets out a set of factual circumstances which may or may not be present as a feature of the offence. Section 80, as amended, sets out a different legal consequence in the presence of these factual circumstances. His Honour also makes the point that the amendments to the CJA also make other changes to s 80, and an interpretation which limits the retrospective effect of some of those changes but not others would seem anomalous.

Finally, it should also be noted, as it is by both Henry and Thomas JJ, that the practical corner-stone of the majority interpretation is the fact that the two Bills became separated in the parliamentary process and therefore came into force on different dates. Had this not been the case, as Thomas J observes, "the alternative interpretation would crumble". Legislative coincidence would not seem a reasonable basis for logical interpretation of the meaning of a statute:

> the interpretation is unduly dependent on happenstance in an area where happenstance should have little or no import. Human rights deserve a studied and principled approach ... In the case of fundamental rights, an approach which is less random is to be preferred. (Thomas J at para 84.)

Both Henry and Thomas JJ agree that the correct approach is to focus on the legislative intent. Section 2(4) is undoubtedly clear, unambiguous and certain in its retrospective effect, and such words cannot be ignored. As to the apparent conflict with s 4(2) of the principal Act, Henry J noted at para 55:

> that articulates the general principle and must as a matter of construction give way to the subsequently enacted particular provision forming as it does part of the overall legislative framework. From that there can be no escape – the legislation must be read so as to give the subsection effect. No question of implied repeal of s 4(2) arises. It continues to have operative effect outside s 80 of the Criminal Justice Act, and can run in conjunction with s 2(4). But as a matter of statutory interpretation, it must be read down so as to allow s 2(4) to operate.

Henry and Thomas JJ joined Gault J in expressing the desirability of legislative repeal.

The issue has subsequently been addressed by Williams J in the High Court in *R v Pora* (High Court, Auckland, T992309, 23 June 2000), where His Honour found that he was obliged to sentence Teina Pora to a 13 years' non-parole period for the murder of Susan Burdett. He also stated, however:

> it is nonetheless repugnant to justice for a Court to be required to sentence you to substantially longer terms of imprisonment than would have been the case had your retrial occurred before July last year.

Williams J's decision in *Pora* strongly affirms the separate judgments in *Poumako*. He states explicitly that he finds the judgments of Henry and Thomas JJ more persuasive than that of the majority. He adopts the view that the plain terms of s 2(4) conflict with the terms of the Criminal Justice Act 1985 s 4 but do not impliedly repeal them. In the end he endorses Henry J's position in *Poumako* (at paras 53 and 55), that the words of the statute cannot be ignored. Short of Parliament repealing s 2(4), the conclusion was inescapable that the amending Acts applied to Teina Pora.

Williams J rejected any suggestion that it may have been open to the Court not to apply the retroactive provisions in the amending Acts. Counsel had submitted that:

1. section 2(4) is expressed to make the amended s 80 apply retrospectively only "in respect of the making of any order under that section"; and
2. section 56 of the Criminal Justice Amendment Act 1993, the section which empowered the making of minimum terms, debars the Court from imposing a minimum period of imprisonment that it could not have imposed on the offender at the time of the commission of the offence.

Williams J's response was three-fold:

1. counsel had overlooked the fact that s 2(4) clearly applies to the date of the making of an order under s 80 after the subsection came into force. It was the date of the order under s 80, not the date when Parliament first enacted the power to impose minimum terms of imprisonment, which was relevant;
2. there is a reasonably strong argument that s 2(4) and the other provisions of last year's amending Acts impliedly repeal s 56;
3. section 80 was in force when these offences were committed – although not in the form which then gave the Court power to impose a minimum term.

Williams J, not entirely convinced with the obiter comments made by the majority in *Poumako*, commented that if Parliament had intended the retroactivity to be limited to 15 days, some indication to that effect would be expected to have been found in the legislation or in the parliamentary debates – and there is none:

the history of the manner in which the amending Acts were passed set out in *Poumako* makes it clear that the 15 day difference in their coming into effect was largely a matter of chance.

As is apparent from the comment of Williams J, Pora became liable to the application of the amendments solely because his case was the subject of a retrial. This highlights the full extent of the retrospective operation of s 80. It will apply even if a sentence or conviction given prior to the operation of the amendments is quashed and the matter falls to be decided again. The basic injustice of this situation is apparent.

A CONSTITUTIONAL ISSUE?

Which brings us to what is, in our opinion, the issue at the heart of *Poumako*. Every Judge who has been called upon to address the home invasion amendments has been of the opinion, either expressly or by implication, that they constitute a fundamental breach of basic human rights, and of an essential principle of the rule of law. But they are also the expressed intention of Parliament. What, if anything, are the Courts to do in such a situation? Two observations can be made. The first concerns the substance of any Court's action, and the second the manner in which their objection is expressed.

With respect to the substance of a Court's objection, it is critical that its opinion be expressed candidly. *Poumako* represents an attempt by some members of the Court of Appeal to avoid making such a clear statement of disapproval by rationalising the problem out of existence. Such a course will not achieve the desired result. If Parliament is to listen to objections from the Courts, those objections must be expressed clearly and honestly, without resort to fine legal reasoning.

The second issue is more open to debate. If such open and honest objections to legislation are to be made by the Courts, what form ought they to take? Obviously the first option would simply be to do nothing beyond expressing this opinion in obiter and applying the legislation regardless. This appears to be the approach adopted above by both Henry and Gault JJ. Henry J did, however, leave the issue of making a formal declaration, as discussed by Thomas J, open because full argument on this issue had not been heard from counsel.

Thomas J was of the view that "this Court would be compromising its judicial function if it did not alert Parliament in the strongest possible manner to the constitutional privation of this provision". (para 70.) Given that retrospective legislation in the criminal law is constitutionally objectionable, Thomas J stated that if Parliament chooses to enact such legislation it must surely take care to ensure that it does so with "due deliberation and with firm adherence to proper form". (para 73.)

In his view, nothing less than a formal declaration that s 2(4) is inconsistent with the Bill of Rights would suffice to maintain the Bill's constitutional integrity. Obiter statements lack the force needed to express the Court's disapproval. Indeed there will be few, if any, cases which will more evidently justify the Court in taking the step of making a formal declaration than this one. It should also be noted that such a declaratory option would also be exercised in the context of the Courts applying the inconsistent legislation.

The Courts exercise a supervisory role as regards the Bill of Rights. Parliament has apparently left the question of remedies for the Court to develop. Where there is no other remedy, a declaration may provide the only effective remedy by which the Court can discharge that supervisory function. There are a number of reasons why such a course could be considered desirable. They are particularly apparent in a situation such as this, where the inconsistent legislation has passed through the House without the benefit of an opinion from the Attorney-General under s 7. In such cases, it is clear that the Courts would have something to offer to Parliament in terms of an analysis of the inconsistency and its possible consequences.

However, there are also valid reasons why a declaratory solution should be approached with caution. It could be seen as an erosion of parliamentary supremacy. It is arguably inappropriate for the Courts to involve themselves in unsolicited comment on the quality of the legislation passed by Parliament.

Whatever the merits of a formal declaration may be, we would respectfully concur with Thomas J that the crucial point is that a candid and honest dialogue take place between Courts and Parliament when issues of this kind arise. Both arms of the state must listen when the other speaks. Nowhere is this more clearly illustrated than in a recent decision of the US Supreme Court: *Dickerson v United States* (No 99-5525, 26 June 2000).

The substantive question in that case was whether law enforcement officers must continue to comply with the *Miranda* warnings, or whether *Miranda* was abrogated by Congress in 1968.

As a matter of constitutional law, the Supreme Court has final jurisdiction to rule on matters involving the interpretation of the Constitution. The issue, therefore, was whether the *Miranda* ruling was such a Constitutional interpretation, or whether it was merely a judicially-created means of giving effect to Constitutional rights. The Supreme Court ruled that *Miranda* was an interpretation of the Constitution, and on that basis struck down the relevant legislative provision.

Not only did the majority use some highly suspect reasoning to come to this conclusion but they did this in an attempt to assert their authority over Congress. This illustrates an extreme example of the problems that arise when there is a stand-off between Courts and legislature. Any potential dialogue between the two entities dries up, and the issue degenerates into a turf war. Obviously the problem is exacerbated in a rigid Constitutional framework such as that in the United States, but it demonstrates the need for an open dialogue between all three branches of the state on contentious issues. This is particularly true of human rights issues. Each arm of the state is subject to different pressures and influences, and the concept of the separation of powers relies on these pressures reaching some kind of equilibrium where all three branches are involved in the law-making process.

Crucial to this process is the need for the Courts to make clear their opinion on issues where they believe Parliament has erred. This is an entirely separate question from whether the Courts should apply the relevant statute or not. That issue is settled by the doctrine of parliamentary supremacy. It remains important regardless that the Courts speak plainly, and that Parliament listens when they speak. Otherwise we may run the risk of similar constitutional stand-offs to that in *Dickerson*, a risk which will only grow should New Zealand move towards any form of entrenched constitutional or human rights law. For this process to succeed, both Courts and Parliament must genuinely engage with the merits of the issue, and not seek to use fine legal argument to avoid it. This is the lesson of *Poumako*. ❑

TRUSTS: ACCOUNTING FOR DEPRECIATION

Martin Perkinson and Norman Wong, the University of Auckland

explain for the benefit of lawyer trustees

In terms of accounting reports, depreciation is a convention which allocates the net cost of a non-current asset (ie the asset's cost less the expected resale value on disposal) across the income periods in which the asset will provide economic benefits. It simply involves a notional, but systematic, deduction against income of the asset's net cost over its economic life, and is part of the process known as accrual accounting.

We explain in this article that this rule is not necessarily used in accounting for depreciation of assets belonging to a trust in New Zealand. In particular, we show that accrual accounting, as applied to the recording of depreciation in trusts, may not be suitable in performing the duty of trustees to ensure that the trust's capital (ie the assets of the trust that remain after liabilities have been paid – more commonly referred to as corpus) is maintained. Instead, a unique and uncommon accounting treatment for depreciation in trusts is provided for in New Zealand in the Trustee Act 1956. Specifically, the systematic allocation of an asset's net cost involves not only the notional deduction of depreciation from income, but also the transfer of funds into an interest bearing account, with the interest received belonging to the beneficiaries entitled to the trust's capital. This treatment for depreciation is embodied in statute in s 15(2) of the Trustee Act 1956.

Our article will be of interest to lawyers and accountants who provide advice in the management of trusts, because we have observed in general that the provisions and the application of s 15(2) are not well known. The article is structured as follows. In the next section, we provide a general discussion of accounting for depreciation and how accrual accounting procedures for it may not be appropriate in trust accounting. We emphasise the importance of trustees in maintaining intact the capital of a trust, and why they must also distinguish funds generated by a trust into income and capital. We then present the requirements of s 15(2) of the Trustee Act. This is followed by a simple example which shows the practical application of applying s 15(2). And finally, we present some final remarks about accounting for depreciation in trusts, and suggest that the depreciation treatment outlined in s 15(2) could apply to other entity types.

ACCOUNTING PRACTICE

It is generally accepted that an entity's accounting for depreciation involves the systematic allocation of the net cost of a depreciable asset across those periods that it is expected to benefit from the use of that asset. Specifically, the depreciable amount is allocated on a systematic basis to each accounting period (see *Statement of Standard Accounting Practice, No 3, Accounting for Depreciation*, ICANZ). The process is necessary to ensure that an entity's capital in monetary terms is maintained before any profit is "realised" and possibly distributed (see example in the appendix). However, the process is not one of valuation (ie depreciation does not attempt to measure the market value of an asset), nor does it involve directly the providing of funds for the replacement of a depreciable asset, although there are cash flow benefits from deducting depreciation as a tax deductible expense over the life of the asset.

While the above applies generally to most entities, differences may occur in accounting for trusts in New Zealand. In particular, the depreciation of trust assets may have real cash outflow implications, where an amount of cash that is equal to the depreciation expense recorded for an accounting period may be set aside to ensure the capital of the trust is maintained. This occurs because duties imposed on trustees require them to maintain the trust's capital – that is, when the capital is returned to those beneficiaries entitled to it, the monetary figure representing capital ought to equate to the original monetary figure for capital at the time the trust was created.

When a trust is created, a trustee must act appropriately in administering the requirements of the trust on the behalf of its beneficiaries – it is paramount that no beneficiary or beneficiaries can benefit at the expense of another beneficiary or beneficiaries. Two important duties in carrying this out is the need of the trustee to ensure that a trust's capital is maintained, and to be able to distinguish how funds derived from the trust's assets are apportioned to income and capital for the benefit of the beneficiaries, who may receive entitlements to income generated from a trust's assets ("life tenants"), or when a trust comes to an end, to its capital ("remaindermen").

In the absence of any instructions otherwise in the trust document, income must be able to be paid out in cash, and is therefore not recognised as income until it is received in cash. As a result, the trustee, in mitigating his/her duties, also has a duty to keep proper accounts of the trust, and will require an accounting system to achieve this. However, a system based on accrual accounting concepts will differ from the cash accounting principles applicable to trusts. For example, an accrual accounting system may recognise income prior to it being received in cash, and therefore place the trustee in a compromising position if that income is paid out immediately to the life tenants. Therefore, the accounting system is more likely to be based on cash accounting principles in order to reflect the cash nature/circumstances

of trusts, but only with respect to income items. For expenses, the trustee may accrue unpaid amounts which will be paid shortly after distribution to the life tenants (this assumes the expenses have arisen for an appropriate purpose within the administration of the trust – if an expense is accrued, and subsequently paid, for any other purpose, the trustee may be in breach of his/her trust duties).

The initial implication of this for accounting of depreciation on trust assets is that depreciation should not be accounted for because it is not an expense which involves the payment of cash. However, if depreciation is not accounted for, then capital, at least in monetary terms, may not be maintained. It would also overstate the trust's net income, since there is no charge against income for the depreciation, and could result in an amount paid to the life tenant beneficiaries that they should not be entitled to (see example in the appendix). Hence, it would appear reasonable for the trustee to allow for depreciation in accounting for trust assets.

But while allowing for depreciation may be reasonable, capital may still have been eroded. This is because some assets are likely to have decreased in value over time and the cash proceeds from liquidating them are unlikely to equate to the original trust capital when the trust was created, which they ought to as part of the fiduciary duties of the trustees. Therefore, this may place the trustees in a difficult position, which may amount to a breach of duty, since the remaindermen beneficiaries could challenge them by arguing that the capital they are entitled to is less than what they would have received at the time the trust came into effect. In other words, the trustees may not have done enough to maintain or preserve the trust's capital for the remaindermen despite it being reasonable to account for depreciation.

This raises an interesting question. How should a trustee account for depreciation of trust assets, given that it can result in conflict in caring for the interests of the trust's beneficiaries? The answer to this question is difficult, but the trustee's first source of direction on this matter is always to examine the trust document for any instructions on how to allow for depreciation, if at all. However, where the trust document is silent on this, s 15(2) of the Trustee Act provides a unique solution which is not commonly applied in generally accepted accounting principles.

TRUSTEE ACT 1956

Section 15(2) of the Trustee Act 1956 provides provisions related to accounting for depreciation of trust assets when the trust document is silent on this matter. It provides:

> Where in the administration of any property employed in the production of income or from which income is derived a trustee considers that in the interests of the persons entitled or who may become entitled to the capital of the property it is equitable to set up a depreciation or replacement fund in respect of the property or in respect of any asset therein, then, notwithstanding any rule of law to the contrary, it shall be lawful for but not obligatory upon him to do so, and to credit from time to time to the fund and accumulate by way of compound interest such part of the income so produced or derived as he considers equitable and also resulting from income therefrom. In any such case the fund shall follow the destination of the capital of the property and shall be subject to all the trusts, powers, and provisions applicable thereto; with further power to the trustee to apply as he thinks fit the fund and accumulations of income in or towards the replacement, repair, maintenance, upkeep, or renovation of the property or asset, or in or towards the acquisition by purchase or otherwise of property or assets of a like nature or which otherwise may advantageously be employed in conjunction with the property in producing or deriving the income as aforesaid.

The key point of s 15(2) is that if the trustees consider it equitable in the interests of the beneficiaries, they may establish a depreciation fund and credit cash from time to time to the fund, while accumulating interest from it, for the replacement, repair, maintenance, upkeep, or renovation of the trust's income generating assets. The interest accumulated from the fund belongs to capital, which may then contribute to the replacement of the asset at a higher cost during inflationary times.

Application of s 15(2)

To see how s 15(2) is applied in practice, we present the following example. Assume a trust has one depreciable asset which on the date of the creation of the trust is valued at $300,000 (land $180,000, building $120,000). For the purposes of this example, assume the trust has no other assets. The life tenants are entitled to the income produced from the land and buildings, and the remaindermen are entitled to the trust capital. The trust document does not provide guidance on depreciation, but the trustee believes that it is reasonable to allow for depreciation to maintain trust capital, and decides to follow the requirements of s 15(2). The trustee also decides to depreciate the asset using the straight line method using income tax depreciation rates.

At the end of the first year of the trust, the trustee would deduct from income an amount of $3000 for depreciation expense (ie 2.5 per cent per annum on $120,000). At the same time, a depreciation fund would be established for the same amount, with $3000 cash transferred into a separate investment account. With the depreciation fund and investment account now established, it is just a matter of deducting $3000 from income for depreciation expense and transferring the same amount from cash to the investment account for each subsequent year.

The key points of carrying out this procedure are:

- the accrual accounting figure for income and the cash accounting figure for income are now the same;
- the "depreciation fund" account is represented by an investment in cash;
- cash already received is transferred to a separate investment account which belongs to the remaindermen.

Any interest on the investment stays with the fund. That is, it belongs to capital (ie the remaindermen) and not as income for the life tenants. For example, let's say that the investment earns interest at ten per cent per annum, with resident withholding tax on the interest deducted at the rate of 33 cents in the dollar, and interest is paid at the end of each year and reinvested. Since the investment account is established at the end of year 1, no interest is earned or received at this time. But at the end of year 2, the trust will be paid $201 in interest (ie the balance of the investment at the beginning of year two of $3000 @ ten per cent per annum less $99 in resident withholding tax), and this will be added to the investment account. Similarly, at the end of years three and four, the investment account will be credited with $415 (ie the balance of the investment at the beginning of year three of $6,201 @ ten per cent per annum less $205 in resident withholding tax) and $645 (ie the balance of the investment at the beginning of year four of $9,616 @ ten per

Table 1. Trust's statement of financial position as at the end of year four and prior to the disposal of the asset

Trust capital	300,000	Land and buildings	300,000
Depreciation fund	13,261	Depreciation investment	13,261
	$313,261		$313,261

Table 2. Trust's statement of financial position as at the end of year four and after the disposal of the asset

Trust capital	300,000	Land and buildings	–
less Loss on disposal	(15,000)		
plus Depreciation fund	13,261	Cash (285,000 + 13,261)	298,261
	298,261		
Depreciation fund	–	Depreciation investment	–
	$298,261		$298,261

Table 3. Entity's statement of financial position as at start of year one

Owners' equity	150,000	Asset	150,000
			0

Table 4. Entity's statement of financial position as at the end of year two

Owners' equity	150,000	Asset	150,000
Retained earnings	200,000	Cash	200,000
	$350,000		$350,000
			0

Table 5. Entity's statement of financial position as at the end of year two

Owners' equity	150,000	Asset	150,000
		less Accumulated depreciation	150,000
		Book value	0
Retained earnings	50,000	Cash	200,000
	$200,000		$200,000
			0

cent per annum less $317 in resident withholding tax), respectively, for interest received by the trust.

When the income producing asset is disposed of at the end of, say, year four, the investment account, which now has a balance of $13,261 can be cashed in. The Statement of Financial Position (or Balance Sheet) of the trust prior to the disposal of the asset would appear as per table 1.

- Assume the land and buildings are sold for cash for $285,000, representing a loss to capital of $15,000. The procedure after the sale would be:
- the depreciation investment is terminated, and the trust would receive cash of $13,261 (plus interest to date of termination);
- the asset has been disposed of at a loss of $15,000 which is deducted from the trust's capital, being a loss to the remaindermen's entitlement;
- the depreciation fund no longer exists because it belongs to the remaindermen, and is therefore added to the trust's capital.

The Statement of Financial Position (or Balance Sheet) of the trust after the above appears as per table 2.

Note that the trust's capital has not been exactly maintained at the $300,000. This is because of the difficulty in predicting values, and providing accurately for depreciation. However, if depreciation had not been provided for, the trust's capital would have been reduced to $285,000. Hence, the result is that the trust's capital has been more or less maintained (subject to the difficulty in valuing properties), and the trustees have met their legal obligations.

CONCLUSION

The purpose of this article is to examine a unique and uncommon treatment for depreciation used in trust accounting, which lawyers and accountants may be unaware of. We show that if a trustee follows section 15(2) of the Trustee Act 1956 in applying depreciation, then depreciation has cash outflow implications. This situation allows the reported income, as per the cash accounting records, to be safely distributed in cash to the income beneficiaries. The trust capital in the meantime has been maintained.

This treatment for depreciation illustrates the fundamental and important principle in the law and accounting of trusts that "cash is king".

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THE LEGAL "OE"

Dr Gordon Walker, the University of Canterbury

has some strategies for NZ lawyers going overseas based on intelligence gleaned from a number of former students

Few New Zealand law students focus on medium-to-long-term career strategies during the first years of law studies. Interest grows in the last two years of university studies when law students interview for summer clerkships and first year associate positions in New Zealand. However, there is little collective student or "institutional" memory about overseas options because there is no recording. Knowledge about offshore options can arise within a given law school year but, because there is no recording mechanism or other means of transmission, such knowledge has a limited shelf life. By contrast, information is readily available in the United States and Australia.

Law is a post-graduate degree in the USA. After a three or four year undergraduate degree, US students sit the Law School Admission Test (LSAT) for entry to a Juris Doctor (JD) degree programme, three years of law studies broadly equivalent to the LLB in New Zealand. From first year onwards, US law students are thinking about career paths. One compelling reason is the level of debt assumed by US law students to finance their tertiary education. In any event, there is abundant institutional memory amongst US law students about global career options via handbooks and in-school career services operations (most big US law schools operate in-house employment units).

In Australia, Dolman Legal Search and Recruitment has published a booklet, *FAQ: A Career Move in Australia and Overseas* (June 2000) which gives basic data on the move to Australia and career moves to London, New York, Hong Kong and Singapore for Australians: see *www.dolman.com.au* or e-mail *dolman @dolman.com.au* .

Information about offshore options, however, is not sufficient on its own. Information must be deployed in a meaningful fashion. In short, a strategy is required.

STRATEGY

Strategy is a subject taught in business schools where the obvious focus is on corporate strategy. However, the strategy formulation process has direct relevance to individuals who seek to attain medium-to-long-term goals. For a brief review of key concepts, see G Walker, "Law as Strategy: Introductory Concepts" (1999) 17 C&SLJ 467. As with corporations, individual strategy formulation has three elements:

- ***strategic analysis:*** Here, the individual seeks to understand his or her strategic position. A typical tool is "SWOT" analysis (strengths, weaknesses, opportunities and threats). This level of analysis focuses on individual capabilities. The aim is to get a clear understanding of the individual's present strategic position. Strategic analysis then looks outwards to the "micro" operating environment (New Zealand and the local legal services market) and the "macro" operating environment (the outside world and the global market for legal services);
- ***strategic choice:*** Here, the individual formulates, evaluates and chooses between the possible courses of action. The aim is to achieve some advantage for the individual through effective positioning (eg do I practise in New Zealand or elsewhere?). Matching individual capabilities with the operating environment is called achieving "strategic fit";
- ***strategic implementation:*** The individual plans how the choice of strategy can be put into effect and manages the changes required.

Strategic analysis

Ask this question: what business am I in? The answer is not as simple as it might first appear. For example, on reading this article you might say that I am in the law teaching business. I might reply that I am in the transportation business. Now, the relevance of the question is that it forces one to think about outcomes and exit strategies. Thus, one might reason as follows: I am in the law business for the purposes of capital accumulation and I hope to own a vineyard in Marlborough at age 40. In strategy terminology, the answer to the question defines the mission (overriding purpose). Thus, let us suppose the mission is capital accumulation. The next question is, why? The answer might be to realise the personal vision of owning a vineyard. We then ask, how do I realise the vision? The answer is by formulating a strategy and here the first task is strategic analysis.

Individual SWOT analysis is relatively straightforward. Strengths include such items as superior law grades and language abilities. Weaknesses are average law grades (which might be remedied by a New Zealand LLM) or simple lack of knowledge about opportunities in the legal services market. The salient opportunity is the arbitrage or pricing asymmetry between pay in New Zealand and offshore. A threat is the length of time such an arbitrage opportunity might remain open.

Strategic analysis then turns to the operating environment. The first step is a comparison of the immediate and medium term status of the New Zealand economy vis-à-vis that of Australia, the United Kingdom and the USA: see current country reports by the OECD and The Economist Intelligence Unit; and D McLoughlin, "The Economy", *North & South*, August 2000, 40. As to New Zealand, there is little reason to disagree with the earlier conclusion of the *New Zealand Porter Report* – New Zealand is an anomaly in the global economy because first-world living standards are largely supported by a third-world export pattern: see G Crocombe, M Enright and M Porter, *Upgrading New Zealand's Competitive Advantage* (1991), 55. As of 2000, it is hard to find compelling evidence that actions for the requisite structural adjustment have occurred. More worrying – at least for this writer – is the absence of any national

strategy of the information economy: see G Walker (1999) 17 C&SLJ 536; (2000) 18 C&SLJ 289. The situation elsewhere is more positive: ibid. A second step is to examine the state of the market for legal services in New Zealand and elsewhere.

The legal debate about the market for legal services has been concerned with tensions between notions of "social trustee professionalism" and law as a commercial activity: see D Dawson, "The Legal Services Market" (1996) 5 J of Judicial Admin 147. From a management or economic perspective, however, law is a services industry. A striking phenomenon of the contemporary, "globalising" world economy is the spectacular growth of the services industries: see P Dicken, *Global Shift: Transforming the World Economy* (3rd ed, 1998), 387. For example, the global financial services industry requires high level legal inputs. Financial market globalisation is also a paradigmatic example of the globalisation process since it is a factual process based on the observable dynamics of the market. A salient aspect of globalisation is the irrelevance of national borders in markets that can truly be described as global. There is now good evidence to suggest that the market for legal services is truly global: see P Lee, "The global players revealed", *International Financial LR*, November 1998, 23; R McArtney, "A Global Law Firm" [1999] NZLJ 358. High status US law schools actively promote themselves as global law schools. It follows that legal service providers will look globally to recruit personnel (here, "global' connotes OECD countries). The first wave of this phenomenon hit New Zealand in the mid-to-late 1990s when London and Australian law firms stepped up recruiting from New Zealand. The anecdotal evidence is that some major New Zealand law firms experienced a "hollowing out" of fourth year associates attracted by higher pay offshore. At present, a second wave of offshore recruitment is occurring. This time, however, the offshore recruiters are drilling downwards. For example, Sydney-based Australian law firms are now recruiting first year associates and summer clerks from New Zealand law schools.

Why are offshore law firms recruiting from New Zealand? First, good New Zealand trained lawyers are valued and appreciated. A second reason is international arbitrage or pricing asymmetry between salaries paid in New Zealand and offshore. For example, a first year associate in a top tier Sydney firm attracts a salary of about A$55,000 (includes employer contributed superannuation portable within Australia), relocation expenses, and College of Law fees as against about NZ$30,000 plus IPLS fees at a similar firm in Auckland. A recent example is a first year associate in Auckland on a salary of $28,000 who transferred to Sydney on a package of A$55,000. A third year associate in Sydney could reasonably expect a package of A$100,000. In New York, a first year associate can expect US$125,000 plus: see *www.nylj.com* under the heading "Associate PayWatch". When thinking about pricing differences, factor in the drop in the exchange rate of the NZ$, the additional ten per cent tax imposed on graduates by the student loan scheme, offshore living costs, and, tax rates. A third and less obvious reason is the arguable oversupply of lawyers in New Zealand.

A third year associate in Sydney could reasonably expect a package of A$100,000. In New York, a first year associate can expect US$125,000

The case for oversupply is best founded on salary differentials between New Zealand and offshore. There is also a structural reason – as the *New Zealand Porter Report* stated in 1991, "New Zealand graduates more lawyers each year than it graduates students in agriculture, forestry, horticulture and veterinary science combined ... This latter group of industries makes up over 85 per cent of New Zealand's exports and needs skilled individuals to improve their competitive position." Op cit, 103. (On this view, the stream of lawyers going offshore comprises an export industry with no obvious benefit to New Zealand.) Oversupply means lower pay (particularly in the provincial centres) because supply outstrips demand. Oversupply may also lead to domestic arbitrage. A first year associate doing tax law with an accountancy firm in Auckland can earn $48,000 as opposed to $30,000 in legal practice.

There is no necessary link between post-graduate study and practice offshore. A third year associate from New Zealand may go direct to Sydney or London and join a law firm. Indeed, if the ultimate aim is to practise in the USA, a "knight's move" to a US or UK firm in London and then across to New York is one way of entering the US market without incurring the tuition costs of a US LLM programme. In practice, however, there is usually a link between study and practice in the case of the USA. A typical entry path to the USA is an LLM from a top tier US Law School followed by the New York Bar exam. An LLM from a top tier US school greatly enhances hiring prospects and gives standing to take the New York or California state bar exam. Elsewhere, enhanced hiring prospects is the general reason for post-graduate study and this course is more often pursued by new graduates seeking to acquire knowledge about "sunrise" subjects not taught in New Zealand law schools such as electronic commerce.

DESTINATIONS

Australia

For the first time, Sydney-based top tier law firms are now recruiting summer clerks and first year associates from New Zealand. The usual criteria apply – good grades, outside achievements and so on. In the past, Bar admission, could be obtained only via Victoria or qualifying exams: see Walker [1983] NZLJ 188; [1984] NZLJ 34. Now, due to the extension of the Closer Economic Relations Agreement, New Zealand admission is sufficient for admission in New South Wales pursuant to the Trans-Tasman Mutual Recognition Act 1997: see *www.lawsocnsw.asn.au* . Admission to the Australian federal Courts via the High Court of Australia flows from admission in an Australian state. Prudence dictates that admission be obtained in New Zealand prior to a move to Australia since automatic entry to Bar admission programmes in Australia is not assured.

Because LLM programmes are now full tuition, Australia is no longer a low cost LLM venue for New Zealanders. LLM courses are not within the Higher Education Course Supplement (HECS) regime. Australians and New Zealanders both pay A$1350 per six credit point course in the LLM at Sydney University: *www.law.usyd. edu.au* . Forty-eight credit points are required for this LLM, bringing total tuition fees to A$10,800. One way of defraying LLM fees is to work as a solicitor in New South Wales and take an employer paid

LLM course in order to satisfy mandatory continuing legal education requirements (MCLE) which attach to annual renewal of practising certificate. Some students choose to take a Residential Associate (RA) position in a hall of residence or university college as a means of defraying costs. This has definite attractions for those who have no other social contacts in Australia.

Australia may be a short or long-term destination. If the UK or the USA are long-term destinations, then Australia is a convenient "half way house". Top tier Australian firms typically have strong offshore connections. Another good reason for going to Australia initially is that some persons who go to the USA eventually wish to return to the Southern Hemisphere and Australia presents as a prime destination.

United Kingdom

The law degree in England takes three years. English university fees are low for locals (about £1000). English law students graduate with extremely low debt levels (about £1000–£1500 if any) compared with debt levels of NZ$30,000 for New Zealand law students. Some background data follows:

Solicitors: After the law degree, new graduates undertake a one-year legal practice course (LPC). They then proceed to law firms on a training contract followed by admission.

Barristers: New graduates apply for pupillage at Chambers and then do a one-year Bar vocational course (BVC). They are called to the Bar after BVC and then do a one-year pupillage followed by tenancy. At the Bar, the Cambridge LLM or Oxford BCL is an unspoken prerequisite for foreign students from common law countries.

Visas: Generally, a work permit is required. A work permit for the Bar is difficult to come by for non-EU passport holding New Zealanders given self-employment status at the Bar. Special visas may be obtained if one grandparent was from the UK ("grandparents visa") or if under the age of 26.

The UK is a traditional destination for New Zealand trained lawyers. Tuition and living expenses for an LLM in the UK are around NZ$55,000–NZ$60,000. As mentioned, UK law firms have been actively recruiting senior associates from New Zealand. There has always been a trickle of New Zealand lawyers taking the Oxford BCL or the Cambridge LLM and then going on to practise in London. Some then go across to New York. Some exceptional New Zealand candidates go straight from the Oxbridge LLM/BCL to New York without practising in London. This pathway has opened via US law firms in London conducting interviews for New York positions. US law firms in London have pushed up first year pay rates at English firms to about £45,000. However, the US law firms offer about 25 per cent on top of the English rate for first year associates (ie up to £75,000).

New Zealand lawyers with post-qualification experience (PQE) bargain for recognition of that experience. Typically, New Zealand lawyers suffer a one-year discount (justified by the English training contract period). Conversely, the BCL or LLM from Oxbridge is counted as one year PQE. As an example of current pay rates, consider a New Zealand lawyer with three years' New Zealand PQE plus a Cambridge LLM offered £63,000 sterling by an English law firm in London.

The stream of recent graduates going to London as para-legals is less well known. Here, New Zealand admission is critical because New Zealand Bar admission enables requalification as a solicitor in England by way of the Qualifying Lawyer Transfer Test (QLTT). This exam can be done in the UK or offshore. The New Zealand Lawyers' Society in the UK provides helpful information: see *www.nzls.co.uk* . For example, a New Zealand solicitor in Sydney can sit the exam in Sydney prior to departure to the UK: see *www.lawsociety.org.uk* .

A New Zealand para-legal in London is typically a recent graduate who has been admitted in New Zealand. Para-legals in London earn around £15-£20 per hour and time-and-a-half to double for weekend work. Banks and other financial services firms offer similar short-term contract work. A number of professional agencies in London specialise in placements (eg Prolaw Recruitment or Robert Walters). The anecdotal evidence is that a para-legal can earn around £800-£1000 per week in London. Some para-legals graduate to positions as salaried solicitors with large London firms after sitting the QLTT. In turn, this may provide an opportunity to work in the Asian offices of the UK firm and thereby attract low Asian personal tax rates (eg Hong Kong).

USA

A brief discussion of New Zealand lawyers who went to the US as graduate students can be found in K Keith, "The Impact of American Ideas on New Zealand Educational Policy, Practice and Theory: The Case of Law" (1998) 18 VUWLR 327, 331-333. There, the author estimates a number of about 80 New Zealanders who undertook post-graduate work in the USA. They were mainly graduates from Auckland, Wellington and Otago. (Until the 1990s, few Canterbury law students went to the US for post-graduate study. In the last decade, however, this writer knows of at least 12 Canterbury law students who have done so.) At present, two New Zealanders hold full law professorships in New York: Benedict Kingsbury at NYU and Jeremy Waldron at Columbia. There are a number of New Zealanders practising in the US, especially New York.

As mentioned, the JD is a post-graduate degree in the USA. Generally, only foreign lawyers take the LLM or the SJD (doctorate in law) degrees. An LLM from a good US law school is the usual prerequisite for entry to an SJD programme although waivers may be obtained. Entry to SJD programmes is limited. (For example, Duke only takes one or two SJD students a year.) There is no special masters programme for an LLM in the US – foreign students take the same classes as JD students. If practise in the USA is the ultimate aim, the foreign student is advised to construct a package of LLM courses that includes corporations and other relevant commercial subjects. Exams are usually open book or take home.

US LLM programmes run from September to late April each year. Prep schools for the Bar exams are conducted by the commercial organisation, BARBRI, whose services are regarded as essential. BARBRI is undertaken in July-August after graduation from the LLM programme in May: see *www. barbri.com* .

A first question is choice of school. A good guide is the annual publication, US Law School Admission Council, *The Official Guide to US Law Schools* (2000). This guide provides a two-page outline of all accredited schools. As a preliminary matter, distinguish national (eg Harvard) from state schools (eg Georgia). Most national schools are private and have the highest tuition fees (around US$23,000–US$25,000) for the LLM. State schools tend to have lower tuition fees (eg University of California at Berkeley and University of Texas at Austin).

Next consider the rankings of the 181 American Bar Association accredited US law schools: see the *US News and World Report* rankings at *www.usnews.com* which ranks all the accredited school in four tiers. The relevance of tier ranking is that major US law firms only recruit from the first twenty schools in the top tier. Generally, employment opportunities rise in a direct relationship with the ranking of your school. One can start winnowing out schools in the top tier fairly quickly. For example, although Yale and Harvard presently rank one and two respectively there is little point in applying to these schools unless you satisfy special entry criteria. Yale only takes actual or prospective law professors and Harvard operates a geographical quota. Some top tier schools do not offer LLM programmes at all. Leaving aside Yale and Harvard, here is an indicative list of top tier (first 15 rankings) US law schools which offer the LLM: Stanford, NYU, Columbia, Chicago, Virginia, Duke, Michigan, Cornell, UC Berkeley and University of Texas at Austin. Note that UC Berkeley (tuition about $13,000) and Texas (tuition about $8000) have fees in the lower bracket, and, as a general rule, accommodation costs are lower in the South or SouthWest (Virginia, Duke, Texas).

In the 1990s, five ex-Canterbury Law School students took the LLM at Duke. This comprises 21 credit points, six of which can be taken at a July-August summer school in Hong Kong or Geneva if one is going straight on to the Duke LLM that year: see *www.law. duke.edu* . If one goes to Duke, the summer school option either lowers the course load or enables additional courses, but, more importantly, provides a prospective employer with evidence of Duke marks when one first arrives. Some Canterbury law students have used the Duke Hong Kong summer school (results can be credited to LLB or LLM at Canterbury) to scope the Duke LLM programme.

Foreign LLM students typically interview at the New York job fair in January after first semester results are posted. This job fair is attended not only by US law firms but also UK firms. The US student visa for an LLM student enables a further year working in the US after graduation.

Asia

A period in Asia is a consideration in any personal strategy. The key factor is the ability to save. The reason is simple: low tax rates enable rapid capital accumulation. The big US and UK law firms have regional networks in Asia and tax rates are favourable (effectively zero to 15 per cent), thereby providing a significant "kicker" to the compensation package. The UK networks have been a traditional destination of New Zealand trained lawyers (eg Hong Kong). Accessing the Asian networks of US firms implies either study or practise in the US. As to pay, the evidence is that some UK law firms are paying London rates plus up to 40 per cent loading (includes three months' salary as bonus each year). So, for example, a New Zealand solicitor moving to Sydney might contemplate a subsequent period in Asia for capital accumulation purposes because the top marginal tax rate in Australia is 47 per cent applicable at A$60,000 as opposed to around 15 per cent flat in Hong Kong or Singapore. Here are some rough numbers for a senior lawyer based on real life data: assume Hong Kong salary of US$250,000 plus full expatriate status, housing and schooling allowances, trips home, and, sign on bonus. Assuming 15 per cent tax paid on US$250,000, the result is US$212,500 after tax. Converting (generously) at US$0.50/NZ$1.00 equals NZ$425,000 after tax. Since housing is largely picked up, substantial savings are possible.

STRATEGIC CHOICE

The question of strategic choice flows from the type of analysis outlined above. Leaving aside Asia, Australia presents as a natural first choice for reasons of proximity and ease of access. The UK is best ranked as a second choice. Here, common law tradition and culture appear as salient advantages. The US is the most difficult destination for New Zealand trained lawyers. The consensus of those who have taken this route is that two to three years in practice in New Zealand and good grades (graduation in the top ten per cent of the law school) are desirable. Generally, accessing the network of New Zealand trained lawyers who have already moved offshore for current lore is advisable.

Suppose, however, that the choice is between the US or the UK (all other things being equal). Now, global legal practice can be viewed as a competition between the US and UK law firms. In this context, there are cogent reasons for preferring the US. First, a New Zealand trained lawyer can readily adapt to UK law. By contrast, US law cannot be picked up easily. Second, study or practice in the US means exposure to a new and dominant legal system. Third, US training means access to the international offices of US law firms. Fourth, UK law firms may pay a premium for a New Zealand trained lawyer who has gained US experience.

It is pertinent to discuss the option of an academic exchange year in the US. Some New Zealand universities offer students an exchange year in the US whereby the New Zealand student pays New Zealand tuition fees. This option is taken at undergraduate level. Thus, a Canterbury University law student might undertake a year at UC Berkeley and credit results to the LLB. The cost saving is US tuition. However, living costs in the US roughly equate with tuition and a New Zealand student might spend, say, NZ$20,000 plus in living costs in an exchange year. This sum could be better spent on a US LLM because the LLM formally qualifies the student within the US system.

Questions arising at this level involve consideration of the long-term strategy. For example, the risk/reward ratio for doing an LLM in the US and returning immediately to New Zealand is not good. If higher salary or abridging the career path is the aim, a period of practice in the US is required since this increases the risk/reward ratio and enables positioning for a similar level compensation package or fast track to partner on return to the Southern Hemisphere. A question (typically, for a third or fourth year associate in New Zealand) is whether or not to skip an LLM in favour of an MBA if, for example, investment banking is a long-term goal. This is relevant for students with quantitative skills (eg LLB, B Com with a major in finance). As to MBA programmes, see *www.registration.ft.com/Career Adviser/MBARankings/reception.htm* .

STRATEGIC IMPLEMENTATION

If one is hired as a solicitor in Australia or the UK, questions of implementation are minimal as a relocation package will accompany the offer and salary commences upon arrival. Because the path to study in the UK or Australia is well known, this part of the article focuses on post-graduate study leading to practice in the US. Here, a commonly expressed view amongst young lawyers is that 60 per cent of the effort was expended on getting to the destination. Long-time horizons and careful planning are required. In

addition, there is a significant level of stress involved in planning the move.

The cost of an LLM in the US consists of two components – tuition (university fees) and living costs. Tuition fees vary from about US$8000 to US$24,000. Living costs for a nine month LLM are in the range US$12,000–US$18,000. At one end of the scale, an LLM at the University of Texas at Austin might cost US$8000 tuition plus US$12,000 living costs. Costs at NYU Law School are more than double that figure. However, some LLM programmes offer full or partial tuition waivers. In addition, some universities offer Residential Associate (RA) positions (comparable to tutors in New Zealand halls of residence) which largely solve the living cost issue. In theory, it is possible to obtain a tuition waiver and a RA position.

Applications for US law schools and New Zealand sourced scholarships are made in December the preceding year. Offers are made March-April and can generally be deferred for one year if necessary. (The same time frames apply to UK law schools.) Few scholarships are offered by US law schools but partial or full tuition waivers and RA slots fulfil the same purpose. The richest scholarship is the Hauser Scholarship offered by NYU Law School. Apply for a number of schools and review offers in March. At that time, cost questions will predominate. In New Zealand dollars, a US LLM can cost up to NZ$80,000 plus at a high status school on the East Coast. Factors such as the presence of a scholarship, tuition waiver or RA position are usually critical in shaping the final choice of school. In the US, one should always seek a partial or full tuition waiver after obtaining a place. Bargaining on this point is common and applicants should not feel inhibited.

In practice, however, a RA position may be worth as much as a tuition waiver. Applications for these positions should be made in or about January-February for the following September. Even with these forms of financial assistance, cost is the critical issue and some form of intra-familial loaning is usually required (often coupled with a term life policy assigned to the lender). Repayments are rapid once a position with a law firm is obtained. As to the latter point, since US law firms favour the top tier law schools when hiring, the rule must be to aim for a "top ten" law school. If this choice involves a higher level of expenditure, so be it. The likelihood of a position with a law firm and speedy repayment of loans is greatly enhanced if one graduates from a high status US law school.

In the US, final year JD students interview for first year associate positions in November for commencement the following September-November after the Bar exam. Foreign LLM students usually interview in January-February at the New York job fair after fall semester grades are posted but may interview with the JDs in November if they have obtained marks earlier from a summer school. A place with a law firm may carry a "sign on" fee or an advance against salary and BARBRI fees.

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OBSERVATIONS

It is a mistake to think that offshore options are only for those who have done particularly well at law school. The facts are that a sizeable number of good law school graduates simply cannot find meaningful or reasonably well paid law work in New Zealand. Some take the view that a salary of NZ$18,000–NZ$25,000 as a first year associate in a provincial centre is inadequate compensation for the effort and student loans incurred in gaining a law degree. By contrast, a newly admitted New Zealand lawyer with "B" average grades can obtain a good and continuing position in London or, at worst, a position as a para-legal in London.

Going offshore is not for the faint-hearted. The New Zealand novelist, Ruth Park, had this to say about her departure to Australia in a flying boat in the 1940s:

> Thereafter I took for my banner those words Harry Tuwhai had brought to mind: He toa piki pari ma te pari. He who climbs a cliff may die on the cliff, so what? Always a risk-taker by nature, now I became one by intent. *A Fence Around the Cuckoo* (1992), 293. ❑

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Section 15(2) provides the mechanism to exempt depreciation from being treated as a non-cash expense. We suggest that this system of accounting for depreciation could apply to entities other than trusts in contributing to the ability of an entity to replace its assets while maintaining its capital intact in monetary terms.

Appendix

The following example illustrates the concept of maintaining capital in monetary terms with respect to accounting for depreciation. Assume at the start of the year an entity begins operations by contributing a depreciable asset that was valued at $150,000. The asset has a useful life of two years and the resale value on disposal is expected be nil. At the end of year 2, the entity has accumulated a total income of $200,000 before depreciation is charged, and has decided that it will distribute all its income as a dividend to the entity's owners at this time. Furthermore, the asset (after two years) is worth $0.

Based on this information, the entity's Statement of Financial Position (or Balance Sheet) at the start of year one would appear as per table 3.

If depreciation is not provided for, the entity's Statement of Financial Position (or Balance Sheet) at the end of the second year but prior to the dividend being paid would appear as per table 4.

In this situation, capital has been eroded because all the cash would be paid as a dividend, leaving an asset which is worthless and unable to be liquidated, to meet the equity claims of the entity's owners. In effect, the payment of the dividend to the owners has resulted in a return *of* capital rather than a return *on* capital.

This can be corrected by allowing for depreciation. Using the same facts, but this time allowing for depreciation on the straight line basis, the entity's Statement of Financial Position (or Balance Sheet) at the end of year two but prior to the payment of the dividend would be as per table 5.

In this situation, the entity would only pay a dividend of $50,000, which is the total accumulated income less the total depreciation charge over the two years since its operations began (ie $200,000-$150,000). This would leave $150,000 cash available to be returned to the owners if the entity were to be wound up at this time – that is, the monetary amount of the original contribution of capital. ❑